

A Model State of the Judiciary Report: A Strategic Tool for Promoting, Monitoring and Reporting on Judicial Integrity Reforms



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IFES Model State of the Judiciary Report

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EXECUTIVE SUMMARY **A MODEL STATE OF THE JUDICIARY REPORT:** **A STRATEGIC TOOL FOR PROMOTING, MONITORING AND REPORTING** **ON JUDICIAL INTEGRITY REFORMS AT THE COUNTRY, REGIONAL AND** **GLOBAL LEVELS ***

Judicial Integrity Consensus Principles and Best Practices

The IFES Judicial Integrity Principles and the model framework for an Annual State of the Judiciary Report were prepared for discussion during a Workshop on Judicial Integrity at the 11th Transparency International Global Conference held in Seoul, South Korea, May 25-28, 2003.

The JIP represent high priority consensus principles and emerging best practices found in virtually all global and regional governmental and non-governmental instruments related to the independence and impartiality of the judiciary. The JIP are aimed at fostering an enabling environment and legal culture necessary for the rule of law to take root, with specific emphasis on judicial independence, accountability and transparency. For purposes of this paper, judicial integrity is not limited to judicial ethics and professional conduct, but is understood to cover, inter alia, judicial independence, judicial accountability, judicial transparency, judicial ethics and the fair and effective enforcement of judgments.

IFES Rule of Law Toolkit

IFES envisions the JIP as the core principles forming the framework of a model State of the Judiciary Report. The JIP and this annotated outline for a State of the Judiciary Report are components of the IFES Rule of Law Toolkit, which has been designed by IFES to provide civil society, reformers and other stakeholders with standardized and flexible tools to promote and undertake reform. While well conceived regional and global indexes and reports provide necessary guidance and support to those using them, the State of the Judiciary Report must ultimately take into account the country context within which it is being written.

The guidance provided by the IFES tools are considered to be a work in progress designed to integrate evolving regional and international consensus principles. IFES has now formed a small advisory working group, the IFES Judicial Integrity Working Group, to refine these tools and methodology. Distinguished members of the working group include Judge Sandra Oxner of Canada, Judge Clifford Wallace of the United States, Chief Justice Davide of the Philippines and Judge Luis Fernando Solano, President of the Constitutional Chamber of the Supreme Court of Costa Rica.

A Model State of the Judiciary Report: Multiple Purposes; Multiple Constituencies.

The JIP may be used by civil society and judges to prepare an annual State of the Judiciary Report (Judiciary Report) that could serve to promote high-priority reforms and

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as a base-line monitoring, reporting and implementation tool for establishing the enabling legal environment to globalise the rule of law. The Judiciary Report could be used for multiple purposes by multiple audiences, including:

- (i) Making judicial integrity and justice sector reforms, particularly those related to human rights higher priority reform issues across regions;
- (ii) Developing broad-based coalitions and judicial reform strategies around a common justice reform agenda within countries and across regions;
- (iii) Developing strategic concrete action plans designed to implement prioritized justice reforms based on global, regional and country best practices;
- (iv) Presenting prioritised recommendations for the development of strategies and policies and for a legal and judicial reform agenda;
- (v) Providing the public, the media and the broader indigenous and international legal communities with the essential information they need to promote justice reforms and develop public trust in the rule of law;
- (vi) Reporting on justice reform progress or regression through uniform but flexible indicators and monitoring standards that could be used to justify more resources domestically and increased donor and technical assistance;
- (vii) Promoting higher quality empirical research, monitoring and reporting as well as coordinated, strategic action among reformers and international organizations and donors and more peer pressure among all actors in the reform process;
- (viii) Enhancing the importance of the judiciary and the status of judges; and
- (ix) Qualifying for donor assistance through the new Millennium Challenge Account and meeting terms of conditionality through the international financial institutions and development banks, such as the IMF, World Bank, IDB, ADB and EBRD, and free trade and anti-corruption conventions and protocols.

The final annual Judiciary Report should be as “national” a product as possible, in order to be useful to the local judiciary and local civil society groups. It must be understandable and accessible to local stakeholders. Its dissemination to a broad public and to large segments of the legal community is crucial to the success of the project and the fulfillment of its objectives which include:

- (i) Increasing the quality of information on the judiciary and key judicial integrity principles and access to that information;
- (ii) Increasing the public understanding and respect of the judiciary;
- (iii) Providing judges, the legal community, reformers and civil society with the tools and information necessary to advocate for reform and funding domestically and internationally; and
- (iv) Providing mechanisms and information for coalition building around key priority reforms and problems.

Country-specific Judiciary Reports should be written in a participatory process including the input of civil society, judges and the legal profession. IFES has designed a process in order to ensure quality control, promote efficiency and develop comparative regional and global information.

