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United Nations Office on Drugs and Crime

The United Nations Convention against Corruption

Implementation Guide and Evaluative Framework **for Article 11**

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Convention against Corruption

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Contents

Introduction

Objectives of this Guide

1. The United Nations Convention against Corruption (UNCAC) is the sole, global, legally binding, instrument designed to promote measures to prevent and combat corruption. As the guardian of the Convention, the United Nations Office on Drugs and Crime (UNODC) works to support States parties in their efforts to meet the requirements of UNCAC. In that capacity, UNODC has developed this knowledge product to support States parties in the implementation of article 11 of the Convention.

2. This article, while one of the shorter provisions of the Convention, can give rise to a broad and diverse range of implementation measures. In light of the broad range of implementation measures that can be adopted by States parties in relation to this provision of the Convention, this document seeks to assist States when considering their implementation of article 11. The need for States to take stock of their progress in relation to this part of the Convention is of particular importance in light of the upcoming second cycle of the UNCAC Implementation Review Mechanism, beginning in 2015.[1]

3. To assist States parties in this task, this document addresses key thematic areas in the field of judicial and prosecutorial integrity. In relation to each of these areas, two key tools are provided. Firstly, relevant international standards and best practices are summarized to provide a helpful overview of the types of measures States may consider adopting in implementation of this article. Secondly, sets of questions are provided which States can use to assess to what extent they have addressed the relevant thematic area. Together, these questions form a comprehensive evaluative framework for article 11 of the Convention against Corruption.

4. This Guide and Evaluative Framework seeks to highlight the range of issues that should be considered when addressing the implementation of article 11 of UNCAC. When using this Guide in its domestic context, a State party may need to revisit provisions of its constitution or other laws, and assess existing rules, procedures and mechanisms of accountability. In doing so, it will, no doubt, take into consideration *(a)* its capacity and resources, and its

[1] Nothing in this Implementation Guide and Evaluative Framework should be interpreted as adding requirements to article 11 of the UNCAC. It is intended solely as a resource tool for States parties seeking to review and strengthen measures taken to further the implementation of article 11.

level of economic development; *(b)* existing but different mechanisms that adequately address the same concerns; and *(c)* the fundamental principles of its own legal system. Finally, this Guide, while broad in scope, does not list an exhaustive range of measures that can be adopted in relation to the issue of judicial and prosecutorial integrity and therefore does not exclude alternative approaches that may meet the spirit and requirements of article 11.

How to use this Guide

5. This Guide and Framework are primarily intended to be used by the judiciary and other government officials to conduct an internal analysis of the State's implementation of article 11 of UNCAC. This Guide and Framework also lend itself to use by other stakeholders as well, including academics, the media and civil society. In many cases, the completion of the Framework may benefit from the participation of a broad and diverse range of actors, beginning with the judiciary, but also including court administrators, litigants, attorneys and non-governmental organizations.

6. In working through the Framework itself, typing the answers directly into the boxes provided, users should seek to provide the most comprehensive answers to the questions raised, and seek to address the topics to their logical conclusion, adding questions where appropriate. In relevant cases where measures have been taken or regulations apply, users of the Framework should address the effectiveness of the applicable measures or regulations in achieving their aims, particularly for those that have been recently implemented. The overall result of the completion of the Framework should be the identification of areas that may require additional attention or do not meet generally accepted international standards consistent with article 11 of the Convention.

Article 11 of the Convention

7. Article 11 of the United Nations Convention Against Corruption provides that:

> (1) Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.
>
> (2) Measures 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.

Paragraph (1) of article 11 therefore establishes a mandatory obligation, while compliance with paragraph (2) is optional.

8. Article 11 emphasizes the crucial role of the judiciary in combating corruption and recognizes that in order to play this role effectively, the judiciary itself must be free of corruption and its members must act with integrity. Accordingly, it requires each State Party to *(a)* take measures to strengthen integrity among members of the judiciary, and *(b)* take measures to prevent opportunities for corruption among members of the judiciary. A code of conduct for judges is suggested as one such measure. Article 11 also recommends that similar measures may be taken with respect to the prosecution service where it does not form part of the judiciary but enjoys independence similar to that of the

judicial service. In a State where the prosecution service functions under the executive branch of government, the accountability of that service will also be ensured by the application of article 7, paragraphs (1) and (4), and article 8 of the Convention.[2]

Structure of the Guide

9. This Guide reflects the two core requirements of article 11. First, it suggests measures that may be taken to strengthen integrity among members of the judiciary. Second, it identifies measures that, if taken, may prevent opportunities for corruption among members of the judiciary. With respect to the first, the primary responsibility for strengthening integrity among members of the judiciary rests with the judiciary itself. However, it is a task that may require the support of the executive and legislative branches of government, and the cooperation of the legal profession, the media, academia and civil society. With respect to the second, the responsibility has to be shared between the judiciary on the one hand, and the executive and legislative authorities of the State on the other. While the former may take appropriate action to regulate matters within the judiciary itself in order to eliminate opportunities for corruption, it is the responsibility of the latter to ensure that the institutional integrity system within which the judiciary operates is strengthened in order to minimize opportunities for corruption.

10. In taking measures in accordance with article 11, some of which may require legislation, a State party is required to bear in mind the importance of the independence of the judiciary, and its crucial role in combating corruption. In more specific terms, article 11 requires that the measures that are taken by a State party in accordance with the fundamental principles of its legal system should not prejudice judicial independence. It is this fundamental question of how best to strike a balance between the fundamental principles of integrity and independence of the judiciary which this Guide seeks to address.

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[2] Article 7: Public Service

(1) Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials:

(a) That are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude;

(b) That include adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions;

(c) That promote adequate remuneration and equitable pay scales, taking into account the level of economic development of the State Party;

(d) That promote educational and training programmes to enable them to meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialized and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions. Such programmes may make reference to codes or standards of conduct in applicable areas.

. . . . . .

(4) Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.

Article 8: Codes of conduct for public officials

(1) In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.

(2) In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.

(3) For the purposes of implementing the provisions of this article, each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, take note of the relevant initiatives of regional, interregional and multilateral organizations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996.

(4) Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

(5) Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

(6) Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.

Judicial independence as addressed in article 11 of the Convention

11. Article 11 does not impose an obligation on a State party to take measures to secure the independence of the judiciary. Instead, by requiring States parties, when taking measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary, to do so "bearing in mind the independence of the judiciary" and "without prejudice to judicial independence", article 11 implies that judicial independence has already been secured. A State party may, therefore, wish to revisit its constitutional and legal framework to satisfy itself that judicial independence has been adequately secured by law, and that an adequate framework has thereby been established within which opportunities for judicial corruption have been minimized.

12. At the core of the concept of judicial independence at organizational level is the theory of the separation of powers: that the judiciary, which is one of three basic and equal pillars in the modern democratic State, should function independently of the other two, the executive and the legislature. This is necessary to ensure that "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]. In addition, since judges often hear administrative law cases, in which citizens bring complaints against certain acts or actions of the Government, the independence of the judiciary ensures that the judiciary is still seen as impartial and trustworthy while resolving cases involving the executive branch of power. Judicial independence thus serves as the guarantee of impartiality, and hence is a fundamental precondition for judicial integrity—the ability of the judiciary as an organization to resist corruption. It is a prerequisite to the rule of law, and fundamental to the principle of a fair trial. It is not a privilege accorded to the judiciary, or enjoyed by judges.

13. Judicial independence at the individual level relates to the impartiality and independence of a judge from the parties to cases before the court and from other (often powerful) economic or political interests that may want to influence the outcome of the judicial proceedings. Effective procedural, institutional and operational measures that protect the judge from external pressure or influence, and ensure that he or she can carry out their functions without fear of interference from anyone, including other judges, allied with strong professional ethics that enable a judge to decide a matter honestly and impartially on the basis of the law, are crucial preconditions to the establishment of personal integrity—the ability to resist corruption at personal level.

14. In its General Comment No. 32 (2007), the Human Rights Committee, established under the International Covenant on Civil and Political Rights ("ICCPR"), identified some of these institutional and operational arrangements. It stated that the requirement of independence in article 14(1) of the ICCPR refers, in particular, to (i) the procedure and qualifications for the appointment of judges; (ii) the guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist; (iii) the conditions governing promotion, transfer, suspension and cessation of their functions; and (iv) the actual independence of the judiciary from political interference by the executive branch and legislature.[4]

15. When considering the principle of judicial independence as addressed under article 11 of the Convention, it should also be noted that many of the measures States

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

[4] HRI/GEN/1/Rev.9 (Vol.1), 27 May 2008, pp 248-268.

parties may adopt in implementation of this provision aimed at increasing integrity and reducing opportunities for corruption amongst the judiciary will also often indirectly support the authority, legitimacy and therefore the independence of the judiciary. While, as noted above, States parties may be required to strike a balance between the two key principles of independence and integrity that underpin this provision of the Convention, measures adopted with the aim of supporting either of these core values are, more often than not, mutually reinforcing.

Fundamental principles of the legal systems of States parties

16. In making reference to "the fundamental principles" of the legal system of a State party, article 11 of the Convention recognizes that due to the different roles played by both the judiciary and prosecution services in different legal systems, the specific measures that will be required to strengthen integrity and prevent opportunities for corruption may also take different forms. For example, in civil law systems, the role of the judge may encompass not only the task of adjudicating, but also, unlike in many common law jurisdictions, a role in leading the investigation of facts relevant to a case. In Islamic legal systems too, the judge is expected to question witnesses and seek further information, if the judge considers it necessary do so in order to reach a decision. In many States, the judicial systems may combine some elements of these different approaches. The role of the prosecutor may also differ significantly, depending on the legal traditions of States parties. In countries with a civil law legacy, the prosecutor may be deeply involved in the investigation of a crime as well as its prosecution. In countries with a common law heritage, the police will generally have responsibility for conducting the investigation, while the prosecutor will objectively assess whether there is sufficient evidence to prosecute, and where such evidence exists, will present that evidence to court.

International instruments and standards: a summary

17. In the preparation of this Guide, reliance has been placed on international instruments that reflect contemporary international standards. The Guide also draws on principles recognized in regional treaties, declarations and jurisprudence on the concepts of judicial independence, integrity and accountability. They include the following:

- The *International Covenant on Civil and Political Rights*. The Covenant was adopted unanimously by the United Nations General Assembly in 1966, and came into force in 1976. As of 10 June 2014, 168 States had either ratified or acceded to it, thereby accepting its provisions as binding obligations under international law.
- The *United Nations Basic Principles on the Independence of the Judiciary*. These *Principles* were adopted in September 1985 by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders at its meeting in Milan, and were endorsed later that year by the United Nations General Assembly.[5] The *Basic Principles* were "formulated to assist Member States in their task of securing and promoting the independence of the judiciary", and were intended to be "taken into account and respected by Governments within the framework of their national legislation and practice".
- *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary*. These were adopted by the Economic and Social Council (ECOSOC) and endorsed by the United National General Assembly in

[5] UNGA Resolution 40/32 of 29 November 1985.

1989.[6] This instrument prescribes a variety of measures which States are required to take for the purpose of giving effect to the *Basic Principles*.

- *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana in 1990. These *Principles* are intended to promote and ensure the proper role of lawyers in the justice system. The subjects addressed include access to lawyers and legal services; special safeguards in criminal justice matters; qualifications and training; duties and responsibilities; guarantees for the functioning of lawyers; freedom of association and expression; professional associations of lawyers; and disciplinary proceedings.
- *Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana in 1990. These *Guidelines* were adopted to secure and promote the effectiveness, impartiality and fairness of prosecutors in criminal proceedings. They refer to qualifications, selection and training; status and conditions of service; freedom of expression and association; role in criminal proceedings; discretionary functions; alternatives to prosecution; relations with other government agencies or institutions; and disciplinary proceedings.
- The *Bangalore Principles of Judicial Conduct*. The *Bangalore Principles* identify the six core values of the judiciary, and are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial. The *Bangalore Principles* were drafted, on the invitation of the United Nations Centre for International Crime Prevention (UNCICP), by a representative group of Chief Justices (now known as the Judicial Integrity Group), in consultation with senior judges from over 75 countries. They were adopted in November 2002 at a round-table meeting of Chief Justices representing all geographical regions, held at the Peace Palace in The Hague, at which judges of the International Court of Justice also participated. In April 2003, the *Bangalore Principles* were presented to the United Nations Commission on Human Rights by the United Nations Special Rapporteur on the Independence of Judges and Lawyers. In a resolution that was unanimously adopted, the Commission brought these *Principles* "to the attention of Member States, the relevant United Nations organs and intergovernmental and non-governmental organizations for their consideration.[7] In 2006, ECOSOC endorsed the *Bangalore Principles of Judicial Conduct* as representing "a further development" and as "complementary to the *Basic Principles on the Independence of the Judiciary*".[8] In the same resolution, ECOSOC invited Member States, "consistent with their domestic legal systems, to encourage their judiciaries to take into consideration the *Bangalore Principles of Judicial Conduct* when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary".
- The *Commentary on the Bangalore Principles of Judicial Conduct*. This 175-page *Commentary* was initially prepared by the Judicial Integrity Group. It was further developed, at the request of ECOSOC,[9] "taking into account the views expressed and the revisions suggested by Member States", at an Open-Ended

[6] UNGA Resolution 44/162 of 15 December 1989; ECOSOC Resolution 1989/60.

[7] Commission on Human Rights Resolution 2003/43.

[8] ECOSOC Resolution 2006/23 of 27 July 2006. For the text of the *Bangalore Principles of Judicial Conduct*, see Annex to this Resolution.

[9] ECOSOC Resolution 2006/23 of 27 July 2006.

Intergovernmental Expert Group Meeting convened by UNODC in March 2007. The *Commentary* was published by UNODC in September 2007, and is intended to contribute to a better understanding of the *Bangalore Principles of Judicial Conduct*.[10] While commending the work of the Open-Ended Intergovernmental Expert Group, ECOSOC requested UNODC to translate the Commentary into all the official languages of the United Nations, and to disseminate it to Member States, international and regional judicial forums and appropriate organizations.[11]

- *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct*.[12] This statement of measures was developed and adopted by the Judicial Integrity Group in January 2010, and offered as guidelines or benchmarks for the effective implementation of the *Bangalore Principles*. Part one of the statement describes the measures that are required to be adopted by the judiciary. Part two describes the institutional arrangements that are required to ensure judicial independence and which are exclusively within the competence of the State.
- The *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*. These were formulated and adopted by the International Association of Prosecutors in 1999. They relate to professional conduct, independence, impartiality, role in criminal proceedings, cooperation and empowerment. In 2008, the United Nations Commission on Crime Prevention and Criminal Justice requested Member States, consistent with their domestic legal systems, to encourage their prosecution services to take these *Standards* into consideration when reviewing or developing rules with respect to the professional and ethical conduct of members of prosecution services. The Commission also requested UNODC to circulate the *Standards* to Member States for their consideration and comments. In their comments, Member States agreed that the *Standards* constitute an international benchmark for the conduct of individual prosecutors and of prosecution services.
- The *European Charter on the Statute for Judges*, adopted under the auspices of the Council of Europe in 1998. This instrument addresses issues such as the selection, recruitment and initial training of judges; appointment and irremovability; career development; liability; remuneration and social welfare; and termination of office.
- *Recommendation No.R (2000) 19 on the role of prosecution in the criminal justice system*, adopted by the Committee of Ministers of the Council of Europe in 2000. This *Recommendation* contains common principles concerning the role of public prosecution in the criminal justice system with respect to such matters as the relationship between public prosecutors and the executive and legislative powers; their relationship to judges and the police; and their duties towards individuals.
- Opinion No.1 (2001) of the Consultative Council of European Judges on standards concerning the independence of the judiciary and the irremovability of judges; and subsequent Opinions on relevant issues including the funding and management of courts (Opinion No.2/2001); ethics and liability of judges (Opinion No.3/2002); training of judges (Opinion No.4/2004); justice and society (Opinion No.7/2005); Council for the Judiciary in the service of society (Opinion No.10/2007); the quality of judicial decisions (Opinion No.11/2008); and the relations between judges and prosecutors in a democratic society (Opinion No.12/2009).

[10] For text, see www.unodc.org; www.judicialintegritygroup.org

[11] ECOSOC Resolution 2007/22 of 26 July 2007.

[12] For text, see www.judicialintegritygroup.org

- The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, proclaimed by the African Commission on Human and Peoples' Rights and endorsed by the Heads of State of the African Union in 2003. This instrument contains general principles applicable to all legal proceedings, such as a fair and public hearing, and the independence and impartiality of the tribunal. It also contains directions to States on judicial training, role of prosecutors, the independence of lawyers, the right of civilians not to be tried by military courts, and on guarantees of independence and impartiality of traditional courts.

Resources and reference materials

UNODC Tools and Publications

18. In parallel with the development and endorsement of the above international standards, UNODC has produced a number of resources aimed at supporting States to assess and enhance their judicial and prosecutorial systems. Many of these resources are referenced throughout this guide and States parties may wish to consult them as additional reference materials when considering their implementation of article 11 of UNCAC. They include the following:

- Resource Guide on Strengthening Judicial Integrity and Capacity[13]
- Commentary on the Bangalore Principles of Judicial Conduct[14]
- The Status and Role of Prosecutors: a UNODC-IAP Guide
- UNODC Criminal Justice Assessment Toolkit[15]
- United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators[16]
- Judicial Ethics Training Manual for the Nigerian Judiciary[17]
- Assessment of Judicial Integrity and Capacity in three Nigerian States[18]
- Assessment of Justice Sector Integrity and Capacity in two Indonesian Provinces[19]

The UNCAC Working Group on the Prevention of Corruption

19. The Open-ended Intergovernmental Working Group on the Prevention of Corruption, established by the Conference of the States Parties to the United Nations Convention against Corruption, addressed the implementation of article 11 of the Convention in its annual meeting held from 26 to 28 August 2013. In advance of this meeting, States parties provided detailed information to UNODC, as Secretariat of the Working Group, outlining the measures they had taken with relevance to the implementation of this article.

[13] www.unodc.org/documents/treaties/UNCAC/Publications/ResourceGuideonStrengtheningJudicialIntegrityandCapacity/11-85709_ebook.pdf

[14] www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf

[15] www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html

[16] www.unodc.org/pdf/crime/corruption/Handbook.pdf

[17] www.unodc.org/documents/corruption/publications_unodc_judicial_training.pdf

[18] www.unodc.org/documents/corruption/publications_nigeria_assessment.pdf

[19] www.unodc.org/pdf/corruption/publications_indonesia_e_assessment.pdf

20. The information provided by States parties, in addition to the presentations provided by panellist speakers during the Working Group and the thematic report produced by the Secretariat in advance of the meeting can be found on the UNODC website.[20] Additionally, UNODC has developed a thematic website containing all of the information provided across all the meetings of the Working Group, including a specific thematic page related to judicial and prosecutorial integrity.[21] States parties are encouraged to draw on the examples of implementation measures provided within the framework of the Working Group when considering their own implementation of article 11 of the Convention.

[20] www.unodc.org/unodc/en/treaties/CAC/working-group4.html

[21] www.unodc.org/unodc/en/corruption/WG-Prevention/judicial-and-prosecutorial-integrity.html

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Measures to strengthen integrity among members of the judiciary

Judicial integrity

21. The term "integrity" in article 11, in its application to members of the judiciary, may be defined as a holistic concept that refers to the ability of the judicial system or an individual member of the judiciary to resist corruption, while fully respecting the core values of independence, impartiality, personal integrity, propriety, equality, competence and diligence. These values are identified in the *Bangalore Principles of Judicial Conduct*, and elaborated comprehensively in the *Commentary on the Bangalore Principles of Judicial Conduct*. The following is a brief summary:

- *Independence*:

  Independence is the state of mind of the judge. It is the responsibility imposed on a judge to enable the judge to adjudicate a dispute honestly and impartially on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, without external pressure, influence, inducement, threat or interference from anyone. The core of the principle of judicial independence is the complete liberty of the judge to hear and decide the cases that come before the court. No outsider—be it government, pressure group, individual or even another judge—should interfere or attempt to interfere with the way in which a judge conducts a case and makes a decision. A judge should 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 from such connections and influence.

- *Impartiality*:

  Impartiality is the fundamental quality required of a judge. There are two aspects to the requirement of impartiality. First, the judge must be subjectively impartial, i.e. the judge should not hold any personal prejudice or bias such as a predisposition towards one side or another or a particular result. Secondly, the judge must also be impartial from an objective viewpoint, i.e. the judge must offer sufficient guarantees to exclude any legitimate doubt in this respect. The perception of impartiality is measured by the standards of a reasonable observer. The perception that a judge is not impartial may arise in a number of ways, for

instance through a perceived conflict of interest, the judge's behaviour on the bench, or the judge's associations and activities outside the court. Accordingly, any judge with respect to whom there is a legitimate reason to fear a lack of impartiality must withdraw.

- *Personal integrity*:

  The components of personal integrity are honesty and judicial morality. A judge should always (not merely in the discharge of official duties) act honourably and in a manner befitting the judicial office; be free from deceit, fraud and falsehood; and be good and virtuous in behaviour and in character. Confidence in the judiciary is founded not only on the competence and diligence of its members, but also on their integrity and moral uprightness. From the public's perspective, a judge has not only pledged to serve the ideals of justice and truth on which the rule of law and the foundations of democracy are built, but also to embody them. Accordingly, the personal qualities, conduct and image that a judge projects affect the judicial system as a whole and, consequently, the confidence that the public places in it. The public demands from the judge's conduct are far above that which is demanded of fellow citizens. These standards of conduct are much higher than those demanded of society as a whole. In fact, the public expects virtually irreproachable conduct from a judge.

- *Propriety*:

  A judge must expect to be the subject of constant public scrutiny and comment. Therefore, a judge must accept, freely and willingly, personal restrictions on certain activities, even when such activities would not be viewed negatively if carried out by other members of the community or by the legal profession. The test of propriety may be applied to a variety of situations. The judge's conduct in court (such as preferential treatment to a high government official) to conduct out of court (such as speaking at length to a litigant in a pending case, even if the conversation is in fact unrelated to the case); frequent visits to public bars; excessive gambling; social relationships with individual lawyers; becoming involved in public controversies; lending the prestige of the judicial office to advance the private interests of the judge's family or friends; the misuse of confidential information; engaging in inappropriate extra-judicial activities; accepting gifts of excessive value and the hospitality of recent acquaintances, are some examples of inappropriate conduct. In every case, when in doubt, the question to be asked is: "How will this look in the eyes of the public?", considering that propriety and the appearance of propriety are essential to the performance of all of the activities of a judge.