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A MODEL STATE OF THE JUDICIARY REPORT: A STRATEGIC TOOL FOR PROMOTING, MONITORING AND REPORTING ON JUDICIAL INTEGRITY REFORMS AT THE COUNTRY, REGIONAL AND GLOBAL LEVELS

IFES JUDICIAL INTEGRITY PRINCIPLES [JIP] *

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| <p>JIP.1 Guarantee of judicial independence, the right to a fair trial, equality under the law and access to justice</p> <p>JIP.2 Institutional and personal/decisional independence of judges</p> <p>JIP.3 Clear and effective jurisdiction of ordinary courts and judicial review powers</p> <p>JIP.4 Adequate judicial resources and salaries</p> <p>JIP.5 Adequate training and continuing legal education</p> <p>JIP.6 Security of tenure</p> <p>JIP.7 Fair and effective enforcement of judgments</p> <p>JIP.8 Judicial freedom of expression and association</p> <p>JIP.9 Adequate qualification and objective and transparent selection and appointment process</p> <p>JIP.10 Objective and transparent processes of the judicial career (promotion and transfer processes)</p> <p>JIP.11 Objective, transparent, fair and effective disciplinary process</p> <p>JIP.12 Limited judicial immunity from civil and criminal suit</p> <p>JIP.13 Conflict of interest rules</p> <p>JIP.14 Income and asset disclosure</p> <p>JIP.15 High standards of judicial conduct and rules of judicial ethics</p> <p>JIP.16 Objective and transparent court administration and judicial processes</p> <p>JIP.17 Judicial access to legal and judicial information</p> <p>JIP.18 Public access to legal and judicial information</p> |
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* For purposes of the State of the Judiciary Report, judicial integrity is defined broadly to include judicial independence, judicial transparency, judicial accountability, judicial ethics and the enforcement of judgments.

1 COUNTRY BACKGROUND AND METHODOLOGY

1.1 COUNTRY BACKGROUND: POLITICAL, LEGAL AND SOCIOECONOMIC

Assessing the country's political, legal and socioeconomic background is a necessary first step in the monitoring of the state of the judiciary. Pertinent and accurate information on the country background will provide the context in which the JIP must be complied with. Country background information should focus on 5 main areas:

- Political background;
- Legal background;
- Public perception and media coverage;
- Judicial policy; and
- Socioeconomic, cultural and traditional context.

Political Background: Indicators

- Key political developments relevant to the judiciary and judicial integrity;
- Assessment of the level of political commitment to judicial reform and the level of political support for judicial integrity.

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Legal Background: Indicators

- Key constitutional and legal changes affecting the judiciary and judicial integrity, especially reforms related to the personal guarantees of independence and impartiality, compensation, liability and discipline;
- Key changes in institutional arrangements affecting the judiciary
- New standards and international and regional obligations affecting the judiciary and judicial integrity;
- Evolution in judicial practice; and
- Intra-judicial and inter-institutional relations

Public Perception and Media Coverage: Indicators

- What is the public perception of the judiciary? Of judicial integrity? Of judicial independence?
- Does the public respect the judiciary and judicial decisions?
- Media coverage of judicial issues and of issues affecting the structure and decision-making of the judiciary
- Reaction of the judiciary to the public perception and media coverage.

Judicial Policy: Indicators

- New policies affecting the judiciary and judicial integrity;
- Responsibility for the development of judicial policies; and
- Responsibility for the implementation of judicial policies

Socioeconomic, Cultural and Traditional Context: Indicators

- Key developments and context as they affect the perception of the judiciary, judicial independence and judicial integrity

1.2 SCOPE OF THE REPORT: THE IFES JUDICIAL INTEGRITY PRINCIPLES [JIP]

This report attempts to develop the IFES Judicial Integrity Principles [JIP] designed to serve as guideposts for the drafting of annual State of the Judiciary Reports which would monitor and report on compliance with key principles of judicial independence, judicial accountability, judicial transparency, judicial ethics and enforcement of judgments and assist in building support for high priority judicial reforms.

In designing the JIP, IFES relied on a number of international and regional governmental and non-governmental conventions, standards and guidelines, cited in Annex, to identify consensus principles and trends. IFES also examined a number of relevant documents and studies including the work of OSI to monitor judicial independence, judicial capacity and anti-corruption policy in EU accession countries, the Millennium Challenge Account “Ruling Justly and Anti-Corruption Principles” and work by individuals such as Judge Sandra Oxner.

IFES is also attempting to building on its own work on judicial independence and the enforcement of judgments, which includes two important groundbreaking comparative

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reports, entitled *Guidance for Promoting Judicial Independence and Impartiality and Barriers to the Fair and Effective Enforcement of Judgments and the Rule of Law*, and promoting the adoption of strategic declarations on judicial independence at conferences hosted regionally in Central America, Southern Africa and the Middle East and North Africa.