- *Equality*:

  Fair and equal treatment is an essential attribute of justice. It is the duty of a judge not only to recognize, and be familiar with, cultural, racial and religious diversity in society, but also to be free of bias or prejudice on grounds such as disability, sexual orientation, and social and economic status. A judge should not, by speech, gestures or conduct, manifest gender bias. A judge must not make improper and insulting remarks about litigants and witnesses, or be abusive towards a convicted prisoner. Judicial remarks should always be tempered with caution, restraint and courtesy. It is the judge who sets the tone and creates the environment for a fair trial. Therefore, unequal and differential treatment of court users is unacceptable. All who appear in court—be they legal practitioners, litigants or witnesses—are entitled to be dealt with in a way that respects their human dignity and fundamental human rights.

- *Competence*:

  Competence in the performance of judicial duties requires legal knowledge, skill, thoroughness and preparation. A judge should therefore take reasonable steps to acquire, maintain and regularly enhance his or her professional ability through training opportunities which the judge has a duty, as well as a right, to take. While it is desirable for a judge to receive detailed, in depth, diverse training appropriate to the judge's professional experience upon first appointment, the judge should be committed to perpetual study and training. Such training is made indispensable by constant changes in the law and technology, and the possibility that a judge will acquire new responsibilities when he or she takes up a new post. In the context of the growing internationalization of societies and the increasing relevance of international law in relations between the individual and the State, a judge should stay informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

- *Diligence*:

  Diligence requires that a judge should perform all judicial duties, including the delivery of reserved judgments, efficiently, fairly and with reasonable promptness, and conduct all court proceedings with patience, dignity and courtesy. The judicial duties of a judge take precedence over all other activities. A judge's primary duty is the due performance of the judicial function, the principal elements of which involve the hearing and determination of cases requiring the interpretation and application of the law. A judge should resist any temptation to devote excessive attention to extra-judicial activities if this reduces the judge's capacity to discharge the judicial office. There is obviously a heightened risk of excessive attention being devoted to such activities if they involve compensation. In such cases, reasonable observers might suspect that the judge has accepted the other duties in order to enhance his or her official income. The judiciary is an institution of service to the community. It is not just another segment of the competitive market economy.

22. The *Bangalore Principles*, supplemented by reference to the *Commentary on the Bangalore Principles,* provides a comprehensive guide to conduct aimed at strengthening judicial integrity. The following are a few of the numerous issues that are addressed:

i. A judge must not be swayed by partisan interests, public clamour or fear of criticism.

ii. While a judge is required to maintain a form of life and conduct more severe and restricted than that of other people, it would be unreasonable to expect a judge to retreat from public life altogether.

iii. It is inconsistent with the principle of judicial independence for a judge to accept, during a period of leave, employment in the executive or legislative branch of government.

iv. It is a violation of the principle of judicial independence for a judge to accept an award from, or on the recommendation of, a minister of justice since the discretional 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, compromises the independence of the judiciary.

v. In order to avoid having to regularly remove himself or herself from presiding over cases so as to avoid potential conflicts of interest, a judge should organize

his or her personal and financial affairs in a way that minimizes the potential for conflict with judicial duties.[22]

vi. 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. A judge should make disclosure on the record and invite submissions from the parties in two situations. First, if the judge has any doubt about whether there are arguable grounds for disqualification. Second, if an unexpected issue arises shortly before or during a proceeding. The judge's request for submissions should emphasize that it is not the consent of the parties or their advocates that is being sought, but assistance on the question whether arguable grounds exist for disqualification and whether, for example, in the circumstances, the doctrine of necessity applies. If there is real ground for doubt, that doubt should ordinarily be resolved in favour of recusal.

vii. 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 which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

viii. 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 activities;

(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;

(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.

ix. A judge and the members of the judge's family shall neither ask for, nor accept, any gift, or favour in relation to anything connected with the performance of his or her judicial duties.

Adopting a code of judicial conduct

23. The adoption of a code of judicial conduct is a crucial aspect of any effective approach to supporting judiciary integrity. The importance of such a measure to the implementation of article 11 is reflected in the fact that it is identified as one method of enhancing judiciary integrity with in the text of the article itself.

[22] The potential for interests to conflict arises when the personal interests of the judge (or of those close to him or her) conflict with the judge's duty to adjudicate impartially. Judicial impartiality is concerned both with impartiality in fact and impartiality in the perception of a reasonable observer. In judicial matters, the test for conflict of interest must include both actual conflicts between the judge's own interests and the duty of impartial adjudication, and the circumstances in which a reasonable observer would (or might) reasonably apprehend a conflict. For example, although members of a judge's family have every right to be politically active, the judge should recognize that the political activities of close family members may, even if erroneously, adversely affect the public perception of the judge's impartiality.

24. While article 11 refers to rules with respect to the conduct of members of the judiciary as a measure that may be considered to strengthen integrity, the United Nations Economic and Social Council (ECOSOC), in 2006, "invited Member States, consistent with their domestic legal systems, to encourage their judiciaries to take into consideration the *Bangalore Principles of Judicial Conduct* [which was annexed to that resolution] when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary."[23]

25. In the fourth session of the Working Group on Prevention that addressed judicial integrity, many countries outlined how they had sought to use the *Bangalore Principles* in enhancing their judicial codes of conduct. This is the case in Nigeria for example where the Code of Conduct for Judicial Officers was developed in line with these principles. The Code is administered by the National Judicial Council which monitors and sanctions non-compliance. The *Bangalore Principles* were also cited by the Russian Federation as a key source in the development of a new Code of Judicial Ethics adopted in December 2012.

26. Many States have concluded that in order to support the relevance, effectiveness and legitimacy of the code of conduct or like expression of principles, it should be formulated, applied and enforced by the judiciary itself. Furthermore, attempts are increasingly being made to consult other stakeholders such as court users, civil society and academia in the development of codes of conduct and ethics. Such an approach is consistent with the principle of judicial independence and separation of powers but can also be of great assistance in ensuring that the code provides meaningful and clear guidelines tailored to the specificities of the legal system in which the judiciary works.

27. Furthermore, if the judiciary fails or neglects to assume responsibility for ensuring that its members maintain the high standards of judicial conduct expected of them, public opinion and political expediency may lead the other two branches of government to intervene. When that happens, the principle of judicial independence upon which the judiciary is founded and by which it is sustained, is likely to be undermined to some degree, perhaps seriously.

Dissemination of the code of judicial conduct

28. A code of judicial conduct has several objectives:

- To establish standards of ethical conduct for judges;
- To provide guidance to judges in the performance of their judicial duties;
- To afford the judiciary a framework for regulating judicial conduct;
- To assist members of the executive and the legislature, and lawyers and the public in general, to better understand the judicial role; and
- To offer the community a standard by which to measure and evaluate the performance of the judicial sector.

In order to achieve these objectives, it is necessary that the judiciary should not only adopt a code of conduct, but that such a code is widely disseminated in the community. It is also necessary that judicial ethics, based on such code, are integral in the initial

[23] ECOSOC Resolution 2006/23 of 27 July 2006.

and continuing training of judges. In this connection, there are a number of examples of judiciaries and judicial training institutes in certain countries that have sought to actively disseminate the domestic code of conduct, and other materials such as the *Commentary on the Bangalore Principles of Judicial Conduct* among judges and the wider community.[24]

Application and enforcement of the code of judicial conduct

29. A code of judicial conduct will do little to improve judicial performance and enhance public confidence if it is not enforceable. Therefore, the State party should consider encouraging the judiciary to establish a mechanism to receive, inquire into, resolve and determine complaints of unethical conduct of members of the judiciary, where no provision exists for the reference of such complaints to a court. [25] To enhance the transparency and legitimacy of such a mechanism, many States have considered it not appropriate for it to be uniquely controlled by the judiciary. Instead, efforts have been made in many States to involve bodies outside of the judiciary in the application and enforcement of codes of judicial conduct. Associating persons external to the judiciary (lawyers, academics and representatives of the community) in the monitoring of ethical principles will prevent a possible perception of self-interest and self-protection, while ensuring that judges are not deprived of the power to determine their own professional ethics.

30. In any inquiry into a complaint of unethical conduct, due process should be secured to the impugned judge, allowing for confidentiality in the preliminary stages of an inquiry if that is what the judge requests. Protection against victimization should be provided to informants, complainants and witnesses, and protection against intimidation, undue influence and blackmail should be provided to judges. Legislation may be necessary to afford such protection. Where the complaint is sufficiently serious, and cannot be resolved through counselling or with a reprimand, it may be referred to the body responsible for exercising disciplinary control over judges. Where the charge is criminal in nature, the disciplinary body should cooperate fully with the relevant law enforcement agency.

31. The State party should also consider encouraging the judiciary to establish a a body consisting of sitting and/or retired judges, to advise members of the judiciary on the propriety of their contemplated or proposed future conduct, if there is no mechanism in existence for that purpose. In many jurisdictions in which such committees have been established, a judge may request an advisory opinion about the propriety of his or her own conduct. The committee may also issue opinions on its own initiative on matters

[24] For example, the Judicial Training Institute of Kenya, in 2010, published a special issue of its official Bulletin containing the full text of the *Commentary on the Bangalore Principles of Judicial Conduct*, and ensured that a copy reached every judge and magistrate in that country.

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

of interest to the judiciary. Many States have found this pro-active preventive approach to have a significant impact in terms of the compliance of members of the judiciary with the provisions of the relevant code.[26]

32. The adoption of a code of conduct, and the establishment of measures for its effective implementation, are generally responsibilities of the judiciary. However, if the judiciary, after having been encouraged to do so, has nevertheless failed to adopt appropriate measures, the State party should consider taking steps (including by enacting legislation if necessary) to comply with the provisions of article 11.

Evaluative framework: Codes of conduct

Has the judiciary or other body developed rules or standards with respect to the professional and ethical conduct of members of the judiciary (hereinafter referred to as the code of conduct)?
Does the code of conduct take into consideration the Bangalore Principles of Judicial Conduct?
Describe the process that governed its development and adoption. In particular, did this process involve consultation with stakeholders outside the judiciary, such as civil society and court user organizations?

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

Has the code of conduct been made available to every judge?
To which institutions has the code of conduct been disseminated in the community or otherwise made publicly available?
Is there a mechanism or procedure, formal or informal, to advise members of the judiciary on the propriety of proposed conduct?
Is there a mechanism or procedure to receive and inquire into complaints of misconduct against members of the judiciary?
Is this mechanism or procedure within the judiciary or external from it? Does it function independently of the judiciary ?
Who participates in this mechanism or procedure, and how are members selected?

What transparency measures are in place in that mechanism or procedure to promote public confidence in the process to address such complaints?

Judicial training

33. It is through the quality of judicial decisions that public confidence in the judicial process can be enhanced.[27] The quality of judicial decisions will depend, among other factors, on the legal training of the professionals involved in judicial proceedings. While the State should provide the judiciary with the necessary resources, the responsibility for organizing and supervising judicial training rests with the judiciary, either by itself or through an independent body under its supervision. It is important to bear in mind that the role of the judge today extends beyond dispute resolution. In many countries the judge is called upon to address broad issues of social values and human rights, and to decide controversial moral issues, all within the context of ever more pluralistic societies.

34. All appointees to judicial office should have or acquire, before they take up their duties, knowledge of relevant aspects of substantive national and international law and procedure. The training should be designed to develop and deepen not only their legal knowledge, but also to develop complementary skills, e.g. knowledge of foreign languages and alternative dispute resolution. This will enable society to be served by judges who are capable not only of applying the law correctly, but also of critical and independent thinking, social sensitivity and open-mindedness.[28] Duly appointed judges should also receive an introduction to other fields relevant to judicial activity, such as management of cases and administration of courts, information technology, social sciences, and legal history and philosophy. The training of judicial officers should be pluralist in outlook in order to guarantee and strengthen the objectivity of the judge and the impartiality of the judiciary.

35. A course on judicial ethics should constitute an essential component of the judicial training programme. Such a course should be designed, not to "teach" judicial ethics, but to create a forum for judges to consider a variety of ethical problems and to discuss appropriate responses. The purpose of the course should be to provide the judges with a framework for analysing and resolving ethical issues that may arise in the future. The "teaching" element with respect to the content of judicial ethics should be intended only to assist a judge to choose the most prudent course of action when faced with an ethical issue. Although issues that may arise in a trial court will be different from those in an appellate court, it is desirable that all appointees to judicial office, as well as serving judges at all levels, be required to participate in such a course.[29]

[27] This subject is discussed at length in UNODC, *Resource Guide on Strengthening Judicial Integrity and Capacity* (2011), pp. 11-17, and in Opinion No. 11 (2008) of the Consultative Council of European Judges (CCJE) on the Quality of Judicial Decisions.

[28] CCJE, Opinion No.10.

[29] See *Judicial Ethics Training Manual for the Nigerian Judiciary*, UNODC, 2007.

36. In most civil law countries, judges are recruited at the commencement of their professional career and enter into a lengthy and extensive training process in order to prepare them to join the judiciary. In these circumstances it is clear that a detailed and substantively broad training programme, including comprehensive units on judicial ethics and conduct, are required to ensure that selected individuals are prepared for their role as a judge. By contrast, in most common law countries, those recruited as members of the judiciary have developed significant experience as practicing lawyers, usually having spent considerable time working professionally in court as an advocate.

37. Reflecting the reference in article 11 to "the fundamental principles and legal systems of States parties", it is clear that the training requirements in the above two contexts will be different. However, regardless of the level of experience of the individual being recruited to the judiciary, it is accepted that initial training is required before a position as judge can be taken. The performance of judicial duties is a new profession for both those recruited through the common law and civil law systems, and involves a particular approach in many areas, notably with respect to professional ethics, case management, court administration, and relations with persons involved in court proceedings. On the other hand, it is important to take the specific features of recruitment methods into account so as to target and adapt the training programmes appropriately. Experienced lawyers may need to be trained only in what is required for their new profession.

38. Where the language of legal literature (i.e. law reports, appellate judgments, etc.) is different from the language of legal education, instruction in the former should be provided to both lawyers and judges. In multilingual countries, training should be delivered in the relevant languages.

39. A particularly important aspect of training programmes is their role in developing and encouraging an environment in which members of different branches and levels of the judiciary meet and exchange their experiences and secure common insights from dialogue with each other.

40. Within the context of the Working Group on Prevention, many States parties have provided examples of the specific ethics and code of conduct training they provide to members of the judiciary. In the United States, complementing the primary role of the Federal Judicial Center, the Judicial Conference Committee on Codes of Conduct has developed and delivered continuing ethics education and published ethics education materials for all judges and judicial employees. Training on judicial ethics, including financial disclosure reporting requirements, is also provided at training programmes for newly appointed district and magistrate judges. Similarly, in Germany, a number of advanced training courses are offered specifically on the subject of judicial ethics, both by the Länder at the regional level and by the German Judges' Academy at the cross-regional level. The Academy, for example, holds an annual one-week seminar entitled "Judicial ethics—bases, perspectives, global comparison of standards of judicial conduct".[30]

[30] For further examples and background see CAC/COSP/WG.4/2013/2, Integrity in the judiciary, judicial administration and prosecution services (article 11 of the United Nations Convention against Corruption), page 8.

Evaluative framework: Judicial training

Have the necessary financial and other resources been allocated for the organization and supervision of judicial training?
Is there a judicial training centre or other specialized institution?
What is included in the training curriculum for the judiciary and how was it developed?
Are specific courses or modules on judicial ethics and conduct included in the mandatory initial training for judges?
How is the training delivered and by whom?
To what extent is continuing training required for judges? What does such training address?

Are courses available for judges providing an introduction to other fields relevant to judicial activity, such as case management or alternative dispute resolution?
If the language of legal literature (i.e. law reports, appellate judgments, etc.) is different from the language of legal education, is instruction in both languages provided to both lawyers and judges?
In countries with multiple official languages, is judicial training delivered in more than one language?

Conflicts of interest and disclosure of financial interests and affiliations

41. Conflicts of interest occurs where there is a conflict between the public duty and the private interest of a public official, in which the official's private-capacity interest could improperly influence the performance of their official duties and responsibilities.[31] A conflict between an official's personal interests, (what they stand to gain, not necessarily limited to money), and their duty as a public servant (what their duty requires them to do, or perhaps more broadly, what is in the public interest), is to be avoided as far as possible, at all times. Even the appearance of a conflict of interest is to be avoided, to minimize the risk to the organization's reputation (and the official's personal reputation also) for integrity.

42. The impact of actual or perceived conflicts of interest can be particularly damaging in the case of members of the judiciary where the appearance of objectivity and independence from outside influence are crucial to maintaining the trust of the public. In recognition of the potentially negative impact of conflicts of interest, States parties to the Convention have adopted a wide range of measures that seek to reduce the likelihood of such conflicts arising including by placing restrictions on the outside activities of members of the judiciary, introducing rules governing the receipt of gifts, and the provision of specialized training.

[31] See Managing Conflict of Interest in the Public Sector: A Toolkit, *Organisation for Economic Co-operation and Development*, 2005

43. Efforts to address conflicts of interest cannot, however, be limited only to the introduction and enforcement of rules governing the conduct of judges. States have found it increasingly important to simultaneously take strong efforts to educate and raise awareness of members of the judiciary both of the risk of conflicts of interest and of the practical application and meaning of relevant laws. As an example, in the Republic of Korea, under a 4-step approach outlined in the Guidelines for Conflict of Interest, an ethical counselling system is available to public officials aimed at developing their ability to accurately assess the likelihood of conflicts of interest and to take action to resolve them when they arise. Disciplinary measures are, however, also used when relevant standards are breached.[32]

44. The disclosure by judges of their financial and other interests is an increasingly common approach for addressing both conflicts of interest and potential cases of embezzlement or illicit enrichment amongst members of the judiciary. Such declarations can also be useful with respect to the assignment of cases. "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser or other active participant in the affairs of an institution or organization. The declaration of financial interests may be filed in court, and be accessible to parties to litigation in the judge's court and/or their legal representatives. Figures produced by the World Bank show that of those countries with an asset declaration system in place, 56 per cent require members of the judiciary to make such declarations, rising to 58 per cent for Supreme Court members.[33]

45. It has been increasingly recognized that in order for declaration systems to be a truly effective tool in relation to the identification of potential or actual conflicts of interest, judges should provide information in such declarations in relation to their outside affiliations and interests, in addition to financial interests. Types of information requested in this regard may include pre-tenure activities, affiliations with businesses such as board memberships, connections with non-governmental or lobbying organizations and any unpaid or volunteer activities.

46. A distinction can be drawn between those countries that include judges within the range of public officials covered by general asset disclosure laws or regulations, and those where a specialized regime of disclosure has been developed in relation to the judiciary and prosecution services.[34]

Evaluative framework: Disclosure of financial interests and affiliations

To what extent are restrictions placed on the outside activities of judges such as employment with private sector bodies, holding of financial or business interests, or membership of political organizations?

[32] For further information see www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2012-August-27-29/V1254431e.pdf#page=4

[33] For further information see http://publicofficialsfinancialdisclosure.worldbank.org/

[34] For further information see Henderson, K *Asset and Income Disclosure for Judges: A Summary Overview and Checklist* (http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/IncomeAssetDisclosure.pdf)

Are rules or measures in place that regulate the acceptance of gifts by a member of the judiciary? How are those rules or measures enforced?
What tools and mechanisms are in place to raise awareness among the judiciary of the risk of conflicts of interest and of the applicable rules and regulations in this field? (Examples may include the publication of guidance materials, specialized training or the provision of advisory services.)
To what extent are judges required or requested to make a declaration of their assets and liabilities?
Do such declarations include the assets and liabilities of his or her spouse, children and other close family members such as parents?
To what extent is the content of such declarations reviewed or verified?
Are judges required to declare affiliations, outside activities and other non-financial interests? How is this done?

Are such declarations made available to the public and/or for reference in the court registry by litigants or their legal representatives?
Under what circumstances must a judge recuse himself or herself from hearing a case? Are the grounds mandatory, optional or a mix of the two?

2

Measures to prevent opportunities for corruption among members of the judiciary

The phenomenon of judicial corruption

47. In the past two decades, evidence of corruption in the administration of justice has steadily and increasingly surfaced in many parts of the world. In terms of public perception of corruption in the judiciary, there are some troubling signs. Transparency International's 2013 *Global Corruption Barometer* found that the judiciary is perceived as the fifth institution most affected by corruption.[35] In 20 countries, the judiciary is perceived to be the most corrupt institution.[36] More worrying still, these perceptions seem to have some basis in these countries, as an average of 30 per cent of the people coming into contact with the judiciary reported that they had to pay a bribe.[37] Public perceptions may be unreliable and may reflect an exaggerated picture, blown up out of proportion to the real thing. But such perceptions should not be ignored. Even if the public wrongly believes that the judicial sector is corrupt, the reasons for that mistaken belief, and what contributes to such negative perceptions, need to be identified and remedied, since the real source of judicial power is the public recognition of the moral authority and integrity of the judiciary.

48. Evidence of the existence and impact of corruption in the judiciary is also available from a number of other sources, particularly the reports of independent commissions of inquiry. One such report documented instances of court personnel demanding bribes to open files or destroy case files; magistrates accepting bribes to grant improper "court injunctions"; accused persons, either voluntarily or under compulsion, offering bribes to magistrates to obtai n light sentences; magistrates and prosecutors accepting bribes to reduce sentences or dismiss cases; bribes being solicited and given to magistrates and prosecutors so that accused persons may be granted bail; court personnel accepting bribes to produce copies of judgments; magistrates accepting bribes from lawyers in exchange for favourable judgments; trial court judges refusing to give copies of judgments to people who had lost their cases so as to prevent them from appealing to higher courts, thereby protecting those who had fraudulently obtained their judgments; and magistrates colluding with auctioneers in selling property belonging to litigants who had lost their

[35] The 2013 *Global Corruption Barometer* measures the extent of corruption in a total of 12 institutions. According to the 2013 results (from most corrupt to less corrupt), the public perception listed: 1) Political parties; 2) Police; 3) Public officials/civil servants; 4) Parliament/Legislature; 5) Judiciary; 6) Business/Private sector; 7) Medical and health services; 8) Education system; 9) Media; 10) Military; 11) NGOs; 12) Religious bodies.

[36] Transparency International, *Global Corruption Barometer* (2013), p. 17.

[37] Ibid.

civil cases, and sharing the receipts. Another instance of corruption documented in the report of a commission of inquiry read thus: "One court has established a standard procedure in dealing with traffic cases. The public prosecutor confers with the accused before the court proceedings begin and advises them on the fastest way to dispose of the cases. Each accused is advised to give a certain amount which will be divided between the prosecutor and the magistrate. If the 'advice' is declined one is likely to be convicted, heavily fined and his driving licence suspended or revoked altogether. The result is that the 'advice' is normally followed and cases are disposed of quickly and the prosecutor and magistrate appear to be doing a good job".