1.3 MULTIFACETED METHODOLOGY

The methodology followed for reporting and monitoring on the State of the Judiciary attempts to incorporate data gathered through quantitative and qualitative indicators and to analyze the data within the broader legal, political, socioeconomic, cultural and traditional context. In gathering and analyzing the data, the methodology relies on a number of tools, including:

- Desk studies of the legal and institutional framework;
 - Review of existing international and regional standards, lessons learned, best practices and research;
 - Surveys of key stakeholders and participants, including judges, lawyers and other members of the legal profession, civil society and human rights groups, media, private sector, users of the courts, and any other stakeholder;
 - In-country interviews of experts and stakeholders;
 - Focus groups.
- **LEGAL ASSESSMENT** including general indicators, to be tailored for each principle monitored, as applicable:
 - Are the necessary laws and regulations in place?
 - Are they implemented and enforced in practice?
 - Are they fairly and effectively implemented and enforced?
 - Have there been legal (or constitutional) interferences with court decisions, judicial independence or judicial integrity?
 - **INSTITUTIONAL ASSESSMENT** including general indicators to be tailored for each principle monitored, as applicable:
 - Which are the relevant institutions?
 - Are they adequately staffed, trained and funded?
 - What initiatives have they taken in support of judicial independence and judicial integrity? Have they played a positive or negative role?
 - How is the requirement of competent, impartial and independent judges implemented?
 - **CIVIL SOCIETY AND MEDIA ASSESSMENT** including general indicators to be tailored for each principle monitored, as applicable:
 - Freedom of association? Freedom of expression? Free media?
 - What relationship does civil society have to the courts? What relationship do the media have to the courts?
 - What initiatives have they taken in support of judicial independence and judicial integrity? Have they played a positive or negative role?

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- What is their capacity to contribute to the promotion and strengthening of judicial independence and judicial integrity?
- **GENERAL CONTEXT AND TRADITIONS ASSESSMENT** including general indicators to be tailored for each principle monitored, as applicable:
 - Which aspects of the historical, socioeconomic and political context and of the legal culture and community/historical traditions are likely to affect, positively or negatively, judicial independence and judicial integrity?

2 INTERNATIONAL AND DOMESTIC LEGAL AND INSTITUTIONAL FRAMEWORK

Set the rationale for the IFES Judicial Integrity Principles [JIP]:

- Track international and regional consensus principles;
- Highlight international, regional and constitutional obligations;
- General overview of the relevant country legal and institutional framework.

2.1 INTERNATIONAL AND REGIONAL OBLIGATIONS

A list of the main international and regional governmental and non-governmental conventions, guidelines and standards relevant to, inter alia, the issues of judicial independence and judicial integrity is attached in annex.

Key International and Regional Obligations¹:

- International and regional human rights treaties and jurisprudence of the international and regional human rights courts and commissions
- UN Basic Principles for the Independence of the Judiciary (UNBP) and related documents
- Non-governmental guidelines, especially declarations adopted by judges as well as the declarations adopted at the IFES conferences on judicial independence in Honduras (April 2002), Malawi (January 2003) and Egypt (February 2003).

2.2 CONSTITUTIONAL PRINCIPLES

Key Constitutional Principles:

- Guarantee of judicial independence, the right to a fair trial and other key principles
- Jurisdiction of the courts and prohibition of the establishment of parallel courts to strip ordinary courts of their competence
- Provision for impartial judicial career processes (appointment, promotion and discipline), including clear criteria.

¹ The IFES Working Paper on Judicial Independence Standards and Consensus Principles provides an overview of the key international and regional obligations related to judicial independence and integrity which includes human rights treaties, international and regional judicial independence guidelines and principles and case law from human rights courts. This paper is available at IFES.

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2.3 RELEVANT COUNTRY LEGAL FRAMEWORK

Key Laws and Statutes Related to the Judiciary and Judicial Integrity:

- Institutional structure of the judiciary;
- Judicial Council regulation;
- Judicial career processes regulation.

2.4 RELEVANT COUNTRY INSTITUTIONAL FRAMEWORK

Key Institutions :

- Intra-judicial structures (courts)
- Extra-judicial structures and governmental relationships (MOJ, prosecution, ombudsman, etc.)
- Judicial Council
- Oversight mechanisms

3 ASSESSMENT OF COMPLIANCE WITH IFES JUDICIAL INTEGRITY PRINCIPLES

For each of the IFES JIP, set:

- Guidelines based on international and regional standards and best practices
- Indicators to monitor the level of compliance/abuse – Detailed indicators will be attached in Annex.

3.1 JIP.1: GUARANTEE OF JUDICIAL INDEPENDENCE, THE RIGHT TO A FAIR TRIAL, EQUALITY UNDER THE LAW AND ACCESS TO JUSTICE

Right to a fair trial: The guarantee of trial by an independent, impartial and competent tribunal established by law is one of the components of the right to a fair trial affirmed in international and regional human rights instruments, both in civil and criminal cases. ICCPR 14; ECHR 6; IACHR 8; ACHPR 26

State guarantee of judicial independence: It is the duty of the State to guarantee judicial independence through constitutional or legal norms and to ensure that such norms are respected. UNBP 1; CoE I (2) (a); UCJ 2; ECSJ 1, 2

International and regional human rights conventions recognize the right to a fair trial. A number of its components, including judicial independence and due process, as well as broader access to justice issues such as equality under the law are also recognized under international and regional human rights conventions either explicitly or implicitly.

Guidelines developed to clarify international and regional human rights conventions as well as the case law of international and regional human rights courts and commissions show a consensus towards the obligation of State parties to guarantee the rights recognized in the conventions. There is therefore an obligation to guarantee judicial independence and other rights considered as components of the right to a fair trial. This

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obligation requires both formal guarantees (through constitutional provisions or legislation) and compliance in practice (implementation).

3.2 JIP.2: INSTITUTIONAL AND PERSONAL/DECISIONAL INDEPENDENCE OF JUDGES

Freedom from interference with the judicial process: There shall be no inappropriate interference with the judicial process, nor shall judicial decisions be subject to revision, except upon appellate review or mitigation or commutation by competent authorities. UNBP 4

Personal independence: Judges shall perform their duties on the basis of facts and in accordance with the law, free from improper influences and without undue delay. They shall ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. UNBP 2

Perception of impartiality and independence: Judges must be impartial and independent, perceived themselves as impartial and independent and be perceived by the public as impartial and independent.

In terms of judicial independence, there appears to be an international consensus that a combination of the institutional independence of the judiciary as a whole and the personal independence of individual judges in their adjudicative decisional capacity is needed. In order to achieve this double level of independence, it is necessary to insulate the judiciary as an institution and judicial processes from outside and internal interferences. Moreover, judges must not only be impartial and independent in their decision-making, but must also appear as such. Finally, judges must be protected from threats against their physical, economic and career safety as well as that of their families and staff.

3.3 JIP.3: CLEAR AND EFFECTIVE JURISDICTION OF ORDINARY COURTS AND JUDICIAL REVIEW POWERS

Jurisdiction of ordinary courts: Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction of the ordinary court, which have been granted exclusive authority to decide issues of a judicial nature, within their competence as defined by law. UNBP 3, 5; ICCPR 14; ECHR 6

While extraordinary courts do not constitute in and of themselves an encroachment on the independence of the judiciary, their creation and use should necessarily be limited in order not to abusively oust the jurisdiction of ordinary court and subject litigants and defendants to unfair trials. Reliance on military and national security courts is of particular concern when used to try civilians, mainly due to the lack of effective due process guarantees provided to the accused in countries in which they are used.

Moreover, the creation of parallel courts or the assignment of jurisdiction of other tribunals such as military or national security tribunals in violation of constitutional or statutory provisions defining the jurisdiction of ordinary courts may constitute a violation of judicial independence, especially to the extent that these tribunals may not respect of legal procedures, statutory and constitutional rights and due process and fair trial principles.

3.4 JIP.4: ADEQUATE JUDICIAL RESOURCES AND SALARIES

Adequate resources: It is the duty of the State to provide adequate resources to enable the judiciary to perform its functions properly. UNBP 7; UCJ 14; Beijing 37

Adequate salaries: UNBP 11; CoE III (1) (b); UCJ 13; Beijing 31

Adequate funding is often lacking for the judiciary, both in terms of the institutional resources and of the remuneration of judges and their staff. Proper funding is a necessary prerequisite of proper judicial conduct, independence and integrity.

3.5 JIP.5: ADEQUATE TRAINING AND CONTINUING LEGAL EDUCATION

Training: Persons selected for judicial office shall be individuals of integrity and ability with appropriate training and qualifications in law. UNBP 10, 11 & 13; UCJ 9; CoE I(2)(c); ECSJ 4 & 5; Beijing 11-16

In conversations with judges from countries across the world, the need for the adequate initial training and continuing legal education of judges has appeared as a crucial condition for the strengthening of judicial independence. While there is no consensus on the type or form of training, emerging trends seem to support targeted training on specific needs specifically identified by the judges themselves. Clearly, any reform affecting the judiciary should be accompanied by substantial training of the judges as well as other members of the judiciary and legal profession.

Training may be offered on a voluntary or mandatory basis and may extend to all judicial officers or be limited to judges. Training has often been provided through judicial training institutes, which are linked to the judiciary, the ministry of justice or the judicial council to varying degrees depending on the country. While each arrangement has its own advantages and disadvantages, some key principles can be advanced, including the need to involve judges in the training and in the design of the curriculum and the importance of covering key topics of ethics and proper management.