49. Corruption amongst the judiciary and prosecution services can be particularly damaging in those countries that are attempting to develop and strengthen the key institutions responsible for upholding the rule of law. In a recent study conducted by UNODC in Afghanistan, it was estimated that over 50 per cent of the members of the judiciary and prosecution services had received or solicited bribes, making them one of the most corrupt classes of public officials. What is more, judges and prosecutors demanded by far the largest amount of money when soliciting a bribe, with the average bribe over $US300. The impact of such endemic corruption is to totally undermine the operation of the justice system, with those who can afford to do so bypassing the application of the law.[38]

50. Corruption in the judiciary is not limited to conventional bribery. An insidious and equally damaging form of corruption arises from the interaction between members of the judiciary and external, powerful political or economic interests. For example, the political patronage through which a judge acquires his or her office, a promotion, an extension of service, preferential treatment, or the promise of employment after retirement, can give rise to corruption. Frequent socializing with local or high level political figures is almost certain to raise, in the minds of others, the suspicion that the judge is susceptible to undue influence in the discharge of his or her duties. With respect to this form of corruption too, hard evidence has surfaced of judges being pressurized by executive authorities to render justice contrary to law, and of being victimized in the event of failure to do so; of opportunism among judges whereby they seek to obtain material and moral advantages and benefits from the executive for themselves or family members; and of political protection for corrupt judges.

51. The following measures are recommended as elements of a holistic approach to preventing corruption in the judiciary by minimizing both the opportunity and the inclination to resort to corruption. Section A describes measures designed to strengthen the institutional integrity system within which the judiciary functions, and which are therefore primarily the responsibility of the executive and legislative branches of government. Section B describes measures designed to minimize opportunities for corruption, which the judiciary is competent to formulate and implement

A. Strengthening the institutional integrity system

52. This section describes measures that the State can take to minimize both the opportunity for and vulnerability to corruption in the judiciary. They are measures that seek to establish, or to strengthen, the institutional integrity system of the judiciary. These

[38] www.unodc.org/documents/frontpage/Corruption_in_Afghanistan_FINAL.pdf

measures include the establishment of clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, disciplinary sanctions and dismissal of members of the judiciary. They also include measures to protect judges from any form of political influence in their decision-making.

Appointment of judges

53. In some countries, a judge is recruited from among law graduates who have had no previous professional experience. Judges so recruited attend courts thereafter and learn from serving judges by being apprenticed under them. In other countries, judges are recruited from among practising members of the legal profession. The position in the judicial hierarchy to which such person is initially appointed usually depends on his or her seniority and experience in the profession. Whichever the model, there is general acceptance that judicial appointments should be made "on the merits" based on "objective criteria" and that political considerations should be inadmissible.[39] Objective standards are required not merely to exclude political influence, but for other reasons, such as the risk of favouritism, nepotism and cronyism (or "cloning"), which exist if appointments are made in an unstructured way or on the basis of personal recommendations. Accordingly, persons selected for judicial office should be individuals of ability, integrity and efficiency with appropriate training or qualifications in law.[40]

54. It is generally agreed that transparency is required in the conditions for the selection of candidates. In order to ensure transparency and accountability in the process, the appointment and selection criteria should be made accessible to the general public, including the qualities required from candidates for high judicial office.[41] All judicial vacancies should be advertised in such a way as to invite applications by, or nominations of, suitable candidates for appointment. That would ensure that procedures for judicial appointment and promotion based on merit are opened to a pool of candidates as diverse and reflective of society as a whole as possible. The publication of the list of vacant posts and the list of candidates for those posts will also permit public scrutiny of the appointment process.

55. The assessment of a candidate for judicial office should involve consideration not only of his or her legal expertise and general professional abilities, but also of his or her social awareness and sensitivity, other personal qualities (including a sense of ethics, patience, courtesy, honesty, common sense, tact, humility and punctuality) and communication skills.[42] In the selection of judges, there should be no discrimination on grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status. Due consideration should be given to ensuring a fair reflection by the judiciary of society in all its aspects.[43]

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[39] See Consultative Council of European Judges (CCJE), Opinion No. 1.

[40] United Nations Basic Principles on the Independence of the Judiciary, Principle 10.

[41] See CCJE, Opinion No.10. General criteria have been published by the Lord Chancellor in the United Kingdom, and the Scottish executive has issued a consultation document. Austrian law defines criteria for promotion.

[42] In Canada, for example, courtroom experience is considered to be only one of many factors in assessing a candidate's suitability for judicial office. Professional and competence indicators include general proficiency in the law; intellectual ability; analytical skills; ability to listen; ability to maintain an open mind while hearing all sides of an argument; ability to make decisions; capacity to exercise sound judgment; reputation among professional peers and in the general community; areas of professional specialization, specialized experience or special skills; ability to manage time and workload without supervision; capacity to handle heavy workload; capacity to handle stress and pressures of the isolation of the judicial role; interpersonal skills with peers and the general public; awareness of racial and gender issues and bilingual ability. Relevant personal characteristics also include: a sense of ethics, patience, courtesy, honesty, common sense, tact, integrity, humility and punctuality. See Criteria for judicial appointments in Canada, www.fja.gc.ca/jud_app/assess_e.html, cited in Tanya Ward, *Justice Matters: Independence, Accountability and the Irish Judiciary*, p.51.

[43] The South African Constitution stresses the need for the judiciary to reflect broadly the racial and gender composition of the country, and requires that to be considered when judicial officers are being appointed.

56. National practice suggests that there is a diversity of methods by which judges assume office—election by the people or legislature, or appointment by the executive, the judiciary, or by an independent body. Each of these methods has its positive and negative attributes. The elective system is seen as providing the judiciary a greater degree of democratic legitimacy. It may, however, lead to judges being involved in fund raising, political campaigning and in the temptation to buy or give favours. The involvement of the legislature in the process, even for the purpose of deciding whether or not to confirm an appointment made or recommended by the executive branch of government, may also result in the politicization of judicial appointments since it cannot be excluded that political considerations may prevail over objective criteria. On the other hand, it may serve as a check on the ultimate appointing authority.[44] The appointment by the Head of State, especially of judges of superior courts, also carries a risk of dependence on the executive branch of government, particularly where the Head of State acts on the advice of the head of government or is himself or herself also the head of government. This method may have worked well in some older democracies where the executive is restrained by legal culture and tradition and by a strong media.

57. Recent international and regional initiatives indicate a strong preference for the appointment and promotion of judges to be made by an independent body, such as a Council for the Judiciary or a Judicial Service Commission, with the formal intervention of the Head of State with respect to higher appointments.[45] In such a body, members of the judiciary and members of the community may each play appropriately defined roles in the selection of candidates suitable for judicial office. The composition of such a body should be such as to guarantee its independence and enable it to carry out its functions effectively. Its members should be selected on the basis of their competence, experience, understanding of judicial life, capacity for appropriate discussion and appreciation of the importance of a culture of independence. Its non-judge members may be selected from among outstanding jurists or citizens of acknowledged reputation and experience chosen by an appropriate appointment mechanism. A mixed composition avoids the perception of self-interest, self-protection and cronyism, and reflects the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. The composition of the body should reflect, as far as possible, the diversity in the society.[46]

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[44] The Venice Commission found that "the Parliament is much more engrossed in political games, and the appointment of judges could result in political bargaining in which every member of Parliament coming from one district or another will want to have his or her own judge." See Opinion No.403/2006 of the Venice Commission (European Commission for Democracy Through Law) on "Judicial Appointments".

[45] See CCJE, Opinion No.10. An independent commission was also advocated in the European Charter on the Statute for Judges; the Latimer House Guidelines for the Commonwealth on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights, 1998; the Cairo Declaration on Judicial Independence, adopted at the Second Arab Justice Conference on "Supporting and Advancing Judicial Independence", Cairo, 2003; and by the Judicial Integrity Group in Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct, 2010.

[46] One of the more representative bodies is the Judicial Service Commission of South Africa. It consists of:

(a) The Chief Justice (chairperson);

(b) The President of the Constitutional Court;

(c) One Judge President designated by the Judges President;

(d) The Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;

(e) Two practicing advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;

(f) Two practicing attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;

(g) One teacher of law designated by teachers of law at South African universities;

(h) Six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;

(i) Four permanent delegates to the National Council of Provinces designated together by the Council, supported by a vote of at least six provinces;

(j) Four persons designated by the President, after consulting with the leaders of all the parties in the National Assembly; and

(k) When considering matters specifically relating to a provincial or local division of the High Court, the Judge President of that division and the Premier, or an alternate designated by the Premier, of the province concerned.

Evaluative framework: Appointment of judges

What are the essential legal requirements for appointment to judicial office? Describe the requirements for various types or levels of courts if they differ.
To what extent are judicial vacancies, including for high judicial office, advertised?
What appointment and selection criteria are applicable? How were these criteria developed? Are these criteria made accessible to the general public?
Are the names of judicial candidates published?
Is there an independent body established for the purpose of appointing, or nominating persons for appointment, to judicial office?
How, and by whom, are the members of such body selected and appointed, and what criteria are applied in making such selections?

Is civil society or the community represented on such body?
How is this body perceived by members of the legal community and the general public in terms of its fairness and objectivity?
Does this body conduct interviews of judicial candidates? Are these interviews open to the public? Is the media allowed to attend?
Are a candidate's ethical attributes and other personal qualities, such as temperament and communication skills, taken into consideration in the recruitment process?
Are efforts made to attract qualified candidates from particular groups, such as women or ethnic minorities?

Promotion of judges

58. In order to ensure that the promotion of judges is not conducted on the basis of political or other considerations, something that could bring into question the independence and therefore the integrity of the judiciary, good practice in this area suggests that the promotion of judges should be made by the independent body responsible for the appointment of judges. When not based on seniority, promotion should be based on an objective appraisal of the judge's performance, having regard to the expertise, abilities, personal qualities and skills required for initial appointment.[47]

Evaluative framework: Promotion of judges

Is the selection of judges for promotion based primarily on their performance and experience? What other factors are taken into consideration?
Are promotions among judges made by, or on the recommendation of, an independent body responsible for the appointment of judges?

Transfer of judges

59. The transfer of judges has been addressed in several international instruments, since transfer can be used to punish an independent and courageous judge, and to deter others from following his or her example. Among the principles enunciated are the following:

- A judge should not be transferred from one jurisdiction or function to another without his or her freely given consent, except pursuant to a system of regular rotation or promotion formulated after due consideration by the judiciary; and
- Such a system may include provision for transfers to be made in exceptional circumstances such as by way of a disciplinary sancwtion, in the case of a lawful alteration of the court system, in the case of a temporary assignment to reinforce a neighbouring court, or where a judge in his or her early years is transferred from post to post to enrich his or her judicial experience, the maximum duration of such transfers being strictly limited.

[47] The criteria for appointment to the New Zealand Court of Appeal and High Court include: (i) legal ability (professional qualifications and experience; outstanding knowledge of the law and its application; extensive practice of law before the courts or wide applied knowledge of the law in other branches of legal practice; overall excellence as a lawyer); (ii) qualities of character (personal honesty and integrity; impartiality, open-mindedness and good judgment; patience, social sensitivity and common sense; the ability to work hard); (iii) personal technical skills (oral communication skills with lay people as well as lawyers; the ability to absorb and analyze complex and competing factual and legal material; listening and communication skills; mental agility; management and leadership skills; acceptance of public scrutiny); and (iv) reflection of society (awareness and sensitivity to the diversity of New Zealand community; knowledge of cultural and gender issues). See Criteria for judicial appointments in New Zealand, cited in Tanya Ward, *Justice Matters: Independence, Accountability and the Irish Judiciary*, p. 50.

Evaluative framework: Transfer of judges

Are judges subject to transfer to other jurisdictions, functions, or court locations?
Are such transfers made pursuant to a system of regular rotation of judges provided by law or formulated by the judiciary?
Are such transfers made only by the judiciary or other independent body?
Can a judge be so transferred without his or her consent?
Have any such transfers been made in the last five years as a punitive measure?

Tenure of judges

60. It is a fundamental tenet of judicial independence that a judge should have a constitutionally guaranteed tenure for life; until a mandatory retirement age; or the expiry of a fixed term of office.[48] In the majority of States, a fixed term of office is not ordinarily renewable unless procedures exist to ensure that the decision regarding re-appointment is made according to objective criteria and on merit. There are also some States where certain members of the judiciary and prosecution services are elected. Where this is the case, further steps are required to ensure that members of the judiciary act with impartiality and objectivity while in office.

61. Where the workload of judges is too high, risks of inefficiency rise. This in turn can increase the likelihood of corruption amongst the judiciary as court users seek to have their cases fast-tracked, or in some cases purposefully slowed, through the offer of bribes. An overwhelmed administrative system can provide a fertile ground for corruption.

62. To enhance the efficiency of the judiciary and reduce the pressure on individual judges which could give rise to such risks, States should seek to ensure that a full complement of judges is in place to discharge the work of the judiciary. The engagement of temporary or part-time judges should not be a substitute for a full complement of permanent judges. Where permitted by local law, such temporary or part-time judges should be appointed on conditions, and accompanied by guarantees, of tenure or objectivity regarding the continuation of their engagement which eliminate, as far as possible, any risks in relation to their independence.

63. Within the context of the UNCAC Working Group on the Prevention of Corruption, a number of States, including Germany, the Russian Federation and the United States, referred to the life-time appointment of senior judges as a key tool in ensuring judicial independence and integrity. In the United States, for example, Supreme Court justices, as well as federal lower court judges, serve for life once appointed, unless they resign, retire, or are removed by Congress through the process of impeachment and conviction. In Chile, similar measures are taken to ensure security of tenure but with the application of an age-limit. Under this system, judges cease to hold office when they reach 75 years of age, when they are incapable of carrying out their functions or when they have been sentenced in criminal proceedings. It is for the Supreme Court, upon request of the President of the Republic, at the request of an interested party or ex officio, to declare that a member of the judiciary has not acted in accordance with the standards of good behaviour.[49]

[48] National practice appears to favour a specified retirement age for judges of superior courts. The constitutionally prescribed retirement age for judges of the highest court ranges from 62 in Belize, Botswana and Guyana to 65 in Greece, India, Malaysia, Namibia (with the possibility of extension to 70), Singapore, Sri Lanka and Turkey, 68 in Cyprus, 70 in Australia, Brazil Ghana, and Peru, to 75 in Canada and Chile. In some of these jurisdictions (for example, Belize and Botswana), however, provision exists to permit a judge who has reached retirement age to continue in office "as long as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age". In South Africa, judges of the Constitutional Court are appointed for a non-renewable term of 12 years, but must retire on reaching the age of 70 years.

[49] See CAC/COSP/WG.4/2013/2, Integrity in the judiciary, judicial administration and prosecution services (article 11 of the United Nations Convention against Corruption), p. 6.

Evaluative framework: Tenure of judges

Does the Constitution or other law guarantee tenure for life, or until a mandatory retirement age or the expiry of a fixed term of office?
If tenure is for a fixed term, how long is the term? Is the fixed term subject to renewal? Does the term vary based on the type or level of the court?
Are pending vacancies or legally authorized judicial posts filled promptly?
Are temporary or part-time judges appointed to the judiciary to handle a surge in caseload or cover vacancies until appointment? Are such judges subject to the same professional requirements and standards of conduct as full-time judges?

Judges on probation

64. A practice exists in some jurisdictions of appointing judges on probation. In many civil law systems, where judges are selected at the beginning of their professional careers, it is not uncommon for a judicial appointment to involve a period of training or probation. Where the recruitment procedure provides for a trial period before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, should only be made by the independent body responsible for the appointment of judges (or on its proposal, its recommendation, with its agreement, or following its opinion).

65. The European Charter on the Statute for Judges recognizes that the existence of probationary periods or renewal requirements "presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping

to be established in the post or to have his or her contract renewed".[50] The Council of Europe's European Commission for Democracy through Law, better known as the Venice Commission, considers that setting probationary periods could undermine the independence of judges, "since they might feel under pressure to decide cases in a particular way".[51] In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a decision not to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office. The Venice Commission adds that "despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value."[52]

Evaluative framework: Judges on probation

Are judges appointed on probation?
How is it decided whether or not to confirm a judge appointed on probation?

Remuneration of judges

66. The salaries, conditions of service and pensions of judges should be adequate, commensurate with the status, dignity and responsibilities of their office, and should be periodically reviewed for those purposes. The objective of adequate remuneration is to shield the judges "from pressures aimed at influencing their decisions and more generally their behaviour".[53] Therefore, the salaries, conditions of service and pensions of judges should be guaranteed by law, and should not be altered to their disadvantage after appointment.

67. Some national constitutions or laws specify that judges may not hold any other office, whether public or private, except non-remunerated positions in teaching and scientific research in the legal field.

[50] Explanatory Memorandum to the European Charter on the Statute for Judges, Principle 3.3., Strasbourg, 8-10 July 1998.

[51] Report on the independence of the judicial system Part 1: the Independence of Judges Adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010).

[52] Ibid.

[53] The European Charter on the Statute for Judges, Principle 6.1.

Evaluative framework: Remuneration of judges

Are the salaries, conditions of service and pensions of judges guaranteed by law?
Are the salaries, conditions of service and pensions of judges adequate, and commensurate with the status, dignity and responsibilities of their office?
Have the terms of service and/or remuneration of any judge/judges been altered to their disadvantage after appointment?
Does any judge concurrently hold another office of a non-judicial nature, or a judicial office in another jurisdiction?

Discipline of judges

68. The discipline and potential removal of judges from office represent a meeting point between measures aimed at enhancing the accountability of judges and the key principle of independence of the judiciary. Both accountability and independence are crucial if integrity amongst the judiciary is to be supported and opportunities for corruption reduced. The question for States parties when addressing this area in the context of article 11 is how best to formulate the disciplinary process so as to prevent it from being used as a tool of pressure by other branches of government, thereby also protecting the principle of independence of the judiciary.

69. In an attempt to reduce the potential for abuse of the disciplinary process so as to undermine judicial independence, some countries have sought to specify in detail all conduct that might give grounds for disciplinary proceedings leading to some form of

sanction. On the other hand, it may not be necessary, or even possible, to seek to specify in precise or detailed terms the nature of all misconduct that could lead to disciplinary proceedings and sanctions. The essence of disciplinary proceedings lies in conduct fundamentally contrary to that expected of a professional in the position of the person who has allegedly committed misconduct. Nevertheless, precise reasons should be given for any disciplinary action, as and when it is proposed to be, or is, brought.[54]

70. A person who alleges that he or she has suffered a wrong by reason of a judge's serious misconduct should have the right to complain to the person or body responsible for initiating disciplinary action. So as to strike the correct balance between accountability and independence however, such persons will generally not have the right to initiate, or insist upon, disciplinary action. Unless there is a filter, judges could find themselves facing disciplinary proceedings brought at the instance of disappointed litigants. It is necessary therefore that a specific body or person should be established by law with responsibility for receiving complaints, for obtaining the response of the judge and for considering in the light of such response whether or not there is a sufficient case against the judge to call for the initiation of disciplinary action. In the event of such a conclusion, the body or person can refer the matter to the disciplinary authority. The complainant should be informed of the outcome of the investigation into his complaint.

71. In order to protect the judiciary from undue influence, the power to discipline a judge should be vested in a body which is independent of external influence. Such a body is usually composed of serving or retired judges, but may include in its membership persons other than judges, provided that such other persons are not members of the legislature or the executive. In many countries, this power is vested in the body responsible for the appointment of judges.

72. States should seek to ensure that all disciplinary proceedings are determined expeditiously, by reference to established standards of judicial conduct, and in accordance with a procedure guaranteeing full rights of defence. An appeal procedure from the disciplinary authority to a court is also commonly made available. So as to ensure transparency and encourage public confidence in the disciplinary process the final decision in any proceedings instituted against a judge involving a sanction against such judge, whether held in private or in public, should be published.

73. It is for each State party to consider the sanctions permissible under its own disciplinary system, and ensure that such sanctions are proportionate in application. Examples of such sanctions may include measures adversely affecting a judge's status or career, including transfer of court, or loss of promotion, rights or pay. At the fourth meeting of the Working Group on Prevention held in August 2013, Burundi reported there were presently 20 members of the judiciary subject to criminal or disciplinary proceedings in relation to alleged acts of corruption, noting that these cases had come to light following the introduction of a newly-established mechanism for the reporting of acts of corruption by members of the public.[55]

[54] CCJE, Opinion No.10.

[55] For further information, see UNODC Report for the 4th Meeting of the Open-ended Intergovernmental Working Group on the Prevention of Corruption, "Integrity in the judiciary, judicial administration and prosecution services (article 11 of the United Nations Convention against Corruption)" (CAC/COSP/WG.4/2013/2).

Evaluative framework: Discipline of judges

Has the law or code of conduct applicable to the judiciary defined conduct that may give rise to disciplinary sanctions?
Is there an established procedure, made known to the public, for making a complaint against a judge in his or her professional capacity?
Are there any limits as to who may lodge a complaint?
Is there a disciplinary body established by law with responsibility for receiving complaints against a judge in his or her professional capacity? If so, describe its composition and measures taken to ensure its independence.
Is that body required by law to investigate a complaint in accordance with a procedure guaranteeing full rights of defence?
Does that body conduct its review by reference to established standards of judicial conduct?

Is there a time limit within which the investigation must be completed?
To what extent is the investigation process confidential? What information is made available to the public?
What are the possible outcomes of such an investigation?
In the event of an adverse finding or recommendation, is the judge entitled to appeal? To what body?
Is the complainant kept informed of the progress of the investigation?
To what extent is the final decision in a disciplinary proceedings against a judge that results in a sanction published or otherwise made public?

How many judges have been disciplined during the past five years, and on what grounds?
Is the disciplining body required to co-operate with law enforcement officials when the conduct involves potential criminal conduct?

Removal of judges from office

74. Outside of criminal sanctions, the most serious disciplinary measure that can be applied to a member of the judiciary is removal from his or her position as a judge. The question of how and under what circumstances a judge may be removed provides a key example of how the two principles of integrity and independence that underpin article 11 of the Convention interact. While total immunity from removal under any circumstances could bring into question the accountability and therefore the integrity of the judiciary, the threshold that must be met before a judge is removed must be significant so as to prevent the threat of removal being too readily used to undermine their independence and the integrity of their decision-making.

75. In many States, the principle of judicial independence has been considered so important that removal of a judge can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability to properly perform the judicial function.[56] The question States parties may wish to consider in this regard is whether the conduct for which the judge is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public, in its justice system, would be undermined, rendering the judge incapable of performing the duties of his or her office.[57] There is increasing international consensus that a judge may be removed from office only for proved incapacity, conviction of a serious crime, gross incompetence, or conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary. Proved acts of corruption on the part of a member of the judiciary should be considered as meeting this threshold for removal.

76. To support the integrity of the process of removal, States parties should consider vesting the power to remove a judge from office in an independent body established with power to discipline judges. Where the Head of State or the legislature is vested with the power of removal of a judge, good practice has indicated that such power should

[56] Per Lord Phillips in *Hearing on the Report of the Chief Justice of Gibraltar: Referral under section 4 of the Judicial Committee Act 1833*, Privy Council No.16 of 2009, 12 November 2009.

[57] *Therrien v. Canada* (*Ministry of Justice and another*), [2001] 2 SCR 3, paragraph 147, per Gonthier J.

be exercised only after a recommendation to that effect of the independent body vested with power to discipline judges. The provisions relating to disciplinary action should, mutatis mutandi, apply to proceedings for the removal of a judge from office.

77. So as to prevent the removal of a judge through the abolition of the court on which they sit, the abolition of a court of which a judge is a member should not be accepted as a reason or an occasion for the removal of the judge. Where a court is abolished or restructured, States should seek to ensure that measures are in place to facilitate, in consultation with the judiciary, the reassignment of all existing members of the court to another judicial office of equivalent status and tenure. Where there is no such judicial office of equivalent status or tenure, the judge concerned may be provided with full compensation for loss of office.

Evaluative framework: Removal of judges from office

On what grounds may a judge be removed from office?
Is there an independent body established by law and vested with the power of removal of judges?
Where the Head of State or the legislature is vested with the power of removal of a judge, is such power exercised only after a recommendation to that effect of an independent body or tribunal?
Is the judge subject to removal entitled to full rights of defence before such body or tribunal?

In the event of a decision to remove a judge, is the judge entitled to appeal? To which body?
Have any judges been removed from office during the past five years, or during the current government's administration?
Where courts are being restructured, what principles govern the reassignment of serving judges? To what extent is the judiciary involved or consulted in decisions about judicial restructuring?
Have any judges been excluded from the judiciary following a restructuring of the judiciary in the past five years?

Immunity of judges

78. Related to the question of discipline and removal, and again requiring balance between the principles of accountability, integrity and independence, the issue of the extent to which members of the judiciary should be immune from criminal or civil liability is a key point to be addressed when considering the implementation of article 11 of the Convention. While the principle that a judge should be free to act upon his or her convictions without fear of personal consequence is of the highest importance for the proper administration of justice, this principle is, of course, without prejudice to the right which an individual should have to compensation from the State for injury incurred by reason of negligence or fraudulent or malicious abuse of authority by a court. Effective remedies should also be provided where such injury is proved to have been caused.

79. A key principle in this regard is that a judge should be criminally liable under the general law for an offence of general application committed by him or her and should not be permitted to claim immunity from ordinary criminal process. This principle must

apply to corruption offences for which no form of immunity should be granted. Where reasonable cause exists to warrant investigation by police and other public bodies of suspected criminal offences on the part of a judge, such investigations should take their ordinary course, according to law.

80. Many States, however, consider it of fundamental importance for a judge to enjoy personal immunity from civil suits for monetary damages for improper acts or omissions made in the exercise of their judicial functions. In other words, judges personally enjoy absolute freedom from liability with respect to claims made directly against them relating to their exercise of their functions in good faith. In application of this principle, the remedy for judicial errors, whether with respect to jurisdiction or procedure, in ascertaining or applying the law or in evaluating evidence, will lie in an appropriate system of appeals or judicial review. Furthermore, the remedy for injury incurred by reason of negligence or misuse of authority by a judge will lie only against the State without recourse by the State against the judge.

81. So as to ensure that judicial independence does not render a judge free from public accountability and legitimate public criticism of judicial performance, members of the judiciary should generally avoid the use of the criminal law and contempt proceedings to restrict criticism of the courts.

Evaluative framework: Immunity of judges

Is a judge criminally liable under the law for an offence of general application committed by him or her?
Are criminal investigations against a member of the judiciary handled differently than those against members of the general public?
How many judges have been prosecuted for a criminal offence during the past five years, and on what charges? How many were convicted? How many were removed from office, regardless of the outcome of the criminal proceedings?

Does a judge enjoy personal immunity from civil suits for conduct in the exercise of a judicial function?
To what extent can an aggrieved party seek a remedy from the State for injury incurred by reason of negligence or misuse of authority by a judge?
To what extent do judges use the criminal law or contempt proceedings in response to public criticism of their performance?

Security of judges

82. The State party should ensure the security and physical protection of judges and members of their families, especially in the event of threats being made against them. It will be particularly important to provide such security in the context of cases involving high-level corruption, organized crime and other matters involving those with the capability and incentive to intimidate individual members of the judiciary. Where sufficient protection is not provided, the concern from an individual judge regarding his or her safety, whether well founded or not, could have a negative impact on their decision-making.

83. In order to provide such protection, some States have established specialized security procedures for the hearing of cases involving acts of major corruption and organized crime. In Slovakia, for example, a specialized anti-corruption court has been established, in part in order to address security concerns in relation to such cases.[58]

[58] See UNCAC review reports for Slovakia, www.unodc.org/unodc/treaties/CAC/country-profile/profiles/SVK.html.

Evaluative framework: Security of judges

What measures are taken to provide security and physical protection for the judge in the court?
Are enhanced measures put in place where proceedings give rise to heightened security concerns such as major corruption and organized crime cases?
What measures are taken to provide security and physical protection for members of the judiciary and their families outside the court?
How effective are the measures taken, both in the court and outside the court? Have there been any serious breaches of security in the last five years?

Freedom of expression, association and assembly

84. Judges, like other citizens, are entitled to fundamental human rights. Furthermore, the ability of judges to form associations or trade unions can be of crucial importance in their attempts to ensure they are able, collectively, to resist pressure from other branches of government and thereby protect their independence. Accordingly, the States parties should consider whether they have adopted measures which recognize that:

(a) Judges are 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.

(b) In the exercise of freedom of association, a judge may join a trade union or professional association established to advance and protect the conditions of service and salaries of judges or, together with other judges, form a trade union or association of that nature. However, given the public and constitutional character of the judge's service, restrictions may be placed on the right to strike.

Evaluative framework: Freedom of expression, association and assembly

What restrictions, if any, are imposed on the exercise by judges of their freedom of expression? How are expression in court and expression out of court addressed?
Have the judges formed an association or trade union to advance and protect their interests?
What restrictions, if any, are imposed on the exercise by judges of their freedom of association and assembly?

Budget of the judiciary

85. The funding of courts is closely linked to the issue of the independence of judges in that it determines the conditions in which the courts perform their functions. There is also an obvious link between, on the one hand, the funding and management of courts and, on the other, access to justice and the right to fair proceedings. The latter are not properly guaranteed if a case cannot be considered within a reasonable time by a court that has appropriate funds and resources at its disposal in order to perform efficiently.[59] The importance of allocating sufficient and sustainable financial resources to enable the judiciary to properly perform its functions should therefore be borne in mind when setting national budgets. The amount allotted should be sufficient to enable each court to function without an excessive workload, and should include financial and other resources necessary to support staff and equipment, in particular office automation and data processing facilities, and for the organization and conduct of the training of judges.

[59] CCJE, Opinion No.2.

86. Although the funding of courts is part of the state budget, States should seek to ensure that such funding is protected from political fluctuations. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to reduce the possibility of the executive or the legislative authorities exerting pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts should be taken with the strictest respect for judicial independence.[60]

87. To ensure that the budget of the judiciary reflects the needs of the justice system, States should seek to ensure that it is established by the competent authority in collaboration with the judiciary itself. As an important step in this process, the judiciary can be given the opportunity to submit an estimate of its budgetary requirements to the appropriate authority. Such funds, once approved by the legislature, should then be protected from alienation or misuse. In order to further reduce the potential for use of the budget as a tool of influence over the judiciary, States should seek to ensure that it is administered by the judiciary itself or by a body independent of the executive and the legislature, and which acts in consultation with the judiciary. Such an arrangement should ensure that the allocation or withholding of funding is not used as a means of exercising improper control over the judiciary.

88. The ability of a State to fully meet the budgetary needs and wishes of the judiciary is dependent on its economic and financial position. Article 11 of the Convention allows for States to take into account their financial constraints when considering the implementation measures that are appropriate for them. However, where economic constraints make it difficult to allocate to the court system facilities and resources which judges consider adequate to enable them to perform their functions, States should seek to accord a high level of priority to the judiciary and the court system when allocating resources, given their essential role in maintaining the rule of law and protecting human rights.

Evaluative framework: Budget of the judiciary

Is the budget of the judiciary established in collaboration with the judiciary? What measures are taken to prevent the executive or legislative authorities from exerting pressure or influence on the judiciary when setting its budget?
Is the judiciary allocated sufficient funds and resources to enable each court to perform its functions efficiently and without an excessive workload? How are funds kept and disbursed?

[60] CCJE, Opinion No.2.

How does the judiciary account for its expenditures? Is this accounting made public?

Guarantee of jurisdiction over issues of a judicial nature

89. In order to further protect the independence of the judiciary, States parties should seek to ensure, through constitutional or other similar means that the judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature,[61] and that the judiciary shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

Evaluative framework: Guarantee of jurisdiction over issues of a judicial nature

Does the constitution recognize the exclusive jurisdiction of the judiciary to decide all issues of a judicial nature?
Does the constitution recognize the exclusive power of the judiciary to determine whether it has jurisdiction over a particular matter?
Does the constitution recognize the authority of the judiciary to review the lawfulness of executive actions?

[61] This includes the application of the constitution and other law to both legislative and executive actions.

Does the constitution recognize the authority of the judiciary to strike down or invalidate a law on the basis that it is unconstitutional or is in conflict with a binding regional or international treaty?
Is any area of legislative or executive action deemed by the constitution to be beyond review by the judiciary, such as political questions?
When the highest court renders a decision, is it binding upon the entire country?
Are judges free to enter judgments against the government without risking retaliation, such as loss of their posts, the loss of benefits, or transfers to obscure and remote parts of the country?

Protection against interference by the executive and the legislature

90. Central to the question of integrity is the ability of the judiciary to act without interference from other branches of government. While this may be considered primarily a question of independence, measures taken to protect the judiciary from such pressure are also directly relevant to the question of integrity. If a judge makes a decision based on the concerns of a government, Minister or another outside party and not purely on the merits of the case, it is clear that, through the lack of independence, the judge is unable to carry out the judicial functions with full integrity.

91. Consequently, States parties, when considering the measures they have taken to enhance integrity, may also wish to reflect on the legal framework and practical measures that have been put in place to ensure that the judiciary is able to operate with

independence from other branches of government. Specifically, the State party should seek to ensure, through constitutional or similar means that:

- The judiciary shall be independent of the executive and the legislature, and that no power shall be exercised as to interfere with the judicial process.
- In the decision-making process, judges are able to act without any restriction, improper influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason, and are able to exercise unfettered freedom to decide cases impartially, in accordance with their conscience and the application of the law to the facts as they find them.
- A person exercising executive or legislative power shall not exercise, or attempt to exercise, any form of pressure on a judge or judges, whether overt or covert.
- Legislative or executive powers that may affect judges in their office, their remuneration, conditions of service or their resources, shall not be used with the object or consequence of threatening or bringing pressure upon a particular judge or judges.
- With the exception of decisions on amnesty, pardon or similar exercise of powers, the executive shall refrain from any act or omission that preempts the judicial resolution of a dispute or frustrates the proper execution of a court decision.
- A judge or a court shall not be required to render an advisory opinion to the executive or the legislature except under an express constitutional or statutory provision permitting that course.
- Allegations of misconduct against a judge shall not be discussed in the legislature except on a substantive motion for the removal or censure of a judge of which prior notice has been given.
- While exercising functions as a judge, the judge should not be involved in executive or legislative activities at the same time.
- No offer of post-judicial employment is made to a judge by the executive authorities while he or she is still functioning in a judicial capacity.

Evaluative framework: Protection against interference by the executive and the legislature

Does the constitution expressly guarantee the independence of the judiciary?
Does the constitution guarantee non-interference with the judicial process in any manner, direct or indirect, by the executive or the legislature or any member thereof?

Has the executive, by any act or omission, pre-empted the judicial resolution of a dispute or frustrated the execution of a court decision?
Does the legislature have the authority to enact legislation to invalidate the final judgment or decision of a court? Under what circumstances? Has this ever occurred?
Has the government ever required a judge to render an advisory opinion to the executive or the legislature? If so, under what legal authority?
While serving as a judge, has any judge been involved in executive or legislative activity?

B. Minimizing opportunities for corruption

92. This section describes measures that the judiciary is competent to initiate in order to minimize both the opportunity and the inclination of members of the judiciary and court personnel to resort to corruption. Their implementation may require the support of the executive and legislative branches of government.

Integrity of court personnel[62]

93. Court personnel are the initial contact point and the providers of information to those who seek to invoke the jurisdiction of the court, whether they are litigants, witnesses or lawyers. This initial contact leads court users to form their impressions of the

[62] For general principles of conduct for court personnel, developed by the Judiciary Integrity Group, please refer to: www.judicialintegritygroup.org/resources/documents/principles_court_personnel_en.pdf.

judicial system and shapes the confidence they place in the courts. Court personnel are also responsible for the administrative and technical non-judicial tasks that contribute to the outcome of a judicial proceeding. Among other tasks, they manage court facilities, assist with case management, protect evidence, facilitate the appearance of parties and witnesses, and perform a variety of other functions that help avoid postponements and contribute to a professional and timely adjudication process. They help judges with legal research, and ensure that decisions are properly announced and published, and maintain case files.[63] They have the potential to undermine the integrity of the judicial process, through neglect of duty, abuse of power or corruption. Therefore, non-judicial court personnel, who constitute the bulk of the judiciary staff, are crucial to any measures that aim at strengthening the integrity and capacity of the judicial system.

94. There are different approaches adopted in designing selection and appointment procedures of court personnel. A common feature in the majority of good models is that they aim to make the procedures transparent and the appointments merit-based, consistent with the requirements article 7(1) of the Convention against Corruption in relation to the public service. To do this, court personnel positions at all levels should be publicly advertised to attract the best applicants, and the final selection should be based on the educational and vocational qualifications of the applicants rather than on nepotism or other inappropriate personal or political considerations.

95. Professional training courses for court personnel constitute an essential element in the realization, and the perception among court users, of judicial integrity.[64] Firstly, effective training can improve trust in the judicial system through improved customer service and transparency. Secondly, training is essential for procedural efficiency and court management. Without well-trained court personnel, judges spend an unnecessary amount of time on administrative tasks, thereby slowing the judicial process. Thirdly, training programmes can help reduce incidences of unethical and unprofessional conduct. Fourthly, by increasing professionalism and creating competencies in a variety of areas, the court's capacity and flexibility is enhanced.

96. As with judges, the salaries of court personnel must be commensurate with their responsibilities. Adequate compensation for their work can assist in reducing incentives for corruption, as recognized in article 7(1)*(c)* of the Convention. Although low salaries are not the only cause of corruption, court personnel are likely to be less prone to serious dishonourable acts such as bribery and embezzlement when they receive sufficient compensation, and do not have to rely on illicit sources of income. Similarly, providing benefits, such as health and life insurance and/or a retirement plan, allows court personnel to focus on their work rather than having to worry about how to provide for their families.

97. Even in systems where corruption is relatively low adequate compensation helps to raise employee morale and overall job satisfaction which, in turn, leads to a more productive workplace and a willingness on the part of court personnel to work proactively towards maintaining high standards of conduct. Appropriate training and increased professionalism should result in salary adjustments and other incentives. As will be seen in the following sections, putting place effective systems of case management and monitoring are also essential tools in reducing the potential for corruption amongst court staff.

[63] See *Resource Guide*, pp. 21-37.

[64] See article 7(1)*(d)* of the Convention.

98. Ethical standards for court personnel are as important as ethical standards for judges. Establishing ethical standards for court personnel is a relatively new, but growing, trend in judiciaries across the world and is consistent with article 8 of the Convention. The Principles of Conduct for Judicial Personnel that were adopted by the Judicial Integrity Group in 2005 prescribes detailed standards of conduct with respect to fidelity to duty, confidentiality, conflicts of interest and performance of duties.[65] The adoption of a code of conduct should be followed by its dissemination among, or at least its availability to, court users. Training court personnel in the code of conduct is an essential method of informing them of their ethical obligations. Another step should be the establishment of an appropriate mechanism to provide advisory services to court personnel on potential or actual ethical issues.

Evaluative framework: Integrity of court personnel

How is the appointment, supervision and disciplinary control of court personnel conducted?
Are positions of court personnel advertised publicly?
What recruitment and appointment procedures are in place to ensure that the process is transparent and objective?
What criteria are applied in determining which candidate should be appointed?

[65] Report of the Fourth Meeting of the Judicial Integrity Group (Vienna, 2005) at www.unodc.org, or www.judicialintegritygroup.org

Is there a policy against nepotism in making such appointments?
Is there a policy of equal opportunity/non-discrimination?
Do court personnel reflect the diversity of the general population?
Are bilingual or multilingual personnel who speak ethnic minority languages recruited?
What initial training do court personnel receive? Is the training provided in conformity with the specific functions of the position? How is such training provided?
Is ongoing training available for court personnel in other relevant areas (e.g. skills, policy, professionalism, changes in the law and procedure)? Does such training include ethics?

Is the number of judicial personnel sufficient to meet the mandate of the judiciary?
Are the salaries of court personnel reasonable when compared to the local cost and standards of living?
What is the retention rate of court personnel?
Are there opportunities for professional improvement and advancement of court personnel?
Does a code of ethics or principles of conduct apply to court personnel? If so, is such code or principles available to the general public?
What measures or mechanisms are in place to provide ethics advice to court personnel or review allegations of misconduct?

Court administration

99. The principal responsibility for court administration should vest in the judiciary or in a body subject to its direction and control. This includes the appointment, supervision and disciplinary control of court personnel. However, the introduction into court systems, in recent decades, of a variety of management principles and practices oriented toward achieving increased productivity, improved case processing and reduced costs, has highlighted the need for a more professional approach to court administration. The skills and abilities that are now required, including familiarity with technological developments, do not fit the traditional job description of judges. Consequently, in many jurisdictions, a court administrator now has authority over all non-judicial court management and administrative functions. These include long-range administrative planning, finance, budget, procurement, human resources, facilities management, court security, and employee discipline, in addition to judicial support functions. The judge is thereby liberated from having to invest considerable time and energy in non-judicial functions for which he or she may not have been trained, and is able to focus more effectively on the judicial function. However, since the overall functioning of a court depends on the interplay between the judge and the administrative staff, there should be a shared responsibility between the head of the court and the court administrator for the overall management of the court.

100. The court may also be supported by an inspectorate or similar body. An inspectorate is usually a body created by statute to inspect and report to the head of the judiciary on the system that supports the carrying on of the business of the courts and the services provided for those courts.

Evaluative framework: Court administration

Is the principal responsibility for court administration vested in the judiciary or in a body subject to its direction and control?
Are non-judicial duties performed by a registrar or court administrator? What duties are included?
Is the judiciary supported by an inspectorate or similar body? If so, what are its functions?

Assignment of cases

101. The assignment of cases among the judges of a court is a potential source of corruption in the judicial system. For example, the practice of "judge shopping" in which the process of the assignment of cases is manipulated is a common feature in some jurisdictions. Governments have been known to have influenced the appointment of judges to hear politically sensitive cases. The principle that the assignment of cases is a judicial function is clear and long established.[66] However, it is certainly the case that the assignment of cases could be manipulated even when that task is performed by a judge.

102. Court systems vary in the procedures they utilize to assign cases to judges. In some countries, the head of the court is responsible for determining the distribution of cases. In others, case assignment is a function managed by court administrators rather than judges. A third option is the random assignment of cases, either manually or automated. Finally, case assignment may be based on informal criteria, such as long established court practices, or more formal rules and laws governing the court. Whichever method is chosen, the procedure to assign cases to judges should be strictly related to key values such as independence and impartiality, transparency, efficiency, flexibility, equal distribution of the caseload, and quality in judicial decision-making.

103. The use of a model based on judicial specialization may promote efficiency, but may also result in an unbalanced caseload among judges. A random case assignment procedure may serve transparency and avoid the risk of "judge shopping", but may discourage specialization and reduce efficiency. Therefore, the tensions among these values should be balanced in the context of the specific features of each judicial system.

104. Whichever model is adopted, the assignment of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Nor should it be within the absolute discretion of a judicial officer. The division of work among the judges of a court, including the distribution of cases, should ordinarily be performed under a predetermined, transparent arrangement provided by law or agreed by all the judges of the relevant court. Such arrangements may be changed in clearly defined circumstances such as the need to have regard to a judge's special knowledge or experience. The allocation of cases may, by way of example, be made by a system of alphabetical or chronological order or other random selection process.

105. States should seek to ensure that a case cannot be withdrawn from a judge without valid reasons, such as serious illness or conflict of interest. Permissible reasons for withdrawal and the procedures for such withdrawal should be provided for by law or rules of court.[67]

[66] See *The Queen v. Liyanage* (1962) 64 *New Law Reports* 313.

[67] See also the above section on Transfer of judges.

Evaluative framework: Assignment of cases

How is the division of work among the judges of a court determined, including the distribution of cases and applicable plan or protocol?
Has such plan or protocol been agreed to by all the judges of that court?
Has such plan or protocol been made known to lawyers and other court users?
May a judge request a specific case, and if so, how and to whom is that addressed?
Are cases of a certain level of complexity individually assigned?
Is there a rule or procedure that allows for expedited trials?

Are any measures in place to prevent the manipulation of case assignment for corrupt or other improper purposes?
Have there been allegations of improper assignment of cases in the judicial system? If so, how have these been addressed?
In what circumstances, or for what reasons, could a case be reassigned to another judge without the consent of the judge originally assigned? Are such reasons made known to the parties involved, court users and interested members of the public?

Maintenance of case records

106. In many court offices, information relating to cases has traditionally been maintained in two forms: paper dockets and case folders. The former are books containing the basic information of all the cases handled by the court. The latter are usually paper folders containing all the documents related to a specific case, including records of hearings, transcripts and exhibits. This is key information for both judicial and managerial decision-making. In recent years, information surfacing from many jurisdictions indicates that it is not uncommon for documents to disappear from case folders, or for the case folder to disappear altogether, whether due to corruption or error.

107. There appears to be no uniform method of recording proceedings in court. In some jurisdictions, this task is still performed by the judge, usually in summarized handwritten form, with no opportunity for the parties to a case to correct the record. In others, court stenographers perform the task of recording proceedings verbatim, enabling copies to be made available, usually on payment, to the parties. In the more developed countries, audio and video recording facilities are now being installed.