3.6 JIP.6: SECURITY OF TENURE

Tenure: Judges shall have guaranteed tenure until retirement or the expiration of their term of office where such exists. UNBP 12; Beijing 18

Both life tenure and term tenure have their advantages and disadvantages. While there is no consensus as to which is preferable, there seems to be one on the need for terms which are sufficiently long and secure to insulate judges from outside pressure. In a 1999 report on Guatemala, the UN Special Rapporteur on the Independence of Judges and Lawyers noted that five-year terms did not provide sufficient security of tenure to judges and recommended extending the terms to ten years.²

² See, Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, 1999 Visit to Guatemala

3.7 JIP.7: FAIR AND EFFECTIVE ENFORCEMENT OF JUDGMENTS

Fair and effective enforcement of judgments: Enforcement proceedings are an integral part of the trial for the assessment of the reasonableness of the length of proceedings but also in terms of access to justice, of the right to an effective remedy and of assessing the effectiveness of the fair trial guarantees of the European and Inter-American Conventions of Human Rights.³

The European Court of Human Rights has been the most active in defining the limits and contents of the right to a fair trial and judicial independence and has interpreted extensively the provisions of article 6(1). Its case law covers multiple issues affecting both criminal and civil or commercial trials and while there is no mention of the enforcement of judgments in the ECHR, the European Court recent case law has linked the fair and effective enforcement of judgments to the right to a fair trial within a reasonable time and to the right of access to justice.⁴ In a recent case, the Inter-American Court of Human Rights has also ruled that the failure to enforce final court judgments violated the right to judicial protection and to an effective remedy for violations of rights protected by the Convention under article 25 of the Convention.⁵

3.8 JIP.8: JUDICIAL FREEDOM OF EXPRESSION AND ASSOCIATION

Freedom of expression and association: Judges enjoy freedom of expression, belief, association and assembly, provided that in the exercise of such rights they conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. UNBP 8 & 9; Beijing 8 & 9

Judges, like any other citizen, should enjoy the freedom of expression and association. Their rights may however be limited to the extent necessary to preserve the independence, impartiality and integrity of the judiciary.

³ See, *inter alia*, *Silvia Pontes v. Portugal*, Judgment of March 23, 1994, Eur. Cour H.R., Series A no.286-A; *Zappia v. Italy*, Judgment of September 26, 1996, Eur. Cour H.R., Reports 1996-IV; *Di Pede v. Italy*, Judgment of September 26, 1996, Eur. Cour H.R., Reports 1996-IV; *Hornsby v. Greece*, Judgment of March 19, 1997, Eur. Cour H.R., Reports 1997-II; *Immobiliare Saffi v. Italy*, Judgment of July 19, 1999, Eur. Cour H.R., Reports 1999-V; and “*Cinco Pensionistas*” v. *Perú*, Judgment of February 28, 2003, Inter-Am. Ct. H.R., Series C No. 98 (2003)

⁴ *Hornsby v. Greece*, Judgment of March 19, 1997, Eur. Cour H.R., Reports 1997-II “Article 6(1) ... embodied the ‘right to a court’, of which the right to access, that is the right to institute proceedings before courts in civil matters, constituted one aspect. However, **this right would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.** It would be inconceivable that article 6(1) should describe in detail procedural guarantees afforded to litigants ... without protecting the implementation of judicial decisions; to construe article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law ... **Execution of a judgment given by any court therefore had to be regarded as an integral part of the “trial” for the purposes of article 6;** moreover, the Court had already accepted this principle in cases concerning the length of proceedings.” [Emphasis added].

⁵ “*Cinco Pensionistas*” v. *Perú*, Judgment of February 28, 2003, Inter-Am. Ct. H.R., Series C No. 98 (2003)

3.9 JIP.9: ADEQUATE QUALIFICATIONS AND OBJECTIVE AND TRANSPARENT SELECTION PROCESS

Qualifications and selection: Persons selected for judicial office shall be individuals of integrity and ability with appropriate training and qualifications in law. Any method of judicial selection shall be based on objective factors defined by law, in particular ability, integrity and experience, and shall include safeguards against discrimination and improper influences. UNBP 10, 11 & 13; UCJ 9; CoE I(2)(c); ECSJ 4 & 5; Beijing 11-16

International and regional human rights conventions require competent, independent and impartial judges. Entry into the judiciary is controlled by the selection process. In order to guarantee a high degree of integrity and impartiality, judges should be selected according to a transparent merit-based process which relies on a clearly set combination of objective and subjective criteria and requires adequate qualifications. There is an emerging consensus for more civil society participation in and monitoring of the judicial selection process, including broader participation from the legal community, in order to depoliticize and legitimize the process and to reinforce the checks and balances on the selecting and appointing entities.