108. The State should, therefore, assist the judiciary to complement (or replace, where resources permit) the paper-based court record systems with electronic information and communication technologies (ICT). ICT will enable case records to be kept up to date, accurately, promptly and in an easily accessible form, and will contribute to strengthening the transparency, integrity and efficiency of justice. The computerization of case records will also avoid the reality or appearance, common in some jurisdictions, of court files

being "lost", and "fees" being required for their retrieval or substitution.[68] As an example, in the United States, the Case Management/Electronic Case Files system allows courts to accept filings and provide access to filed documents over the Internet while also giving concurrent access to case files by multiple parties, and offering expanded search and reporting capabilities. The system also enables pleadings to be filed electronically with the court and documents to be downloaded and printed directly from the court system.[69]

Evaluative framework: Maintenance of case records

What documentation or materials are generated when a case or appeal is filed? Is that paper-based, electronic or both?
How is each case/appeal categorized or numbered at the time of filing?
How are documents related to the case recorded and stored within the case file?
Are any of these functions automated? Is electronic filing permissible?

[68] For advice on formulating an ICT development strategy, see *Resource Guide*, pp.51-58.
[69] www.uscourts.gov.

How are case files tracked as they move through the judicial process?
What mechanism is in place to track and identify when a particular time period is reached, such as a time for an opposing party to respond to a motion filed or other relevant deadlines?
Are lawyers allowed direct access to the court files or records? Under what circumstances? Is there supervision by court staff?
What is the procedure for locating files that have been misplaced or misfiled?
To what extent are there procedures for constructing a new court file when a file is missing or lost?
Does the law provide for the recording of court proceedings? To what extent? By what means?

Where there is no verbatim recording, do court personnel or the judge summarize the proceedings in writing? Are parties allowed to challenge or submit corrections to these summaries?
Are notes taken by the judge during proceedings included in the case file? Who has access to these?
How easily can a court user obtain a copy of the proceedings, including the judgment? How much does it cost? Is the cost waived for indigent parties?
Has the paper-based court record systems been complemented or replaced with electronic information and communication technologies (ICT)? Have electronic systems been introduced for case records?

Case management

109. Case management has been defined as "the entire set of actions that a court takes to monitor and control the progress of cases, from initiation through trial or other initial disposition to the completion of all post-disposition court work, to make sure that justice is done promptly".[70] Both judicial and administrative corruption in courts may be facilitated by poor case management. Assignment of a case to a "benevolent" judge makes judicial corruption possible and may compromise the integrity of the process; lack of organization in file-keeping, archives, management of documents makes administrative corruption more likely. Different approaches to case management exist, depending on the specific problem they try to address.[71]

[70] For a discussion of this subject and practical examples, see *Resource Guide*, pp.40-43.

[71] For more details see *Resource Guide*, pp 40-43

110. The introduction of virtually any effective system of case management may assist in reducing petty corruption in the justice system, particularly amongst court personnel. In order to prevent judicial corruption, efforts generally focus on ensuring that none of the parties could affect the selection of the judge who will hear their case. One effective means of doing this is the introduction of systems of random distribution of the cases, including through information technology. The extensive use of computerized case management systems may also have a beneficial effect on the efficiency and monitoring of judicial proceedings. As already noted, the introduction of case management systems may improve the transparency and accountability of courts, opening them to public scrutiny and creating incentives for reform. Eventually, this may also lead to more public trust in the judiciary and to reduced corruption.

111. Judges, particularly in common law systems, traditionally did not play an active role in supervising the movement of a case which was left under the control of the parties. This has now changed and the image of a judge today includes a much more robust role in active case management than in the past.

112. In many jurisdictions, judges have begun to play a more active role in case management by monitoring and controlling the progress of a case from institution to judgment, including the completion of all the post-judgment steps. The objectives of active case management are threefold: to make more efficient use of the scarce commodity of court time, to reduce litigation costs, and to ensure fairness. The tools which judges use to manage cases will vary according to a number of factors: the nature of the case, the availability of the tools provided in the jurisdiction concerned and the willingness of individual judges to exercise case management powers, but may include managing evidence and submissions, preparatory hearings, timetables, narrowing of issues of contention, and managing mega-litigation.[72]

113. Justice Bell cautioned that judges should also understand the risks associated with exercising these powers which may, inter alia, give rise to risks regarding impartiality, procedural safeguards, and that case management responsibilities may influence judges to value their statistics more than the quality of their decisions. All things considered, however, active case management has now become the prevailing theory with respect to the proper performance of the judicial function in modern society.

Evaluative framework: Case management

To what extent does the judge monitor and control the progress of a case from its initiation to the judgment? To what extent does the judge also engage in additional steps post-judgment, such as enforcement of orders or the appeal?

[72] Evan Bell, "Judicial Case Management", [2009-2] *Judicial Studies Institute Journal,* 76-121.

Are trained staff available to assist the judge in the case management and monitoring processes?
Have any new measures been introduced in the last five years to improve case-flow management? What has been the impact of those measures?

Access to the justice system

114. Access to the justice system is often beyond the reach of many because of cost, distance, language and lack of awareness of judicial processes. These impediments are compounded by the experience of cumbersome procedures, multiple court appearances, and the perception that courts are biased or corrupt. Consequently, in many countries, especially in rural areas, people resort to traditional and community-based dispute resolution mechanisms.[73] Indeed, such mechanisms are widely used throughout much of the developing world. Geographically, such traditional systems appear to be concentrated primarily in Africa, the Middle East, East and South Asia, the Pacific and South America. This Guide, however, does not seek to address the challenges of traditional mechanisms, but those of the formal systems of justice. In this instance, it seeks to examine how access to the formal justice system could be facilitated.

115. States that engage in the construction of new courthouses, for example, should consider locating them near public transportation hubs, to ease the burden of travelling to and from court. Some courts have taken the accessibility principle to the next level by implementing such innovations as mobile courts or night court programmes, telephone or videoconferencing,[74] or conducting pretrial hearings in online chat rooms.

116. Court facilities should be designed and operated from the customers' perspective. For example, upon entering a courthouse, a court user should immediately come across assistance in finding his or her way around the building. This can be achieved by centralized and easily readable signs, publicly displayed courthouse orientation guides, court schedules, room assignments, and availability of court personnel to answer questions from court users, provide guidance to litigants, and serve as the official interface with the media. Courts should also endeavour to set up public relations desks in close proximity to the entrances, and to establish formal customer service and resource centres providing single-window service delivery. Furthermore, court buildings ought to be safe,

[73] For further information, see UNODC, *Handbook on Restorative Justice Programmes*.

[74] For example, video conferencing used in Singapore's Subordinate Courts allows domestic violence victims who seek counselling at participating community family service centres to apply for protective orders without having to go to court. Video conferencing is also used to improve the efficiency of criminal and juvenile justice divisions, through video bail processing, pretrial conferences and conferences with probation officers.

clean and convenient to use by offering comfortable waiting areas, adequate public space to complete forms and conduct negotiations, and amenities for special-needs users, such as children, witnesses, victims and the disabled. Court users are also entitled not only to timely and efficient services, but also to the highest standards of ethical conduct, professionalism and accountability from court personnel.

117. The "multi-door courthouse" concept recognizes that there are several different doors to justice, of which litigation is only one door.[75] The multi-door courthouse acts as an information centre, responsible for informing potential court users of the services provided by the courts, including information about alternative dispute resolution;[76] a desk providing additional information in the form of pamphlets, brochures and forms; explaining court procedures and costs associated with different forms of dispute resolution; and helping with legal aid applications.

118. Access to the justice system is effectively denied if potential litigants do not know how to use the system. Accordingly, it is critical for courts to provide their clients with standard, user-friendly forms and instructions, and furnish clear and accurate information on matters such as filing fees, court procedures and hearing schedules. Since access commences before the potential litigant arrives in court, this information could also be disseminated via the Internet or automated telephone systems, if resources permit.

119. The inability of a litigant to understand the language used in court can create significant barriers to justice. International human rights law recognizes the right of individuals to be informed of charges against them in a language they understand, and the right to an interpreter if they cannot understand the language used in court.[77] However, interpretation is necessary not only to ensure that defendants are able to understand a trial or hearing, but also to allow witnesses to testify or for documents to be introduced as evidence. Therefore, interpretation and translation of court documents are essential to ensuring equal protection of the law to linguistic minorities. In order to address this problem, judges first need to be aware of the needs of the community that they are serving. In regions where a significant proportion of the population speaks a minority language, it may be necessary to hold court proceedings in the minority language, where legally permissible.[78]

120. The right to legal representation, especially for defendants in criminal proceedings, is a fundamental component of the right to a fair trial.79 However, in practice, the systems of criminal legal aid delivery that exist in many countries face numerous systemic

[75] The multi-door courthouse is a court-annexed programme that has been successfully implemented in Nigeria. It offers a variety of alternative dispute resolution processes. The multi-door concept refers to various options that are available. These include case evaluation, mediation, arbitration, conciliation, and complex case management. These services are usually provided by skilled and experienced mediators, case evaluators and arbitrators, and are available before the filing of a lawsuit or at any stage of litigation. The multi-door courthouse provides potential litigants with effective alternatives for resolving disputes or grievances, whether it is family or business, and whether it relates to commercial, employment, banking, maritime, or energy issues.

[76] The use of alternative dispute resolution (ADR) mechanisms, whether traditional or otherwise, may significantly reduce the workload of regular courts while providing a simpler, inexpensive, expeditious and informal forum for the settlement of disputes relating to the family, home, employment and, indeed, even in respect of the review of certain administrative decisions. ADR therefore can be an effective complement, but not a substitute, to formal court procedures. However, formal ADR mechanisms suffer from problems such as unpredictability, lack of impartiality, lack of clear procedural guidelines and standards of conduct for mediators, and difficulties with enforcement. Nevertheless, these mechanisms are time and cost efficient and could be used as an effective backlog reduction strategy. They are less intimidating to the public, and offer disadvantaged groups greater access to justice, especially where the formal system is inefficient and discredited.

[77] See ICCPR, article 14(3)*(a)* and *(f)*.

[78] For a fuller discussion of this subject, see *Resource Guide*, pp.63-67.

[79] See ICCPR, article 14(3)*(d)* and the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, adopted by General Assembly resolution 67/187.

problems, often resulting in poor quality assistance received by indigent defendants. These problems include lack of adequate government funding, lack of qualified lawyers, and inadequate facilities, especially in rural areas. The scope of assistance is also limited, as advice and representation are typically available only during in-court proceedings, but are rarely offered during pretrial phases. The brunt of these shortcomings is disproportionately borne by the economically or otherwise disadvantaged groups. In this regard, a good practice emerging in several countries is the institution of "public defender", who provides a service as part of a larger public defender office staffed with a team of salaried criminal defence lawyers. Public defenders are generally better prepared during trials, and are more likely to appear at all required stages of the proceedings, which contributes to increased overall efficiency of the criminal justice system.

121. Unlike in criminal cases, international human rights law imposes, at best, a limited duty on governments to provide legal assistance to indigent civil litigants. Consequently, significant numbers of disadvantaged individuals do not receive legal advice and representation on issues of vital importance to them, such as housing and property disputes, child support, employment issues, consumer rights, and asylum and refugee status. A few countries have attempted a comprehensive approach to civil legal aid by providing a "one-stop shop" legal aid centre to offer a range of services to the poor and socially marginalized, and these have proved to be a cost-effective means of delivering legal services. It is, therefore, for the judiciary, where there is no sufficient legal aid publicly available, to consider initiatives such as the encouragement of pro bono representation of selected litigants by the legal profession, the appointment of a "friend of the court" (*amici curiae*), suggesting alternative dispute resolution, or reference to university legal clinics and community justice procedures, to protect interests that would otherwise be unrepresented in court proceedings. Granting permission to appropriate non-qualified persons (including paralegals) to represent parties before a court may also be considered in appropriate cases.[80]

Evaluative framework: Access to the justice system

What factors are taken into account in determining where to locate a courthouse?
What options, if any, are available to persons who are physically unable to travel to court?

[80] For a fuller discussion of this subject, see *Resource Guide*, pp.70-83.

Are offices within a courthouse identifiable by clearly readable signs?
Is there an information counter or help desk in the courthouse?
Are schedules of hearings and proceedings and courtrooms posted in the courthouse in clearly visible areas?
Do court personnel speak the language of court users or have the ability to obtain the assistance of interpreters?
Are there comfortable waiting areas for court users, including witnesses? Are they sufficient to meet daily needs?
How are the special needs of particular categories of court users (e.g. children, victims of sexual violence or domestic violence, special-needs users) addressed?

Do court users have access to safe, clean, convenient and user-friendly court premises?
What measures are in place to ensure that court users of differing social, ethnic, religious, gender and cultural backgrounds are afforded professionalism, courtesy and dignity?
What steps are taken to ensure that court users are provided with timely and efficient services and the highest standards of ethical conduct, professionalism and accountability by court personnel?
What forms of alternative dispute resolution are available?
Is the use of alternative dispute resolution (ADR) mechanisms, whether traditional or otherwise, actively encouraged?
Are standard, user-friendly forms and instructions, and clear and accurate information on matters such as filing fees, court procedures and hearing schedules, freely available in the court premises for the benefit of court users?

Is the information referred to above available in multiple languages?
How is the information referred to above also available or disseminated to the general public (such as via the internet or automated telephone systems)?
What assistance is provided to court users who cannot read or write in their own language?
How do judges ensure that the parties before the court understand the language in which the proceedings are being conducted?
What legal or procedural measures permit appropriate non-qualified persons (including paralegals) to represent parties before a court or other proceeding?

Transparency of the judicial process

122. The principle of transparency requires the judiciary to demystify the judicial process. Integrating justice into society requires an open, well known and well understood judicial system. Publicizing information about court operations and judicial efforts to increase the quality and efficiency of justice also has beneficial effects on public trust

in the judiciary. For the purposes of article 11 of the Convention, increased transparency also means that opportunities for corruption are reduced and that, where such acts do occur, they are more easily identifiable and their perpetrators apprehended. Increasing transparency in public administration, and particularly amongst the work of the judiciary, has been a significant area of reform for States parties to the Convention in recent years.

123. The public nature of court hearings is one of the fundamental procedural guarantees in a democratic society. The principle of public proceedings implies that citizens and media professionals should be allowed access to the courtrooms in which judicial proceedings take place. The court should, therefore, ensure that the public and the media can attend court proceedings. For this purpose, information regarding the time and venue of hearings should be made available to the public. Adequate facilities in terms of space, seating, facilities for persons with disabilities, etc., should also be provided for the attendance of the public, within reasonable limits, taking into account the potential interest in the case and the duration of the hearing. Where legitimate grounds exist to exclude the public or the media from a particular judicial proceeding,[81] the judge should issue and display a written order explaining the reason for doing so.

124. States parties should seek to ensure that, subject to judicial supervision, the public, the media and court users should have reliable access to information pertaining to judicial proceedings, both pending and concluded (except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children). Such access could be provided on a court website or through appropriate and accessible records. Such information should include reasoned judgments, pleadings, motions and evidence. Affidavits or similar evidentiary documents that have not yet been accepted by the court as evidence may be excluded. Access to court documents should not be limited to case-related material, but should also include court-related administrative information such as statistics on the caseload and case clearance rates, as well as budget-related data, e.g. collection of court fees and the use of budgetary allocations.

125. The right to a public trial and to the public pronouncement of the judgment[82] underscores the importance of transparency in the delivery of justice. Unfortunately, in some countries, judgments are released only to the parties to a case and their lawyers. In others, expansive privacy laws, which stem from a traditional reluctance to provide open access to court information, limit access. Potentially worse, some countries have no policy at all on the publication of judgments or the dissemination of court information. For practical reasons, access to information is often limited by inadequate resources for copies or publication, lack of indexing of cases, long delays between the delivery of a judgment and its publication, and the failure of superior courts to distribute their decisions to lower courts. In fact, the framework within which many judiciaries still operate means that any suggestion that the bar, the media and the public be provided with access to court judgments is rebuffed in the interests of preserving privacy and confidentiality, with some expectation that if they were made generally accessible, public confidence in the judiciary would diminish. This, of course, is a contributory reason for the prevalence of corruption in the judicial system.

[81] The requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations, or to pretrial decisions. Article 14(1) of the ICCPR acknowledges that a court has the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning of the court must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.

[82] ICCPR, article 14(1).

126. Enabling access to information is associated with numerous benefits that contribute to the integrity and efficiency of the justice system. Without reliable access to laws, jurisprudence and other primary legal sources, judges, lawyers, individuals and businesses are left without clear guidance on how the law should operate in any particular case or situation. The publication of judgments allows the public, the press, civil society organizations, lawyers, judges and legal scholars to scrutinize the actions of judges. Submitting judgments to public scrutiny through publication also regularizes the application of the law, and makes judicial decisions more predictable and consistent, thus improving the quality of justice. In judicial systems where higher court decisions are binding precedents, the publication and distribution of appellate court decisions is crucial in ensuring that lower court judges are following the law. Even in countries where higher court decisions are merely persuasive, it is still important to ensure that judges are interpreting the applicable statutes in a consistent manner. Many developed countries have now created databases that store the texts of court decisions and statutes, as well as scholarly articles from law reviews and legal journals. Increasingly, courts are also making judgments available on public websites.

127. Transparency involves more than simply providing access to court proceedings and information. To achieve transparency, information should also be disseminated in a format that is easily accessible for the intended audience—especially for journalists and court users who do not have a legal background and may often have limited literacy. In a departure from the traditional belief that judges should remain isolated from the community to ensure their independence and impartiality, judicial outreach now involves proactive measures by judges and direct interaction with the communities they serve.

128. Recent outreach approaches have included town hall meetings, the production of radio and television programmes, and the dissemination of awareness-raising materials such as court user guides. These guides, in the form of short pamphlets, provide basic information on arrest, detention and bail, criminal and civil procedures, and useful contacts for crime victims, witnesses and other users. In fact, programmes of judicial outreach and education concerning court services and procedures are useful from the perspective of both the judiciary and the court users. They help to actively engage a court in a relationship with the community, and to demystify many of the complexities surrounding the operation of a legal system and the conduct of court proceedings. Thus, by educating and involving the public in the court's work through proactive judicial outreach and communication strategies, courts can increase public confidence and strengthen respect for the rule of law in their communities.

129. By way of example, in Chile, a Commission for Transparency in the Judiciary was established in 2008 with the aim of responding to requests for information to judicial authorities, facilitating the active publication of information for court users and more broadly promoting transparency in judicial work. A dedicated e-mail address had been established for the receipt of requests for information from the public.[83] In the Bolivarian Republic of Venezuela, a wide range of technological tools have been introduced in an attempt to enhance participation in, and understanding of, the criminal justice process. The "Portal Vitrina" was introduced to increase the budget transparency of the Supreme Court. Under that system, members of the public can access information regarding individual procurement procedures by the court.

[83] See CAC/COSP/WG.4/2013/2, Integrity in the judiciary, judicial administration and prosecution services (article 11 of the United Nations Convention against Corruption), page 13.

Evaluative framework: Transparency of the judicial process

Are court proceedings, by law, open to the public and the media? What exceptions are permitted?
Are judgments issued in writing, or are they only delivered orally?
Are judgments delivered in public?
What measures are taken to ensure that there is sufficient seating space for the public inside the courtroom?
Is information regarding the time and venue of hearings made available to the public in advance? How is the information disseminated?
Are adequate facilities provided for the attendance of members of media? Do they attend? Do they report on judicial proceedings? In general, how accurate is their reporting?

What information is available to the general public, such as reasoned judgments, pleadings, motions and evidence? How is that information made available?
Is information publicly available regarding caseload statistics and case clearance rates?
Is information publicly available on budget-related data, such as collection of court fees and the use of budgetary allocations?
What procedures are in place for the publication of appellate court decisions, and in what format?
What measures are taken to educate the public about the functions the judiciary performs, including outreach programmes, media platforms, and/or awareness-raising materials such as court user guides, information sheets describing the steps of the criminal justice process, etc.?

Measuring public confidence in the delivery of justice

130. Continuing public confidence in the quality of justice is a critical feature of a judicial system. The judiciary, therefore, has the responsibility to promote the quality of justice. This requires not only the performance of judicial work professionally and diligently, but also that judgments of courts reflect a breadth and depth of knowledge that

extends beyond the purely technical field of domestic law into areas of social concern. Equally important is that judgments demonstrate an awareness of the growing internationalization of societies and the increasing relevance of comparative and international law in relations between individuals, and between individuals and the State.

131. For courts to be effective in delivering justice, the public must have confidence in their ability to do so. Efforts to promote public trust and confidence in the judiciary should, therefore, form a part of a comprehensive, system-wide strategy aimed at correcting negative public perceptions and eliminating inefficiencies that lead to such perceptions. Public perceptions of the judicial system are often predetermined by the personal experiences of court users. Therefore, the better informed the judiciary is about public needs and desires, the more capable it is to respond to them.

132. There are a variety of tools for measuring the level of public satisfaction with the delivery of justice. Apart from being sensitive to contributions from academia, the judiciary should encourage court user feedback. An effective and impartial complaint system, regular case audits, periodic surveys of court users and other stakeholders, and discussions with court user committees, are means of reviewing public satisfaction with the delivery of justice and identifying systemic weaknesses in the judicial process, especially any that may have created "gatekeepers" seeking gratifications.[84] Experience-based corruption surveys that reveal that users of the judicial system experienced bribery are particularly serious. However, these exercises will be meaningless if lessons are not learnt and remedial action not taken. The publication of an annual report of its activities, including any difficulties encountered and measures taken to improve the functioning of the justice system, is one measure to foster public confidence in the judiciary.

Evaluative framework: Measuring public confidence in the delivery of justice

What is the average time required for a judge to issue a written decision on a motion or judgment from the time of submission?
How much reasoning do judgments contain, such as the consideration of the opposing views, reasons why challenged evidence was admitted or excluded, and records of objections so that they are preserved for appeal?

[84] To elicit precise and reliable information from respondents with scientific methods will require specific skills and competencies that courts often do not possess.

Do judges have access to, and are permitted to take into account, opinions or decisions of international tribunals and treaty monitoring bodies (e.g. the Human Rights Committee established under the ICCPR)?
Does the judiciary periodically review public satisfaction with the delivery of justice? Does that involve regular surveys of court users and other stakeholders, or other means of identifying systemic challenges or weaknesses? What challenges have been identified through these means?
Does the judiciary conduct regular case audits?
Has the judiciary formulated a comprehensive, system-wide strategy aimed at correcting negative public perceptions and eliminating inefficiencies or other obstacles that lead to such perceptions?
Does the judiciary publish an annual report of its activities, including any difficulties encountered and measures taken to improve the functioning of the justice system?

Relations with the media

133. It is the function of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence. In fulfilling this role, the media act as a key channel through which the transparency of the justice system and the public understanding of the work and role of the judiciary can be enhanced. As outlined above, this in turn can have a significant impact on reducing the opportunities for corruption in the judiciary. However, it is an unfortunate fact that in some countries, being a journalist is a dangerous occupation, and reporting court proceedings is a hazardous exercise.

134. Media access to judicial proceedings is not a matter of simply opening doors to the courtroom and providing seats to journalists. Courts are not well served by inaccurate and sensationalist coverage of court proceedings. In fact, poor or biased media coverage can undermine public trust in the judiciary and raise concerns with regard to judicial independence, impartiality and integrity. The training of journalists organized by, or in cooperation with, the courts can help reduce ineffective reporting. Such training will provide them with basic knowledge about court procedures and legal issues, and thus contribute to improving journalistic skills and ethics, and building trust between judges and journalists.[85]

135. Engaging the media may also require that courts actively reach out to journalists. A successful approach in many countries has involved establishing press or public affairs offices within each court to facilitate media coverage of judicial proceedings. These offices will liaise with media representatives, respond to and manage requests from journalists, issue press releases and generally provide accurate information about judicial decisions and legal issues. These offices will also provide schedules of upcoming cases, monitor the media for accurate reporting, and design media campaigns that promote public understanding of the judiciary.

136. Legitimate public criticism of judicial performance is a means of ensuring accountability. States should therefore seek to ensure that criminal law and contempt proceedings cannot be used to restrict such criticism of the courts. A better approach is to raise awareness amongst the media of the potential conflict between judicial independence and excessive pressure on judges, to ensure that the media shows restraint in reporting on pending cases where such publication may influence the outcome of the case.

Evaluative framework: Relations with the media

Is there a free and independent media in the country?

[85] See *Resource Guide*, pp.86-88 and UNODC, *Reporting on Corruption: A Resource Tool for Governments and Journalists* (www.unodc.org/documents/corruption/Publications/2014/13-87497_Ebook.pdf).

How permissible is it for the media to report freely on court cases?
Has the public's and legal community's perception of the quality of media reporting of court proceedings been assessed or measured? If so, what were the results?
Do journalists receive training or an orientation on court procedures and legal issues? If so, how is that training delivered and by whom?
How does the court address inquiries from the press?
Have press or public affairs offices been established in the courts? If so, how do they function? What are the core tasks of the office?

3

The prosecution service

Introduction

137. Article 11(2) of the Convention against Corruption provides that in those States parties where the prosecution service does not form part of the judiciary but enjoys independence similar to that of the judicial service, measures to the same effect as those taken with respect to the judiciary may be introduced and applied to the prosecution service. This extends the standards of integrity applicable to members of the judiciary to independent prosecution services as well, in whatever form they may take. Therefore, such measures may be applied, for example, to prosecution services that operate as stand-alone institutions, under the institutional architecture of the Ministry of Justice or as part of the police service, to the extent that such offices perform independent prosecutorial functions. While many of the previous sections of this Guide will be relevant for prosecutors as well as for the judiciary, this section will set forth and discuss integrity and professionalism issues unique to prosecution services.

International standards and structures for prosecution

138. The prosecution plays a critical and central role in any criminal justice system. The prosecution ensures that the public interest is represented in criminal cases, as the prosecutor is responsible for representing not only the interests of the victim, but also those of society at large. The prosecution must uphold the rule of law and ensure that justice is achieved.

139. The *Report of the Special Rapporteur on the independence of judges and lawyers* has underlined that "[p]rosecutors are the essential agents of the administration of justice, and as such should respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system. Prosecutors also play a key role in protecting society from a culture of impunity and function as gatekeepers to the judiciary."[86]

[86] *Report of the Special Rapporteur on the independence of judges and lawyers (2012)*, reported by the United Nations Human Rights Council, A/HRC/20/19, para 93. Special Rapporteurs are independent experts and do not represent the position of the United Nations.

140. The *United Nations Guidelines on the Role of Prosecutors* similarly provides that "[p]rosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights."[87] The importance of the role of prosecutors in the administration of justice and the search for the truth is also highlighted in the *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* that were developed by the International Association of Prosecutors and endorsed by the United Nations Commission on Crime Prevention and Criminal Justice.[88] Both the *United Nations Guidelines* and the *Standards of Professional Responsibility* emphasize that prosecutors must be independent, professional and impartial in the exercise of their functions.[89]

141. The role of the prosecution has also been referred to in several United Nations crime-related treaties, which seek to increase the effectiveness of investigations and prosecutions against crimes such as drug trafficking, organized crime and corruption. Those treaties require States parties to ensure that any discretionary legal powers relating to the prosecution of such offences "are exercised to maximize the effectiveness of law enforcement measures".[90]

142. Under article 11(2) of the Convention against Corruption, which recognizes the crucial role of the prosecution in combating corruption, States parties may take measures to strengthen integrity and to prevent opportunities for corruption, which may include rules of conduct, to the same effect as rules established for the judiciary, to be applied within the prosecution service in those States parties where it does not form part of the judiciary but enjoys similar independence.

143. In most countries, a state entity is vested with the power to prosecute criminal offences. However, the structures, functions and powers of prosecuting entities differ from country to country and are usually rooted in the history and legal culture of each country. In the common law system, the prosecution forms part of the executive branch of government (frequently the Ministry of Justice), while in the civil law system, it may form part of the executive in some countries or part of the judiciary in others, which would carry with it a status of magistrate or judge. Whereas common law countries operate a system of discretionary prosecution, there are some civil law countries that operate a system of mandatory prosecution. In some systems, the prosecutor has the discretion to discontinue a prosecution if there is no public interest in it continuing. In some countries, the prosecutor not only has the discretion whether or not to prosecute, but may also engage in plea bargaining, by agreeing to dismiss or reduce one or more charges in exchange for a guilty plea from the accused and, in some cases, a particular sentence recommendation.[91]

[87] Guideline 12, *Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, United Nations Doc. A/CONF.144/28/Rev.1 at 189 (1990) (hereinafter "*United Nations Guidelines" or "Guidelines"*).

[88] Resolution 17/2, Commission on Crime Prevention and Criminal Justice, *Report on the Seventeenth Session* (30 November 2007 and 14–18 April 2008), E/2008/30 and E/CN.15/2008/22, annex, *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*.

[89] See UNODC-International Association of Prosecutors (IAP), *The Status and Role of Prosecutors: a UNODC-IAP Guide* (2014), www.unodc.org/documents/justice-and-prison-reform/14-07304_ebook.pdf (hereinafter "*UNODC-IAP Guide*").

[90] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, art. 3, para. 6; the United Nations Convention against Transnational Organized Crime, art. 11, para. 2; and the United Nations Convention against Corruption, art. 30, para. 3.

[91] See James Hamilton, Director of Public Prosecutions, Ireland, "The Role of the Public Prosecutor in Upholding the Rule of Law", www.osce.org/odihr/19077?download=true, 2006; Despina Kyprianou, "Comparative Analysis of Prosecution Systems: Origins, Constitutional Position and Organization of Prosecution Services", the Cyprus Attorney General's Office, 2009; United Nations Handbook on "Practical Anti-Corruption Measures for Prosecutors and Investigators", www.unodc.org/documents/afghanistan/Anti-Corruption/Handbook_practical_anti-corruption.pdf, Vienna, 2004.

144. In the civil law system where the prosecution forms part of the judiciary, prosecutors may enjoy individual independence, but may also function as part of the judicial hierarchy with regulated limitations on the exercise of their discretion. In the common law tradition where the prosecution is part of the executive (and may be integrated within the justice department or ministry), it may enjoy a very high degree of independence guided by internal rules and regulations governing the exercise of discretion and other powers.

145. One of the major challenges in establishing an internationally recognized set of rules of practice for prosecutors has been the global diversity of substantive law, evidence and criminal procedures in the context of various legal traditions and legal systems existing worldwide. There are also hybrid legal systems in operation.

146. Despite this global diversity, it has proven possible to identify common standards and general principles applicable to all prosecutors, regardless of role or function, based on emerging international guidelines elaborated on by specialized professional bodies and organizations. The present Guide is written within this context, with a view to framing some basic principles and tenets of the role and integrity of the prosecution service that remain constant, regardless of where in the world and under which legal tradition these roles are performed.

Evaluative framework: international standards and structures for prosecution

Is the prosecution service an independent entity or is it part of the judiciary or executive? How is the prosecution service structured?[92]
If part of the executive, to what extent is the prosecution service independent of other branches of the executive?
If part of the judiciary, to what extent is the prosecution function separated from the judicial function?

[92] For more on prosecutorial independence, see the section on prosecutorial independence below.

How is the prosecution service structured?

Role of prosecutors in criminal proceedings

Criminal investigations

147. Throughout the world, there is a wide spectrum of prosecutorial involvement at the investigative stage, ranging from no involvement at all to being in charge of and taking an active role in criminal investigations. However, there is an increasing tendency for prosecutors to become involved at an earlier stage to provide advice and guidance to law enforcement, particularly in complex cases such as fraud or corruption, even in countries where the prosecutor has no formal role in investigations. Given such circumstances, it is not surprising that, despite the difference in the basic legal principles in criminal proceedings, or relationship between the police and prosecutors, most countries seem to be heading in the same direction, where closer collaboration between the police and prosecutors is emphasized.

148. This collaborative relationship does not, however, obviate the requirement that the prosecutor conducts an independent review of the evidence to determine whether a case warrants formal prosecution. In this context, the development of new forms of cooperation between the police and prosecutors should not be viewed as just an adjustment for the sake of convenience. On the contrary, such developments in many countries are based on thoughtful considerations of the independently entrusted roles of the police and prosecutors in furthering the interests of justice. The relationship between the police and prosecutors inevitably and desirably involves, to some extent, a conflicting element. Accordingly, close collaboration between the police and prosecutors should be developed in recognition of this challenging, though positively stimulating, relationship.[93]

149. The *United Nations Guidelines* state that the prosecutor may play a role "where authorized by law or consistent with local practice, in the investigation of crime [and] supervision over the legality of these investigations".[94] Standard 4.2 of the *Standards of Professional Responsibility* states that prosecutors: *a)* where authorized 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; *b)* when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights; and *c)* when giving advice, they will take care to remain impartial and objective.[95]

150. Regardless of the relationship and the extent of prosecutorial involvement in the investigation of crime, prosecutors "should … ensure that the police or other investigators respect legal precepts and fundamental human rights".[96]

[93] *UNODC-IAP Guide*, p. 56.

[94] *United Nations Guidelines,* Guideline 11.

[95] Rule 4.2(a), (b), (c) of the IAP Standards of Professional Responsibility, adopted 23 April 1999, www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-(1)/English.pdf.aspx.

[96] *UNODC-IAP Guide*, p. 38.

151. In general, public prosecutors should scrutinize the lawfulness of police investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, public prosecutors will also monitor the observance of human rights by the police.

152. The roles that prosecutors perform during the investigative phase of a criminal case may differ depending on the legal tradition of each State. In most civil law and some common law systems, the prosecutor has control over the entirety of the investigation and directs the police on what course of action they should take in their investigation and what charges should be brought against an accused.

153. In other systems, the police investigate crimes and decide whether charges should be referred for prosecution against one or more individuals. The prosecution thereafter decides whether the evidence gathered is sufficient to prove the crime(s) alleged and if so, would present the case before the court for adjudication. The *United Nations Guidelines* require that prosecutors not initiate or continue prosecution, or make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.[97]

154. The relationship between the police and prosecutors is essential to ensuring smooth criminal prosecutions. Within the different categories, a general distinction can be made between a police service that carries out investigations independently of the prosecution service, and a police service that is subordinate to the prosecution service.

155. In countries with an independent police force, prosecutors are not entitled to instruct the police, although the possibility exists whereby prosecutors, after receiving the case file, can request that additional investigatory measures be undertaken. Where the police operate subordinate to the prosecutor, the prosecution service can instruct the police to carry out investigations and assess the legality of investigatory practices. Prosecutors may also have the power to carry out investigations themselves, which requires training in investigatory and forensic skills.

156. In several countries, the growing emphasis on security has led to the allocation of more resources and powers to police services. While the strengthening of the police service should be generally welcomed, there are concerns that in certain cases the police may overpower the prosecution services. In this respect, the Special Rapporteur on the independence of judges and lawyers stressed that, especially where a police service is independent of the prosecution service, effective measures must be taken to guarantee that prosecutors and the police cooperate in an appropriate manner in order to obtain the best and most fair outcome, especially for victims. The Special Rapporteur also highlighted the need for prosecutors to bring impartial and objective judgement to bear on case files prepared by police or investigators.[98]

Dealing with evidence illegally or improperly obtained

157. The prosecutor should examine proposed evidence to ascertain whether it has been lawfully or constitutionally obtained. The *United Nations Guidelines* state: "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

[97] *United Nations Guidelines*, Guideline 14.

[98] See *Report of the Special Rapporteur on the independence of judges and lawyers*, paras. 41-43.

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."[99]

158. The *IAP Standards of Professional Responsibility* similarly state "[P]rosecutors shall… e) 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; [and] g) seek to ensure that appropriate action is taken against those responsible for using such methods."[100]

159. The spectrum of evidence to be excluded on the ground that it was illegally or improperly obtained differs from country to country and is subject to different legal tests for admissibility. In modern criminal law, regardless of legal tradition, evidence acquired by unlawful methods that constitute a grave violation of the suspect's human rights is absolutely excluded, although such exclusions are based on different theories in each legal system.

160. Further, in countries where prosecutors participate in, conduct, direct or supervise investigations, they themselves should not use unlawful or improper methods in obtaining evidence and should give appropriate instructions and advice to police or investigators to do likewise.[101]

Role of prosecutors in relation to defence counsel, the suspect and the accused

161. The prosecutor not only acts on behalf of the community as a whole, but also has duties to particular individuals, including persons suspected of criminal activity. Such rights may be enshrined in a Constitution or other legal framework,[102] and often include such things as a person's rights to remain silent, to limitations on the duration of pretrial detention, to a public trial within a reasonable time, to the presumption of innocence until proven guilty, to have full access to evidence presented against them, to be represented by legal counsel and to have the assistance of an interpreter when necessary. These rights are central to the protection and preservation of human rights for all persons, and the responsibility of the prosecutor includes the safeguarding of those rights.

162. Prosecutors are required to act impartially, objectively and fairly at all times. In conducting prosecutions, they must ensure that justice is done and that the human rights of persons accused of crime are respected. Fundamental principles of the rule of law require that prosecutions be conducted fairly and reasonably, with integrity and care. The decision whether or not to commence a prosecution should not be motivated by improper considerations, but by the interests of justice. Political advantage or disadvantage, or factors such as the gender, colour, race, religion, political opinion, sexual orientation or ethnic origin of the suspected person or the victim, are wholly irrelevant.

163. The right to legal assistance should be available at all stages of the proceedings, including during the pretrial stage. All persons who are arrested, detained or imprisoned should be provided with adequate opportunities, time and facilities to be visited and to communicate and consult with a lawyer, without delay, interception or censorship and

[99] *United Nations Guidelines,* Guideline 16.

[100] Rule 4.3 (e), (f), (g) of the IAP Standards of Professional Responsibility.

[101] See *UNODC-IAP Guide*, p. 57.

[102] These rights are also reflected in international human rights standards in article 14 of International Covenant on Civil and Political Rights.

in full confidentiality.[103] Prosecutors must make every effort to safeguard these rights of the accused in cooperation with the court and other relevant agencies.[104]

164. Prosecutors also have an important role in protecting the rights of suspected or accused persons. Prosecutors should ensure, as far as possible, that the suspected or accused persons are aware of their rights, irrespective of whether they are to the advantage or disadvantage of the suspect or accused.

165. This relationship is especially important in cases where prosecutors assume a more significant role in the investigatory proceedings. Prosecutors who are involved in an investigation from the outset should ensure that the rights of the defence are fully respected. During the investigation, and in particular when gathering evidence, prosecutors should at all times respect the principle of professional privilege. This principle protects the confidentiality of all communication between the lawyer and the client and requires that such communication not be used as evidence, and that all consultations between the suspected or accused and his/her lawyer are held in private.[105]

166. A prosecutor should uphold the right to a fair trial as defined and guaranteed in article 14 of the International Covenant on Civil and Political Rights (ICCPR). This right is guaranteed in similar terms in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights. Accordingly, a prosecutor should, in particular, respect the presumption of innocence and the right against self-incrimination, and safeguard the principle of equality of arms. The principle of equality of arms, as it is described in some jurisdictions, requires a number of procedural steps to be taken for the benefit of an accused person. He or she is entitled to the effective assistance of a lawyer and to "have adequate time and facilities for the preparation of his defence …"[106] According to the Human Rights Committee, "adequate facilities" must include access to documents and other evidence; that access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory.[107] It also includes the right to examine witnesses against the accused and to obtain the attendance and examination of witnesses on their behalf.[108]

167. When instituting criminal proceedings, the prosecutor should proceed only when a case is well-founded, upon evidence reasonably believed to be reliable and admissible, and should not continue with such proceedings in the absence of such evidence. In court, the prosecutor should ensure that the case is firmly but fairly presented, and not beyond what is indicated by the evidence. The prosecutor should disclose to the accused and counsel all exculpatory, prejudicial and beneficial information as soon as reasonably possible.[109] In some jurisdictions, it is mandatory for the prosecutor to do so or risk disciplinary measures and the possible dismissal of the case. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g., mitigating circumstances).[110]

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[103] Paragraph 8, *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 at 118 (hereinafter "*Basic Principles on the Role of Lawyers*").

[104] Rule 4.3 (c) of the IAP Standards of Professional Responsibility.

[105] See *Basic Principles on the Role of Lawyers*, paras 8, 12.

[106] ICCPR art. 14, para 3(b).

[107] Human Rights Committee, General Comment No. 32 (2007) on article 14 on the right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32).

[108] *Ibid.*

[109] Rule 4.3 (d) of the IAP Standards of Professional Responsibility.

[110] Human Rights Committee, General Comment No. 32 (2007) on article 14 on the right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32), para. 33.

168. Owing to diverse rules of evidence and procedure, disclosure obligations take very different forms in each legal system. Prosecutors should ensure that there is fair disclosure of material that may be relevant to the innocence or guilt of the accused, may assist the accused in the timely preparation and presentation of the defence case and may assist the court to focus on the relevant issues in the trial. The disclosure should be presented in a format that enables the accused to fully comprehend the case and the charges filed. Disclosure that does not meet these objectives may prevent a fair trial.

169. Fairness does, however, recognize that there are other interests that may need to be protected, including those of victims and witnesses who would otherwise likely be exposed to harm, and that the public interest in such circumstances would justify keeping certain documents or information confidential.[111]

Role of prosecutors in relation to victims and witnesses

170. The *United Nations Guidelines* require that "In the performance of their duties, prosecutors shall … 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".[112]

171. The *IAP Standards of Professional Responsibility* provide that "[p]rosecutors shall…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".[113]

172. With regard to victims and witnesses, prosecutors shall take their interests into account and take measures, where necessary, to protect their security and privacy.[114] Testifying or providing statements in the criminal process can be an unfamiliar and potentially frightening experience for witnesses who are not properly informed of the criminal justice process and their role in that process. Victims and witnesses should be kept apprised of how cases are progressing from the time of the initial complaint to the completion of the last appeal.

173. Prosecutors should work closely with victim services workers and other support services to ensure that victims and witnesses understand the criminal justice institutions and the roles and functions of its participants. Care should be taken to explain that the prosecutor does not represent the victim in a legal capacity, as well as what can be expected during the trial and at sentencing should there be a conviction. Working with witnesses and victims is a skill requiring tact and understanding and a firm knowledge of the role and responsibilities of the prosecution. Care should be taken to always maintain a professional detachment even in the most emotional case so that the integrity of the system is maintained.

[111] See *UNODC-IAP Guide*, p. 59.

[112] *United Nations Guidelines,* Guideline 13(*d*).

[113] Rule 4.3 (b) of the IAP Standards of Professional Responsibility.

[114] See United Nations Convention against Corruption, article 32.

174. Depending on the jurisdiction, there may also be procedural and evidentiary avenues providing for the protection of vulnerable witnesses, such as testimony given where the accused and witness are screened from one another, allowing for the admissibility of hearsay evidence under limited circumstances (in those jurisdictions where generally hearsay evidence is not admissible), testimony via video link or hearings in closed court.[115]

Evaluative framework: criminal proceedings

Criminal investigations

What is the role of the prosecutor in the criminal justice system? To what extent is the prosecutor involved in the criminal investigation process?
Which institution is primarily responsible for the investigation of crime?
Does the prosecution service supervise or participate in investigations that are conducted by other agencies?
Does the prosecution service directly supervise aspects of the criminal investigation, or is the prosecution service kept informed of progress and offers advice on how to proceed?

[115] See *UNODC-IAP Guide*, p. 70.

Dealing with evidence illegally or improperly obtained

How does the prosecution service ensure that the investigating agency respects legal requirements and fundamental human rights?
If a prosecutor becomes aware that evidence provided by the investigating agency was obtained through illegal means, what is the obligation of the prosecutor in terms of ethics, law and/or policy?
Is it prohibited for the prosecution service to use evidence illegally or improperly obtained in a criminal proceeding?
Does that prohibition, if it exists, also extend to any derivative evidence that was obtained as a result of the improperly obtained evidence?
Are investigators who obtain evidence illegally, following the prosecutor's discovery, subject to criminal and/or disciplinary penalties? If so, explain the consequences for such investigators?

Role of prosecutors in relation to defence counsel, the suspect and the accused

What role and responsibility does the prosecution service have to ensure and protect the rights of the accused at all stages of the proceedings?
What obligation does the prosecutor have with regard to the accused's right to legal assistance?
If the accused is not represented by legal counsel, is it possible for the prosecutor to interview him/her and, if so, under what circumstances?
What is the policy of the prosecution service on the disclosure of evidence to the defence?
Are there laws or procedures mandating the disclosure of exculpatory evidence to the defence?

Role of prosecutors in relation to victims and witnesses

Does the prosecutor have an obligation to consult with and consider the views of victims during the course of the criminal proceedings? If so, at what stage(s) and for what purpose?
What role does the prosecutor have to ensure that victims and witnesses are informed of their rights?
To what extent is the prosecutor responsible for ensuring that the interests of the victim are protected in the criminal justice system?
Does an Office of Victim Services or similar institution exist in the criminal justice system? If so, what role does the prosecution service have in working with that office?

The exercise of prosecutorial discretion

175. The exercise of prosecutorial discretion can play an important role in ensuring the smooth operation of the criminal justice system and respect for the public interest. Prosecutorial discretion is considered an important component of modern criminal justice systems because it allows prosecutors to place emphasis on cases with more impact on the administration of justice. As with all discretionary powers, however, prosecutorial discretion must be exercised carefully, impartially and transparently.

176. The *United Nations Guidelines* provide that "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."[116] The *Standards of*

[116] *United Nations Guidelines,* Guideline 17.