3.10 JIP.10: OBJECTIVE AND TRANSPARENT JUDICIAL CAREER PROCESSES (EVALUATION, PROMOTION AND TRANSFER)

Promotion: Any method of judicial promotion shall be based on objective factors defined by law, in particular ability, integrity and experience, and shall include safeguards against discrimination and improper influences. UNBP 10, 11 & 13; UCJ 9; CoE I(2)(c); ECSJ 4 & 5; Beijing 11-16

Guaranteeing an objective and transparent judicial selection process will not protect judicial integrity and independent unless the other processes of the judicial career, especially the promotion and transfer processes, are equally regulated. In order to guarantee a high degree of integrity and impartiality, judges should be evaluated, promoted and transferred according to transparent merit-based processes which rely on a clearly set combination of objective and subjective criteria and require adequate qualifications and experience. There is an emerging consensus for more civil society participation in the general monitoring of the judicial career processes, especially broader participation from the legal community, in order to discourage politicization, to promote professionalism, civil service reform and career incentives and to reinforce the checks and balances on the evaluating and promoting entities.

3.11 JIP.11: OBJECTIVE, TRANSPARENT, FAIR AND EFFECTIVE DISCIPLINARY PROCESS

Discipline and removal: Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties. Judges have a right to a fair and expeditious hearing concerning complaints or charges against them as well as to an independent review of the proceedings. All disciplinary, suspension and removal proceedings shall be determined in accordance with established standards of judicial conduct. UNBP 17-20; CoE VI; UCJ 11; Beijing 17, 22-30

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In order to guarantee a high degree of integrity and impartiality, the objectivity and transparency of judicial career processes must extend to the disciplinary process. Judges should be disciplined according to transparent merit-based processes which rely on a clearly set combination of objective and subjective criteria and require adequate qualifications and experience. It is also important that disciplinary actions, offenses and sanctions be clearly defined and fairly implemented in processes respectful of the due process rights of judges.

The disciplinary process must not only be objective and transparent but also fair and effective. Indeed, judges against whom disciplinary charges are brought must be given an opportunity to defend themselves in a fair and speedy hearing in which their due process rights are respected. Disciplinary and other sanctions must be fairly and effectively applied once a breach of discipline has been proven.

3.12JIP.12: LIMITED JUDICIAL IMMUNITY FROM CIVIL AND CRIMINAL SUIT

Immunity: Judges shall enjoy personal immunity from civil suits for acts or omissions in the exercise of their judicial functions. UNBP 16

Judicial immunity is a very important component of judicial independence in that it protects individual judges from abusive civil, criminal and disciplinary actions. While some degree of immunity is necessary, it should not however be absolute. The scope and limits of judicial immunity must be clearly defined. Moreover, personal immunity does not interfere with the eventual liability of the judiciary as an institution. It is therefore also important to define the role of the State regarding the duty to compensate the victims of judicial errors.

3.13JIP.13: CONFLICT OF INTEREST RULES

Conflict of interest: The judge must not carry out any other function, whether public or private, paid or unpaid, that is not fully compatible with the duties and status of a judge. UCJ 7

Due to the likelihood of conflicts of interests, aspects of each of the activities listed below are prohibited under the Bangalore Code and other documents⁶:

- Political party membership
- Position of authority within a political party
- Political office within the executive branch
- Administrative office within the executive branch
- Candidacy in a national, regional and/or local election
- Elected office in parliament
- Elected office in regional representative entities
- Elected office in local government
- Business activities
- Financial interests
- Private practice of law

⁶ The degrees to which these activities or only some aspect of them are prohibited vary from one document to the other and among countries. The most comprehensive and detailed effort regarding conflicts of interests and prohibited activities for judges is the Bangalore Code which draws mainly from Codes of Conduct in Anglophone African and Asian countries.

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- Prosecutorial and investigative functions.

Ethical rules and personal restrictions on conduct and activities acceptable from ordinary citizens are necessary to protect judicial independence and impartiality and should be accepted freely by judges. Clear judicial and professional ethical principles must be respected. They should be designed to include, *inter alia*, effective conflict of interest rules which warrant restrictions on the activities undertaken and the interests retained by judges and members of their family.

3.14JIP.14: INCOME AND ASSET DISCLOSURE

Asset disclosure: A judge shall make such financial disclosures and pay all such taxes as are required by law. Bangalore Code rule 1.23.

In the fight against corruption, financial transparency has become a central issue. Over the last decade, the disclosure of assets and incomes of public officers has become a core issue. This obligation was directed primarily to elected officials, as legislators, and to appointed officials, as well as those in central government. More recently, the issue of the disclosure of assets and income sources of judges has been raised in many countries.

3.15JIP.15: HIGH STANDARDS OF JUDICIAL CONDUCT AND RULES OF JUDICIAL ETHICS

Judicial conduct Judges are required to exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence. Bangalore Code rule 1.6

“Many countries have adopted codes of ethics as part of a judicial reform process. Codes of ethics are valuable to the extent that they stimulate discussion and understanding among judges, as well as the general public, on what constitutes acceptable and unacceptable conduct. They may also inspire public confidence that concrete steps are being taken to improve the integrity of the judiciary.”⁷

3.16JIP.16 OBJECTIVE AND TRANSPARENT COURT ADMINISTRATION AND JUDICIAL PROCESSES

Judicial administration: Judicial administration should be carried out by an independent body with substantial judicial representation unless another mechanism deeply rooted in tradition exists. The administration of the judiciary must be organized in an objective manner that does not interfere with judicial independence. Case assignment is a matter of internal administration. UCJ 11; UNBP 14.