Professional Responsibility highlight that the exercise of prosecutorial discretion is a grave and serious responsibility and one that should be conducted in an objective and impartial manner, as openly as possible and exercised independently.[117]

177. Prosecutors may exercise discretion in determining whether or not to institute criminal proceedings or, when proceedings have been commenced, to decide whether to withdraw specific charges or the entire proceedings. A number of factors can be outlined regarding the exercise of prosecutorial discretion in determining the likelihood of conviction and the decision to file criminal charges, including the following:

- Insufficient evidence
- The evidence was unlawfully obtained
- The investigation has demonstrated that the suspect is not guilty or there is a substantial likelihood that the suspect is not guilty
- Important witnesses for the prosecution are not available or their testimony is not credible
- The act or person may not be punished for reasons of amnesty or immunity

178. There could be additional grounds to justify a decision not to prosecute based on the public interest, even when there is sufficient evidence to do so, such as:

- Minimal punishment would result
- The criminal suspect is not mentally competent or is terminally ill
- The proceedings would damage international relations or national interests
- Substantial delay has diminished the significance of the case
- The offence was minor or a legitimate mistake
- Resolutions outside the formal criminal justice system better provide justice

179. The *United Nations Guidelines* also contain provisions encouraging the use of alternatives to prosecution in the formal justice system, noting that such diversion schemes can serve to alleviate excessive court loads as well as to avoid the stigmatization of criminal proceedings and the possible adverse effects of imprisonment. The *Guidelines* state that 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 suspect(s) and the victim(s)".[118] Diversion is particularly recommended in cases involving juveniles, and the *Guidelines* urge prosecutors to "use their best efforts to take prosecutorial action against juveniles only to the extent strictly necessary."[119] Any such allowance for prosecutors to divert cases from the formal criminal justice system should include clear and transparent guidance and grounds for doing so.

180. International standards recommend that guidelines, either in the law or in published rules or regulations, be adopted in order to enhance fairness and consistency in the exercise of prosecutorial discretion.[120] Public guidelines are also important in ensuring transparency and thus in building confidence of the general public in the decisions made by prosecutors when exercising their discretion.

[117] Preamble and Rule 2.1 of the IAP Standards of Professional Responsibility.
[118] *United Nations Guidelines,* Guideline 18.
[119] Ibid., Guideline 19.
[120] Ibid., Guideline 6.

181. In those civil law countries where the "legality principle" applies, the prosecutor is required to prosecute every case where there is sufficient evidence to sustain a prosecution. It could be that this helps to eliminate potential areas for failure within the justice system by removing discretion. If a suspect is to escape conviction, it must be after the evidence has been heard publicly, in open court. It will not be the result of a decision taken behind closed doors, in a prosecutor's office. In the common law tradition, however, prosecutors are faced daily with decisions as to whether or not to prosecute. In each case, the impact of that decision on the suspect, the victim and the community is such that the exercise of this discretion is, in some instances, an exceedingly difficult one. A misguided decision to prosecute (or not to prosecute) can erode public confidence in the criminal process or inflict undeserved stress on a person wrongfully charged.

182. Prosecutors should be in a position to prosecute public and private officials for offences committed by them; particularly the offences of corruption established within the United Nations Convention against Corruption, abuse of power, grave violations of human rights and other crimes. In some countries, the law permits a non-prosecutorial authority, such as a minister of justice, to give general or specific instructions to prosecutors. Such instructions may include a direction to institute criminal proceedings or to stop legally instituted proceedings. It is essential that, in order to safeguard prosecutorial independence as well as the perception of independence, any such instruction be transparent, consistent with lawful authority, and subject to established guidelines.[121] Any such instruction should become part of the case file so that the other parties may take notice of it and comment thereon.

183. In the exercise of prosecutorial discretion, a prosecutor is uniquely faced with a number of challenges that must be managed in order to maintain objectivity and equality before the law. First, a prosecutor faces pressure to secure a conviction in a criminal case from multiple sources, including the victim, the victim's family, victim advocacy groups, the media, members of the general public, other prosecutor colleagues and supervisors. As one expert has pointed out, this pressure can lead to "conviction psychology," which is the overemphasis on obtaining convictions at the expense of seeking to "do justice."[122] This requires the prosecutor to delicately balance the competing requirements to both serve the ends of justice and, at the same time, be a zealous advocate.

184. A second challenge faced by prosecutors is the duty to reasonably believe that the charges are supported by probable cause and that admissible evidence will be sufficient to support conviction. This obligation may be found in statute or regulation but may also simply manifest itself as a product of the prosecutor's sense of his/her fundamental role to serve the ends of justice. It has been noted that this approach can lead to a certain "tunnel vision" by prosecutors which can compromise their objectivity because prosecutors seeking to do justice must first satisfy themselves of a person's guilt as a precondition to the decision that a criminal conviction is the just result.[123]

185. Thirdly, the prosecutor often receives a one-dimensional view of the case, which could compound and reinforce errors that may have been made during the investigation stage, in cases where the police have narrowed their focus to one particular suspect during the course of the investigation, thereby tending to over-credit evidence in favour of the suspect's guilt and subconsciously discount evidence either mitigating criminal responsibility or – in the worst cases – supporting the criminal responsibility of someone

[121] Rule 2.2 of the IAP Standards of Professional Responsibility.

[122] Bruce A. MacFarlane, *Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System (2008),* p. 52.

[123] Ibid., p. 53.

else.[124] Because of the separation of the police and prosecutor roles in many jurisdictions, as described above, the prosecutor will often only see evidence generated as the result of the police investigation against a particular criminal suspect rather than the full panoply of evidence and potential suspects considered during the course of the investigation. This challenge can be compounded by the complex relationship that develops between police and prosecutors who, on the one hand, work collaboratively together to ensure that persons who commit crime are held legally accountable, and, on the other hand, operate as a check on the other to ensure an objective and fair criminal justice system. This role can cause significant tension, and at times negotiation and compromises can affect how particular cases are handled or treated.

186. In systems where prosecutorial discretion exists, it does not only apply to the charging stage or to decisions whether or not to dismiss a case that has been charged. It also extends to other stages of the criminal proceedings and can involve particular considerations that should be informed by internal guidelines or policies of the prosecutor's office to ensure consistency of approach and application as well as the proper exercise of discretion. Such issues may arise in the following circumstances, among others:

- Charging decisions: In the determination of whether to file criminal charges in a particular case, the prosecutor should be guided by considerations of the reasonable likelihood of conviction based on the evidence and whether formal criminal charges would be in the public interest.
- Recommendations for bail or conditional release: In deciding whether to request continued pretrial detention, bail or conditions upon release (with or without bail), the prosecutor must take several factors into account, including the protection of society, the seriousness of the allegations, the safety of the victim and the likelihood of recidivism or flight by the person charged. In weighing what to request from the judge, the prosecutor must exercise sound discretion in line with these and other considerations.
- Plea agreements: In making a decision whether and to what extent to enter into a plea agreement with a person charged with a criminal offence, where this is permitted, the prosecutor must exercise discretion and sound judgement in balancing various factors, including the public interest, the rights and interests of the victim, the likelihood of restitution, the deterrence of the defendant and other members of broader society, and the interests of justice.
- Working with cooperating offenders: When a prosecutor seeks the cooperation of someone either charged with a criminal offence or suspected of a criminal offence in order to advance the criminal investigations of other suspects,[125] there are several important considerations that a prosecutor needs to address. In addition to the interests of justice and the general public interest, the prosecutor also must consider the interests of the victim as well as the cooperating offender in implicating themselves as they assist in the investigations. Finally, the prosecutor should take special care when working with cooperating offenders who are not represented by legal counsel to ensure they are fully informed of their rights and the consequences if cooperation should end before any agreement is fulfilled.
- Sentencing recommendations: In making a recommendation to the sentencing judge regarding the appropriate sentence following a criminal conviction, the prosecutor must consider the interests of justice, the wishes of the victim, the seriousness of the crime, factors of individual and societal deterrence, the protection of society, the role of the offender and many other factors. The prosecutor

[124] Ibid., p. 53.

[125] See article 37 of the United Nations Convention against Corruption.

should not simply seek the maximum penalty that might be possible under the offence or offences of conviction, but instead balance the interests present – most importantly the interests of justice.

In all of these contexts, as well as others, the exercise of prosecutorial discretion can be guided by ethical and professional obligations, as well as internal policies and guidelines to ensure fairness, consistency and objectivity.

187. In those countries in which citizens have the right to institute private prosecutions for matters perceived to be in the public interest, which often occur in cases of statutory infringements or relatively minor offences, a prosecutor generally should not intervene to abort such criminal proceeding except in the interests of justice where it is manifestly clear that the proceeding is frivolous or vexatious. The reasons for any such intervention should be publicly declared. In some jurisdictions, the prosecutor may exercise discretion to intervene and become a party to a private prosecution, considering such factors as the public interest, the seriousness of the offence, the prospects for a fair trial and to avoid duplicate or parallel proceedings. The exercise of such discretion should be governed by the principles outlined above and be consistent with any internal guidelines or code for prosecutors faced with such matters.[126]

Evaluative framework: prosecutorial discretion

Does the prosecution service have a written policy manual that addresses the exercise of prosecutorial discretion?
Is such policy manual available to the public?
To what extent and in which aspects of the criminal proceeding does the prosecutor have the authority to exercise discretion?

[126] One example of such guidelines for prosecutors considering intervention in a private prosecution can be found in the Prosecution Code for the Department of Justice of the Government of Hong Kong, at www.doj.gov.hk/eng/public/pubsoppapcon.html.

To what extent does such discretion extend to determining the sufficiency of evidence to sustain a conviction?
Does the chief prosecutor delegate discretion to each individual prosecutor? If so, how does he/she guide the exercise of discretion among members of the prosecution service?
What is the prosecution service's policy on instituting prosecutions?
Must a prosecution be instituted whenever an investigation shows that there is prima facie evidence of a crime?[127]
Do guidelines exist for recommendations regarding bail or pretrial conditional release?
Is there a written policy on diversion or deferral of prosecution? To what extent, and under what circumstances, is the prosecutor empowered to determine when diversion or deferral of prosecution is appropriate?

[127] Meaning sufficient evidence "on its face" on the elements of the alleged crime.

Do guidelines exist for prosecutors in relation to cooperating offenders?
Do guidelines exist for prosecutors engaging in plea negotiations or in making plea agreements?
Do guidelines exist for prosecutors in making sentencing recommendations?
If a prosecutor intervenes in a private prosecution (where provision for such exists) and proceeds to abort that prosecution, is the prosecutor required to publicly state the reasons for such intervention?

Role of prosecutors in relation to the media and the public

188. A prosecutor should perform his or her duties without fear, favour or prejudice. In particular, the prosecutor must carry out the functions of his/her office impartially. He or she must remain unaffected by individual or sectional interests and public or media pressures, and have regard only to the public interest. A prosecutor must always speak and act objectively, and have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect. A prosecutor must ensure that all necessary and reasonable inquiries are made and the result disclosed to him or her, whether that points towards the guilt or the innocence of a suspect. A prosecutor's duty is to search for the truth, assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to the law and the dictates of conscience.[128]

[128] See *American Bar Association Criminal Justice Standards for the Prosecution Function*, Fourth Edition, 12 November 2018, www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/

189. The *United Nations Guidelines* state that: "In the performance of their duties, prosecutors shall…keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise".[129] The *IAP Standards of Professional Responsibility* provide that "Prosecutors shall preserve professional confidentiality".[130]

190. The public and the media who inform them have an abiding interest in the administration of justice. As a result, the cases that are dealt with by a prosecution service can sometimes attract media attention. Prosecution services must be able to satisfy the public's right to know about aspects of a criminal proceeding while at the same time not jeopardizing the proceeding itself through the dissemination of information subject to a publication ban or by comments that could be considered inflammatory or damaging to an accused who is under trial, or to the trial process itself. Confidentiality requirements protect not only the internal work of the prosecutor's office, but also the large amount of information to which prosecutors have access, including information pertaining to suspects, victims and witnesses.

191. It is nevertheless a common occurrence that the prosecutor will receive requests from the media – particularly in high-profile cases – for information about the case or the proceedings. In such cases, the prosecutor should certainly facilitate the media's access to information regarding the stage of the proceedings, upcoming public hearings or other judicial activity, while at the same time balancing the need for confidentiality of evidence or other information not clearly in the immediate public interest. In all cases, the prosecutor should avoid rendering a legal or personal opinion on the strength of the evidence or the guilt of the person accused of criminal activity.

192. Publicly criticizing the courts or commenting on ongoing cases being investigated or prosecuted is not appropriate conduct for prosecutors in any public forum, particularly the media. Communication of personal information of suspects, victims and witnesses is improper. Prosecutors should also not display any bias towards specific members of the media.

193. Prosecutors now operate in new types of media environments, including social media, blogs and websites. Prosecutors should be aware of the potential challenges that may arise as a result of the diversity of media platforms. Additionally, prosecutors must be cautious with respect to their own participation in social media in a similar manner to how they conduct themselves in any public setting.

194. While in some jurisdictions access by traditional media is limited, in many jurisdictions media interest in all types of prosecution cases is typical. Prosecution services should have public information policies and guidelines in place to provide guidance to prosecutors in dealing with the media. Specialized training should be made available to prosecutors concerning how to communicate effectively during formal interviews, impromptu interviews outside court and news conferences. Prosecution services should also have guidelines in place on the establishment of spokespersons, media contacts and a communication plan for major cases, particularly those of national interest and where major legal issues are involved.

[129] *United Nations Guidelines,* Guideline 13(c).

[130] Rule 4.3(a) of the IAP Standards of Professional Responsibility.

Evaluative framework: role of prosecutors in relation to the media and the public

Do guidelines or policies exist in the prosecution service regarding the confidentiality of information about criminal proceedings? What is the scope of these guidelines or policies?
Does the prosecution service facilitate or restrict access to public information relating to cases that it is prosecuting? In what ways and under what circumstances?
What guidance, if any, is provided to prosecutors regarding interactions with the media?
Does the prosecution service have an official spokesperson, public information officer or similar capacity? If so, what is the scope of their duties and functions?

Measures to strengthen prosecutorial integrity

195. A prosecutor should not be subject to direction from any external source. In that sense, the qualities required of a prosecutor are no different from those of a judge. The conduct expected is that of a professional, acting in accordance with the law and public interest and the rules and ethics of the profession. The prosecutor must, at all times, exercise the highest standards of integrity and care; act fairly, consistently and expeditiously; be well informed of relevant national and international legal developments; be consistent, independent and impartial; protect an accused person's right to a fair trial; and respect and uphold the universal concepts of human dignity and human rights.[131]

196. As mentioned above, many of the sections in the Judicial Integrity portion of this Guide will be relevant for prosecutors as well as for the judiciary. This section will set forth and discuss the concept of independence in prosecutions and how it interacts with accountability, another pillar of prosecutions, in the context of prosecution services. It

[131] See IAP Standards of Professional Responsibility.

suggests measures that may be taken to strengthen integrity in the prosecution service, at both the individual and institutional levels.

Strengthening institutional integrity: independence and impartiality

a) Prosecutorial independence

197. The *United Nations Guidelines* state that: "States shall ensure that prosecutors are able to perform their functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability."[132] In addition, the *Guidelines* state that: "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."[133]

198. The *IAP Standards of Professional Responsibility* provide that: "The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference", and "If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be: transparent; consistent with lawful authority; subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence." Finally, "Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion."[134]

199. The United Nations Special Rapporteur on the Independence of Judges and Lawyers has underlined that it is essential that prosecutors discharge their duties independently, impartially, objectively and in a transparent manner.[135]

200. The international standards emphasize the importance of having a prosecution service with sufficient independence to be able to perform its duties free from inappropriate outside pressure. A lack of autonomy and functional independence can erode the credibility of the prosecutorial authority and undermine public confidence in the justice system.

201. The term "independence" is sometimes misconstrued to mean absolute autonomy, but that is not necessarily the case. The fair, independent and impartial administration of justice also requires that prosecutors be held to account should they not fulfil their functions in accordance with their professional duties. In this context, the Special Rapporteur emphasized that autonomy should not exist to the detriment of accountability.[136]

202. Independence of prosecutorial decision-making is necessary as prosecutors play an important role and function in relation to the executive and legislative branches. An independent prosecution service helps ensure that the Government and the public administration are held to account for their actions. In order to fulfil this role and ensure the completely free and unfettered exercise of its independent prosecutorial judgement, a prosecution service cannot function under the authority of other branches of government, as that can lead to the prosecution service being subject to inappropriate influences from those other branches.

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[132] *United Nations Guidelines,* Guideline 4.

[133] Ibid., Guideline 17.

[134] Rule 2 of the IAP Standards of Professional Responsibility.

[135] See *Report of the Special Rapporteur on the independence of judges and lawyers*, para. 24.

[136] See ibid., para. 82.

203. Prosecutorial independence thus serves as the guarantee of impartiality, which in turn leads to a transparent and robust prosecution service with strong ethics and integrity based on the rule of law. This independence must also be maintained in the face of inappropriate pressure that may arise from the media, individuals or interest groups in the community, or even the public as a whole. When described in this manner, prosecutorial independence can be viewed as a fundamental component of the administration of justice.

204. Many elements affect the capacity of prosecutors to perform their functions in an independent and impartial manner. Some challenges are related to the way the prosecution system is structured and their career organized, while others depend on external factors. Such challenges include a lack of adequate resources (e.g. human, financial and logistical); lack of autonomy and independence due to internal or external pressure; poor conditions of service (e.g. low salary, lack of infrastructure and the necessary technical equipment for effective work performance); and concerns related to the security of prosecutors and their families.

b) Chief of the prosecution service

205. It is important that the method of selection for the chief of the prosecution service – for example, the prosecutor general or the attorney general – should serve to foster public confidence and the respect of the prosecution services. Therefore, professional, non-political expertise should be among the core considerations in the selection process. However, it is reasonable for a Government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the State, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process. It is suggested, therefore, that consideration be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the Government.[137] It might consist of the incumbents of some or all of the following positions:

- The President of each of the courts or of each of the superior courts
- The President of the faculty of advocates or bar association
- The civil service head of the state legal service
- The civil service secretary to the Government
- The deans of the university law schools[138]

206. There are many models for selection of the chief of the prosecution service. In some countries, the chief is appointed by the Head of State with the involvement or approval of the Parliament or the Superior Council of the Judiciary, on recommendation by the Minister of Justice or the Head of Government, or on the recommendation by the Supreme Court. In other instances, the chief of the prosecution service is appointed by the Supreme Court of Justice (Court of Cassation) from a list of candidates proposed by the Head of State. In countries where the prosecution service is attached or dependent on the executive branch of government, the chief of prosecution service may be appointed by the Executive.

207. An appointment process involving the executive branch and representation of the legislative branch has the advantage of giving democratic legitimacy to the appointment

[137] Council of Europe, "Report on European standards as regards the independence of the judicial system: part II — The Prosecution Service", para. 34.

[138] The European Commission for Democracy Through Law (Venice Commission, 2015), "Compilation of Venice Commission Opinions and Reports Concerning Prosecutors", p. 16.

of the head of the prosecution service. However, in view of the risks of politicizing the prosecution service, it is important to provide transparency in the appointment process. Clear criteria for appointment should be established. Vacancies should be advertised and suitable candidates invited to apply. Qualified persons with relevant expertise and of high reputation should provide input into the selection process.[139]

208. In terms of tenure, it is preferable that the chief of the prosecution service be appointed for a fairly long term of office, pre-established by law, because in seeking re-appointment, there is the risk of a political body behaving, or being perceived as behaving, in a way as to favour reappointment. The European Commission for Democracy Through Law (Venice Commission) suggests that a non-renewable term is preferable to the possibility of reappointment.[140] In addition, the chief of the prosecution service should be protected from arbitrary or politically motivated dismissal.

c) Allocation of the budget

209. It is important to ensure that the procedure for establishing budgets for the prosecution service and allocating financial resources to it are provided for in the law on the budget or other financial regulations. While the allocation of funds to the prosecution service is deemed to be a political decision, the legislative and executive authorities concerned should not be in a position to unduly influence the prosecution service when making a decision on its budget. The decision on the allocation of resources to the prosecution service should be made in strict accordance with the principle of its independence and should ensure the necessary preconditions for accomplishing its mission.[141]

d) Appointment and promotion

210. Necessary steps should be taken to ensure that recruitment and promotion within the prosecution service are based on objective factors, and in particular on professional qualifications, ability, integrity,[142] performance and experience, and are decided in accordance with fair and impartial procedures. The recruitment procedures should embody safeguards against any approach which favours the interests of specific groups, and should exclude discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, sexual orientation, national or social origin, property, birth or other status. Some parts of this Guide that address the recruitment of members of the judiciary may be applicable to prosecutors as well. Prosecutors must have appropriate education and training, particularly in the areas of ethics and human rights.[143]

211. Appointment procedures depend to some extent on the institutionalization of the prosecution service. In a number of countries, access to the career of prosecutor occurs through a public competitive examination or other selection process.[144] In other countries, appointment involves the executive and/or the legislative branch. In some cases, practical experience as a lawyer is required to be admitted to the prosecution service.

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[139] See *UNODC-IAP Guide*, p.14.

[140] Council of Europe, "Report on European standards as regards the independence of the judicial system: part II — The Prosecution Service", para. 71.

[141] Opinion No. 7 (2012) of the Consultative Council of European Prosecutors, document CCPE (2012)3 Final, para. 13.

[142] "Integrity" in this context is a broad concept that could include such things as objectivity, efficiency, professionalism, honesty and respect for human rights.

[143] *United Nations Guidelines,* Guideline 2(b).

[144] For example, French law students are not required to be well-experienced practitioners since they will first have to pass an annual competitive national examination to enter the National School for the Judiciary. Nevertheless, training undertaken at this school lasts not less than 31 months and provides the future prosecutors and/or judges with significant relevant experience.

212. The Special Rapporteur has emphasized that "a public competitive selection process (an examination) is an objective way to ensure the appointment of qualified candidates to the profession. Both selection and promotion processes should be transparent in order to avoid undue influence, favouritism or nepotism. Recruitment bodies should be selected on the basis of competence and skills and should discharge their functions impartially and based on objective criteria. This body should be composed by a majority of members from within the profession in order to avoid any possible political or other external interference."[145]

213. Transparency and fairness in the recruitment process of prosecutors must also be mirrored in their career advancement. This again provides protection for prosecutorial independence by preventing external influences, such as offers of money, or internal influences, such as offers of promotion, which are designed to affect the decision of a prosecutor, from occurring. Promotions should not be made by politicians or political appointees in order to avoid the perception that political influence is at work.

e) Conditions of service

214. The *United Nations Guidelines* state that "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".[146] Salaries and other benefits should not be arbitrarily diminished. [147]

215. Prosecutors should be entitled to form and join professional associations or other organizations, in accordance with law, to represent their interests, to promote their professional training and to protect their status.

216. The irremovability of prosecutors is another important element that should be incorporated into the conditions of service. The undue imposition of transfers to different positions or locations may lead to unjustifiable interference as the threat of transferring prosecutors between posts can be used as an instrument for putting pressure on a prosecutor or as a means for removing them from sensitive cases.