While it is important to ensure that the judicial career processes are objective and transparent, it is equally important to promote objective and transparent court administration and judicial processes. Transparency in court management, court staff oversight, information management and case assignment will translate in more open

⁷ *Guidance for Promoting Judicial Independence and Impartiality*, 2001, USAID Technical Publication

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judicial processes and judges who are more accountable to the public. In addition, publicity and transparency should be injected into judicial processes in order to increase the awareness of the public and to facilitate monitoring by civil society.

3.17JIP.17: JUDICIAL ACCESS TO LEGAL AND JUDICIAL INFORMATION

Access to information: In deciding cases, judges are subject only to the law. UCJ 3

Given that judges must decide cases in accordance with the law, they must have adequate and reliable access to legal and judicial information. Available information should include legal and judicial materials likely to affect judicial rulings, legal and judicial materials affecting the status and functions of judges, judicial vacancies, criteria applicable to judicial promotions and disciplinary processes, ethics rules, etc.

3.18JIP.18: PUBLIC ACCESS TO LEGAL AND JUDICIAL INFORMATION

Publicity: Legislation, judicial information and court decisions shall be made available to the public.

The public must have adequate and reliable access to quality legal and judicial information. Available information should include laws, court and procedural information, court decisions, judicial vacancies, criteria applicable to judicial selections, promotions and disciplinary processes, etc.

4 OVERVIEW OF KEY DEVELOPMENTS AND CHARACTERIZED VIOLATIONS AND ABUSES: KEY CASES AFFECTING JUDICIAL INDEPENDENCE

Key issues, indicators and guidance:

- Summary review of judicial appointments, disciplinary actions and removals of judges made over the course of the last year
- Highlight key abuses and violations of judicial independence, including threats to judges and direct/indirect abuses and interferences as well as threats to journalists, human rights activists, lawyers, judicial personnel and the families of judges.
- For the purposes of highlighting key abuses and violations of judicial independence, special focus will be put on physical and career safety, judicial corruption, the adjudication and enforcement of judgments against the State, and freedom of speech and association rights.
- Highlight specific cases – impunity or effective redress; lack of judicial independence or example of judicial independence – including cases before regional/international courts and commissions
- Thematic analysis – maybe we could include a topic, analyzed more closely and varying yearly, such as judicial integrity or any other specific right under international/regional conventions

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5 PRIORITIZED ACTION PLAN

Highlight the most important problems, priority reforms and suggested remedies and suggested remedies and recommendations.

6 LIST OF ACRONYMS

ACHPR – African Charter of Human and People’s Rights (1986)

Bangalore – The Bangalore Principles of Judicial Conduct (2002)

Beijing – Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, “Beijing Principles” (1995)

CoE – Council of Europe Recommendation on the Independence, Efficiency and Role of Judges (1993)

ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

ECSJ – European Charter on the Status of Judges (1998)

IACHR – Inter-American Convention of Human Rights (1978)

ICCPR – International Covenant on Civil and Political Rights (1966)

UCJ – Universal Charter of the Judge (1999)

UNBP – UN Basic Principles on the Independence of the Judiciary (1985)

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ANNEX 1: JUDICIAL INDEPENDENCE STANDARDS AND PRINCIPLES *

GOVERNMENTAL INSTRUMENTS

UN

- *Universal Declaration of Human Rights*, 12/10/1948, United Nations, GA resolution 217A (III)
- *International Covenant on Civil and Political Rights*, 12/16/1966, United Nations, GA resolution 2200A (XXI), 21 UN GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force on March 23, 1976
- *UN Basic Principles on the Independence of the Judiciary*, 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 08/26-09/06/1985, GA resolutions 40/32 of 11/29/1985 and 40/146 of 12/13/1985, UN GAOR, 40th Session, Supp. no.53, UN Doc. A/40/53 (1985)
- *UN Basic Principles on the Role of Lawyers*, 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 08/27-09/07/1990
- *UN Guidelines on the Role of Prosecutors*, 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 08/27-09/07/1990

Council of Europe

- *European Convention on the Protection of Human Rights and Fundamental Freedoms*, 11/04/1950, Council of Europe, European Treaty Series no.5
- *Recommendation no.R(94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges*, 10/13/1993, 518th Meeting of the Ministers' Deputies, Council of Europe
- *European Charter on the Status of Judges*, 07/08-10/1998, Council of Europe