217. The tenure of prosecutors depends on how the prosecution service is structured. Security of tenure for prosecutors is an important element that reinforces their independence and impartiality. Given their important role and function, the dismissal of prosecutors should be subject to strict requirements, which should not undermine the independent and impartial performance of their activities. There should be a framework for dealing with internal disciplinary matters and complaints against prosecutors, who should in any case have the right to challenge – including in court – all decisions concerning their career, including those resulting from disciplinary proceedings.

f) Security of prosecutors

218. In many countries, prosecutors are directly exposed to security risks, especially those dealing with particularly sensitive cases such as organized crime and terrorism cases. A prosecutor who fears for his/her security – or that of his/her family – cannot possibly be fully independent and impartial in the performance of duties. Given the risks sometimes associated with conducting prosecutions, States are required to ensure that

[145] See *Report of the Special Rapporteur on the independence of judges and lawyers*, para. 62.
[146] *United Nations Guidelines,* Guideline 6.
[147] Rule 6 (c), (d) of the IAP Standards of Professional Responsibility.

prosecutors can perform their functions without intimidation, interference, unjustified exposure to liability or risk to their safety.[148]

219. The *United Nations Guidelines* emphasize that "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".[149] The Declaration on Minimum Standards Concerning the Security and Protection of Public Prosecutors and their Families developed by IAP states: "An appropriate state authority should be given the responsibility to assess the security risk both to prosecutors generally and to specific prosecutors as well as their families and to keep all assessments under review at reasonable intervals or when circumstances change … [and] … to provide public prosecutors and their families with information, training and advice concerning personal safety."[150] If prosecutors or their families are subjected to any form of violence or threats of violence, or to any form of intimidation, coercion or of inappropriate surveillance, it is the responsibility of the Government to fully investigate such incidents and take steps to prevent their future recurrence, as well as to provide prosecutors and their families with the necessary counselling or psychological support.

g) Case assignment and management

220. The method for assigning cases within the prosecution service is another important element to safeguard the independence and impartiality of prosecutors. An independent and impartial case assignment system protects prosecutors from interference from within the prosecution service. Preferably, the specialization and qualification of the prosecutors should be taken into account when assigning cases.[151]

221. It benefits no one in the criminal justice system to overburden prosecutors or send them to court to conduct cases that are beyond their level of expertise or experience. Careful management and tracking of case assignments is crucial to ensuring that all cases are either prosecuted fairly and vigorously to the extent that the law will allow or screened out of the criminal process through careful consideration and the application of the appropriate legal tests.

222. Accountability, transparency and operational effectiveness all require a prosecution service that has the ability to track and articulate what is being done on any file that has been opened or closed by any office in the prosecution service. In most jurisdictions, that will require considerable effort on the part of the administration in conjunction with management and the prosecutors themselves to ensure that the file is properly documented and tracked throughout its lifetime, including when archived. This should be done while preserving all necessary confidentiality of the different actors in the legal process. Often, different legal case tracking systems are not compatible, and apart from causing operational difficulties, render the task of obtaining accurate and reliable crime statistics more difficult.[152]

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[148] *United Nations Guidelines,* Guideline 4 and 5; Rule 6 (a), (b) of the IAP Standards of Professional Responsibility.

[149] *United Nations Guidelines,* Guideline 5.

[150] IAP, *Declaration on Minimum Standards Concerning the Security and Protection of Public Prosecutors and their Families*, March 2008, www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-(1)/Protection-of-Prosecutors/IAP_Standards-for-Protection-and-Security-of-Prosecutors.pdf.aspx

[151] See *Report of the Special Rapporteur on the independence of judges and lawyers*, para 80.

[152] See *UNODC-IAP Guide*, p. 21.

Evaluative framework: independence and impartiality

Prosecutorial independence

To what extent does the judiciary or the executive branch of government give orders or directions to the prosecution service?
Does the law permit the Minister of Justice or similar political official to give general or special instructions to the prosecution service? If so, how is this done?
Is the prosecutor bound to comply with such instructions? What are the potential consequences for non-compliance?
Does the prosecutor have the authority to prosecute public officials for offences such as corruption or gross violations of human rights?
Has the prosecution service, in the past five years (or under the current Government's administration), prosecuted any senior government officials for corruption or abuse of authority?

Chief of the prosecution service

Who appoints the chief prosecutor? What is the term of office?
To whom does the chief prosecutor report?
Are there legal protection provisions for the chief prosecutor to maintain the confidentiality of ongoing investigations until the case is completed?
What criteria are required for appointment as chief prosecutor? Are vacancies advertised?
What is the selection process for the appointment of the chief prosecutor? Is input received from experts, the public or other external sources?
Under what circumstances can the chief prosecutor be removed from office?

Allocation of the budget

What procedures are followed in the determination of the budgetary request and allocation for the prosecution service?
Are budgetary decisions made in strict accordance with the principle of the independence of the prosecution service?

Appointment and promotion

What are the basic minimum requirements to become a prosecutor?
Are prosecutors required to have a law degree?
Are prosecutors required to have been admitted to practise law?

Are vacancies for prosecutors publicly advertised? If so, how?
What are the selection criteria for prosecutors? How are prosecutor candidates vetted?
Is an examination part of the selection process? If so, how is the examination developed, administered and evaluated?
Does the demographic makeup of prosecutors resemble the population?
Are bilingual or multilingual prosecutors who speak ethnic minority languages recruited?
Is the promotion process for prosecutors based on objective, fair and transparent criteria and procedures? How are prosecutors selected for promotion?

Conditions of service

Do prosecutors receive remuneration commensurate with their role? How is the compensation of prosecutors determined?
Are prosecutors permitted to form or join professional associations or other organizations to represent their interests, promote professional training or to protect their status? If so, what such associations or organizations currently exist?
What other benefits or entitlements do prosecutors receive as part of their conditions of service, including insurance, retirement benefits and similar entitlements?
Under what circumstances can a prosecutor be transferred to a different position or location? What procedures and protections govern the transfer of prosecutors?
Under what circumstances can a prosecutor be dismissed or removed from service? What procedures and protections govern dismissal, either in a disciplinary or other context?
In the event of a decision to transfer or remove a prosecutor, is the prosecutor entitled to appeal that decision before an administrative body or judicial tribunal? How many prosecutors have been transferred or removed from office without their consent during the past five years?

Security of prosecutors

How are prosecutors and their families guaranteed physical security and provided protection?
Do standard operating procedures exist on how to process and respond to threats against prosecutors and/or their families?

Case assignment and management

What mechanisms exist for the prosecution service to manage the incoming caseload? How are cases assigned to prosecutors? How does case management and oversight operate?
Does the prosecution service use statistical reports to monitor the caseloads/workloads of individual prosecutors and prosecution teams?
Is there an automated system that allows cases to be tracked on an individual basis? Is it integrated with the automated system that monitors prosecutors' caseloads? Is it part of a wider integrated system that may include police information, court schedules and detention information?

Strengthening individual integrity: prosecutorial accountability

223. As noted above, the independence of the prosecutor does not mean that a prosecutor is completely autonomous and accountable to no one. Prosecution services are accountable to the executive and legislative branches of government, to the public and, to an extent, the judiciary. "Accountability" of the prosecutor means that a prosecution service may be required to account for its actions either by filing reports, responding to parliamentary inquiries or, in some situations, acting as a respondent in a court hearing.

224. Accountability may also mean that a prosecution service can potentially be held liable as a result of inefficiencies and abuses of its authority. Individual prosecutors are also accountable for their decisions and actions, through the courts, the hierarchies of their prosecution services, their professional associations and the media and public interest in their professional conduct. Many standards and roles mentioned in this Guide are related to accountability, including codes of conduct, discipline and training.

a) Codes of conduct

225. In the performance of their duties, prosecutors should be bound by a code of conduct that incorporates contemporary international standards of professional conduct. A breach of such code may lead to appropriate sanctions. In some contexts, a code of conduct may be supplemented by additional internal guidance materials or policies established by the office to ensure the proper and consistent treatment of similar cases, among other issues.

226. When developing codes of conduct for prosecutors, States may wish to take into account relevant international standards including the *United Nations Guidelines* and the *Standards of Professional Responsibility*.[153] Such codes apply to both a prosecutor's personal as well as professional life, and follow the basic principles and approach taken with regard to judicial integrity and objectivity outlined in previous sections of this Guide. A prosecutor should not compromise the actual, or the reasonably perceived, integrity, fairness and impartiality of the profession, by activities in his/her private life. A prosecutor should respect and obey the law at all times, and conduct him-/herself in such a way as to promote and retain public confidence in the profession. A prosecutor should also take special care in social interactions outside of the professional environment, particularly to the extent that they involve contact with members of the judiciary or the police.

227. Prosecutors have the right to pursue their private lives as they see fit but must do so within the bounds of the law and within the peculiar constraints of their profession. The independence that is so important to prosecutors in effectively performing their duties places some limits on activities that may compromise or give the appearance of compromising the independence of their office, such as outside employment that could lead to a conflict of interest, running for political office while still employed as a prosecutor, consorting with known criminals or frequenting venues where criminals may be found or engaging in activities that may bring the office of the prosecutor into disrepute. This is the case now perhaps more than ever as the digital age has allowed anyone practically anywhere to take photographs or video recordings and disseminate them worldwide with the press of a button. This has the potential to intrude upon every person's private life, including prosecutors.[154]

[153] See ibid.

[154] See ibid, p. 40.

228. A prosecutor should not allow personal or financial interests or family, social or other relationships, to improperly influence professional conduct, and should not use any information to which a prosecutor has had access during the course of the employment to further his/her own private interests or those of others. It is important that a prosecutor not accept any gifts, prizes, benefits, inducements or hospitality from third parties, or carry out any tasks which may be seen to compromise his/her integrity, fairness and impartiality. A prosecutor should never act in his/her professional capacity in a case in which family or business associates have a personal, private or financial interest or association.

b) Guidelines and policies: preventing professional misconduct

229. In performing their duties, prosecutors will deal with a large number of issues on a daily basis. Those issues cover both the legal and administrative aspects of their work and can be either routine or complex and unusual. A quick reference compendium of legal, procedural and administrative guidelines serves as a useful and necessary tool for the smooth and consistent functioning of a prosecution service.

230. The guidelines (often also known as "policy manuals" or "desk books") provide both prosecutors and managers with a quick reference to common questions that arise during the daily practice of their profession and allow for consistent responses to those queries within the prosecution service and outside it. Making reference to a manual can provide not only direction to the individual prosecutor but also provide protection from accusations of arbitrary conduct if a decision to pursue or not pursue a certain course of action is challenged at a future date. Citations to how the guidelines factored into decisions by prosecutors can provide an articulable, legally sound response to any challenges that may arise and further promote transparency in the decision-making process.

231. In order for guidelines to be truly effective, they must be promoted and used at every opportunity by management to show both their importance and efficacy in the daily operation of the prosecution service. This practice must occur primarily with new prosecutors at the induction phase and be reinforced throughout their careers. Care must be taken to ensure that more experienced prosecutors do not forget the basic responsibilities of their office while also promoting the idea that guidance in dealing with difficult and complex problems can frequently be found in the guidelines. The guidelines should be constantly reviewed and revised in light of experience and changing standards and practices.

232. Guidelines for prosecutors are usually read in conjunction with legal obligations on prosecutorial conduct found in the primary and subordinate legislation in each State, as well as in codes of professional ethics. Many States have taken steps to adopt guidelines that assist prosecutors in fulfilling their professional responsibilities.[155]

c) Training

233. The State should ensure that prosecutors receive appropriate training on the scope of their role, the ideals and ethical duties of their office, the constitutional and statutory protections for the rights of the defendant and the victim, the obligations owed to defendants, and the human rights principles and fundamental freedoms recognized by national

[155] For example, Canada www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/index.html; Ireland www.dppireland.ie/app/uploads/2019/03/Guidelines_for_Prosecutors_4th_Edition_-_October_2016.pdf; New Zealand www.crownlaw.govt.nz/publications/prosecution-guidelines; Slovenia www.drzavnotozilski-svet.si/code-of-ethics-of-state-prosecutors; United Kingdom www.cps.gov.uk/prosecution-guidance; United States www.justice.gov/jm/jm-9-27000-principles-federal-prosecution.

and international law. To the extent that there is a code of conduct for prosecutors or other professional guidelines governing the role and conduct of the prosecution service, these materials should form a central part of the initial training of new prosecutors in integrity, accountability and professionalism. In addition, initial and continuing training should regularly address the code or guidelines and considerations in the exercise of prosecutorial discretion, including an understanding of the decision-making process and factors that increase the risk of wrongful convictions. This includes the fallibility of eyewitness testimony and safeguards to increase the reliability of forensic and electronic evidence. Training is both a duty and a right for all prosecutors, before their appointment, as well as on a continuing basis. In order to respond better to developing forms of criminality, in particular organized crime and corruption, specialization opportunities should be offered in appropriate circumstances.

234. In efforts to enhance the integrity of prosecutors and raise awareness of corruption risks within the prosecution service, many States have now begun to develop specialized ethics and training programmes for both new and experienced prosecutors. In Poland, a series of such specialized courses is provided by the National School of Judiciary and Prosecution. The School provides mandatory courses for candidates in the area of "Ethics of Prosecutor's Work" which cover topics such as ethics, professional responsibility and discipline. Similarly, as part of a mandatory training plan introduced for members of the prosecution services in Ecuador in 2012, new thematic courses aimed at fighting corruption have been introduced. One of the specific courses introduced in this regard was the "Ethics, Transparency and Public Service" course which was taken by over 900 prosecutors in the first year alone.[156] Some guides provide practical case examples to better illustrate the application of abstract ethical principles, such as the ethical guidelines for prosecutors in New York State, entitled "The Right Thing".[157] In France, the National Judicial Academy (ENM) is a professional school for the training of judges and prosecutors. The objective of ENM's 31 month initial training course is described as the training of "future judges and prosecutors in the various functions by the acquisition of fundamental skills" allowing for decision-making that conforms to the law and is "adapted to its context, respectful of the individual and the ethical and deontology rules, framed under its national and international institutional environment". The ENM has focused on the famous "three Is": integrity, independence and impartiality.

d) Disciplinary procedures

235. According to the *United Nations Guidelines*, disciplinary proceedings against 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."[158] Prosecutors should not be subject to disciplinary measures (and be entitled to relief from compliance) in all cases involving receipt of an unlawful order or an order which is contrary to professional standards or ethics.

236. In addition, such proceedings "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."[159] Increasingly, States have shown

[156] For further information, see UNODC Report for the Fourth Meeting of the Open-ended Intergovernmental Working Group on the Prevention of Corruption, "Integrity in the judiciary, judicial administration and prosecution services (article 11 of the United Nations Convention against Corruption)" (CAC/COSP/WG.4/2013/2).

[157] www.daasny.com/wp-content/uploads/2016/02/2016-Ethics-Handbook.pdf.

[158] *United Nations Guidelines,* Guideline 21.

[159] Ibid., Guideline 22.

their willingness to take disciplinary and criminal actions where prosecutors have been found culpable for acts of fraud or corruption, or breached rules relevant to ethics and conflicts of interest.[160]

Evaluative framework: prosecutorial accountability

Codes of conduct

Has the prosecution service developed rules or standards with respect to the professional and ethical conduct of members of the prosecution service (hereinafter referred to as the code of conduct)?
Describe the process that governed the development and adoption of the code of conduct. In particular, did this process involve consultations with stakeholders outside the prosecution service, such as civil society and prosecution service user organizations?
Has the code of conduct been made available to every prosecutor?
To which institutions has the code of conduct been disseminated in the community or otherwise made publicly available?

[160] For further information, see UNODC Report for the Fourth Meeting of the Open-ended Intergovernmental Working Group on the Prevention of Corruption, "Integrity in the judiciary, judicial administration and prosecution services (article 11 of the United Nations Convention against Corruption)" (CAC/COSP/WG.4/2013/2).

Are there guidance materials or policies in the prosecution service to ensure the proper and consistent application of the code of conduct?
Is there a mechanism or procedure, whether formal or informal, to advise members of the prosecution service on the propriety of proposed conduct?
What restrictions or limits, if any, are placed on a prosecutor's outside activities?
What restrictions or limits, if any, are placed on a prosecutor's acceptance of gifts, prizes, benefits or hospitality?

Guidelines and policies: preventing professional misconduct

Does the prosecution service maintain an updated reference compendium of legal, procedural and administrative guidelines?
To what extent are internal guidelines and policies promoted or discussed by management?

Training

Have the necessary financial and other resources been allocated for the organization and supervision of prosecutorial training?[161]
Is there a prosecutorial training centre or other specialized institution?[162]
What is included in the training curriculum for the prosecution service and how was it developed?
Does a mandatory initial training exist for prosecutors and if so, what specific courses or modules on prosecutorial ethics and conduct are included?
Does the training include the constitutional and statutory rights of suspects and accused persons?

[161] The resources could be considered adequate if they allow for regular training to be provided at reasonable intervals to all prosecutors.

[162] A functioning institution would require regular staff, regular training programmes, adequate funding and reliance on sustainable internal resources.

Does the training include human rights and the fundamental freedoms recognized in national and international law?
How is the training delivered and by whom?
To what extent is continuing training required for prosecutors? What does such training address? Is compliance with continuing training monitored/tracked and if so, how?
Are courses available for prosecutors providing an introduction to specialized fields relevant to prosecutorial activity, such as relations with the media, organized crime, corruption or asset recovery?
If the language of legal literature (i.e. law reports, indictments, etc.) is different from the language of legal education, is instruction in both languages provided to both lawyers and prosecutors?
In countries with multiple official languages, is prosecutorial training delivered in more than one language?

Disciplinary procedures

Is there a mechanism or procedure to receive and inquire into complaints of misconduct, corruption and abuse or misuse of power against members of the prosecution service?
Is this mechanism or procedure within the prosecution service or external from it? Does it function independently of the prosecution service?
Who participates in this mechanism or procedure, and how are members selected?
Is there a right of defence for prosecutors subject to disciplinary procedures?
What transparency measures exist to promote public confidence in the process to address such complaints?
What is the relationship between internal disciplinary proceedings and external disciplinary bodies, such as that of the Bar?

Measures to prevent opportunities for corruption

Disclosure of financial interests and affiliations

237. The disclosure by prosecutors of their financial and other interests is sometimes used to address both conflicts of interest and potential cases of embezzlement or illicit enrichment among prosecutors. Such declarations can also be useful with respect to the assignment of cases for prosecution. "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser or other active participant in the affairs of an institution or organization. Figures produced by the World Bank show that of those States with an asset declaration system in place, 56 per cent require members of the judiciary to make such declarations, rising to 62 per cent for senior members of the prosecution services.[163]

238. It has been increasingly recognized that in order for declaration systems to be a truly effective tool in relation to the identification of potential or actual conflicts of interest, prosecutors should provide information in such declarations in relation to their outside affiliations and interests, in addition to financial interests. Types of information requested in this regard may include pre-tenure activities, affiliations with businesses such as board memberships, connections with non-governmental or lobbying organizations and any unpaid or volunteer activities.

239. A distinction can be drawn between those countries that include prosecutors within the range of public officials covered by general asset disclosure laws or regulations, and those where a specialized regime of disclosure has been developed in relation to the judiciary and prosecution services.[164]

Immunity

240. Similar to judges, prosecutors should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions made in the exercise of their prosecutorial functions. So long as the prosecutor is acting in good faith, functional immunity should be applied to safeguard independence and impartiality. As recognized for the legal profession more broadly, "[l]awyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority."[165] The same principles apply to prosecutors acting in their official capacities, and accountability for professional errors are best handled through other oversight, accountability and disciplinary mechanisms.

Monitoring mechanism

241. In order to ensure that the mandate of the prosecution service is being carried out and managed effectively, many States have internal and/or external protocols or agencies in place to review decisions and for the management of their prosecution services. Some of those protocols, such as producing annual reports or appearing before parliamentary committees to address specific concerns of legislators, are mentioned above.

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[163] For further information see http://publicofficialsfinancialdisclosure.worldbank.org/

[164] For further information see Henderson, K, *Asset and Income Disclosure for Judges: A Summary Overview and Checklist* (http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/IncomeAssetDisclosure.pdf).

[165] See *Basic Principles on the Role of Lawyers*, para. 20.

242. Others that have been used by the prosecution services of various States are stand-alone monitoring units, file and office audit procedures, legal risk management protocols, prosecution inspectorates and appearances before commissions of inquiry. Monitoring mechanisms can be a useful component of a prosecution service, especially in their audit and legal risk management functions, as they allow for a proactive approach to identifying the practices and procedures of a prosecution service that are potentially legally or operationally unsound and resolving them before they become problematic.[166]

Maintenance of case records and documents

243. Clear policies that prescribe how, when, where and by whom documents used by prosecutors, including case files, should be produced, stored, forwarded and accessed are another tool to reduce opportunities for corruption. Identifying precisely who is entitled to have access to information and who is required to sign documents is essential, not only for sound and efficient management in general, but also as a means to control the risk that documents may be stolen, damaged or improperly altered.

244. Well-designed electronic document management systems make these processes easier and more tamper proof. If combined with a facility-wide tracking system for case files and evidence via barcodes or chips, a trail of their location is created that not only makes it more difficult to misplace or lose files or evidence, but also reveals their chain of custody.

245. The introduction of office information technology can reduce corruption by improving the integrity of data entry and ensuring compliance with process rules. Such technology would also lessen the discretion of staff, prosecutors, and managers in making assignments, minimize tampering with documents and evidence, and increase transparency.

Evaluative framework: measures to prevent opportunities for corruption

Disclosure of financial interests and affiliations

What mechanisms are in place to identify and prevent conflicts of interest for prosecutors?
To what extent are prosecutors required or requested to make a declaration of their assets and liabilities?

[166] See *UNODC-IAP Guide*, pp. 46-47.

Do such declarations include the assets and liabilities of the prosecutor's spouse, children and other close family members, including parents?
To what extent is the content of such declarations reviewed or verified?
Are prosecutors required to declare interests, such as affiliations, outside activities and other non-financial interests? How is this done?
Are such declarations (or parts thereof) made available to the public and/or in the court registry?
To what extent are prosecutors permitted to have a business or other private sector interests?

Immunity

Do prosecutors have functional immunity in the performance of official duties? If so, how far does that immunity extend? How, if at all, can immunity be lifted?

Monitoring mechanism

Are there one or more monitoring mechanisms to oversee the performance and consistency of the prosecution service? How does it (do they) operate and function?
Does the prosecution service have an internal audit and/or legal risk management capacity? How does it operate in practice?

Maintenance of case records and documents

What policies, if any, govern the management of case files in the prosecution service, including creation, storage, handling and archiving?
Does the prosecution service have an electronic document management system?

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