Organization of American States

- *American Declaration of the Rights and Duties of Man*, 1948, OAS res. XXX, Ninth International Conference of American States, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992)
- *Inter-American Convention on Human Rights*, 11/22/1969, OAS Treaty Series No.36, 1144 UNTS 123, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), entered into force on July 18, 1978

Organization of African Unity

- *African Charter on Human and People's Rights*, 06/27/1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on October 21, 1986

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NON-GOVERNMENTAL AND INTER-JUDICIAL INSTRUMENTS

Judges' Associations and Bar Associations

- *Code of Minimum Standards of Judicial Independence, "New Delhi Standards"*, New Delhi, India, 1982
- *Judges' Charter in Europe*, 03/20/1993, European Association of Judges
- *Universal Charter of the Judge*, 11/17/1999, General Council of the International Association of Judges
- *The Bangalore Principles of Judicial Conduct*, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Roundtable Meeting of Chief Justices held at the Peace Palace, The Hague, the Netherlands, 11/25-26/2002

International Commission of Jurists

- *Draft Principles on the Independence of the Judiciary, "Syracuse Principles"*, 1981 (in collaboration with the International Association of Penal Law)

1st World Conference on the Independence of Justice

- *Montreal Universal Declaration on the Independence of Justice*, 1983

LAWASIA Human Rights Standing Committee

- *Independence of the Judiciary in the LAWASIA Region: Principles and Conclusion, "Tokyo Principles"*, Tokyo, Japan, 1982

Inter-Judicial Conferences

- *Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, "Beijing Principles"*, 1995, 6th Conference of Chief Justices of Asia and the Pacific Region
- *Caracas Declaration*, 03/04-06/1998, Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts, Caracas, Venezuela
- *Recommendations of the First Arab Conference on Justice, "Beirut Declaration"*, 06/14-16/1999, Conference on "The Judiciary in the Arab Region and the Challenges of the 21st Century", Beirut, Lebanon

IFES Judicial Independence Conferences

- *Agreement of the Three Branches of Government of Honduras to Strengthen Judicial Independence and Impartiality*, 04/10/2002, Regional Conference on "Promoting Judicial Independence and Impartiality", Tegucigalpa, Honduras
- *Blantyre Rule of Law/Separation of Powers Communiqué*, 01/31/2003, IFES Rule of Law/Separation of Powers Conference, Blantyre, Malawi
- *Cairo Declaration on Judicial Independence*, 02/24/2003, The Second Arab Justice Conference "Supporting and Advancing Judicial Independence", Cairo, Egypt

* An IFES Occasional Paper analyzing these conventions, standards and guidelines, as well as relevant case law of international and regional courts and commissions is available at IFES upon request.

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ANNEX 2: IFES RULE OF LAW TOOLKIT

IFES Rule of Law Checklists:

- Transparency Principles
- Accountability Principles
- Enabling Environment Principles
- Key Obstacles to Judicial Independence
- Anti-Discrimination Issues
- Barriers to Enforcement
- Judicial Independence Indicators

IFES White Papers:

- Conflict of Interest
- Income and Assets Disclosure
- Judicial Immunity
- Judicial Councils
- Enforcement Country Papers

Global Bibliographies:

- Lessons Learned
- Rule of Law Programs
- Web Resources – Judicial Independence, Rule of Law, Enforcement
- Global Enforcement Bibliography
- Legal and Judicial Reform and Small Business Bibliography

Other Background Information on Judicial Independence/Rule of Law

- International and Regional Standards – Judicial Independence, Criminal Justice
- Case Law from International and Regional Courts – Judicial

Independence, Enforcement, Criminal Justice

- Human Rights and Anticorruption Obligations

Judicial Independence Data:

- Comparative Data from the Judicial Independence Guide
- Survey Results

IFES Projects/Reports: Executive Summaries:

- Rule of Law
- Judicial Independence
- Haiti Constituency Building Project
- Global Enforcement Project
- Legal Barriers to Small Business Development: Peru Case Study
- Criminal Justice Reform Strategies
- Rule of Law Toolkit Overview

Matrices:

- Judicial Independence Issues
- Enforcement against the State Issues
- Enforcement of Civil and Commercial Judgments Issues
- IFES Judicial Integrity Principles

Conferences/Surveys:

- Strategic Survey Instruments
- Models for Judicial Independence/Rule of Law Regional Conferences
- Conference Declarations (Cairo, Honduras and Malawi)

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ANNEX 3: THE BLANTYRE RULE OF LAW/SEPARATION OF POWERS COMMUNIQUE

TO THE LEADERSHIP AND PEOPLE OF THE SADC REGION

Preamble

1. There is a universal need in every constitutional democracy for the structure of the state to consist of three main institutions, or branches:
 - (a) A government with executive powers
 - (b) An elected legislature to represent the people in making laws and in exercising oversight over the policies and decisions of the government
 - (c) A system of courts and judges to administer civil and criminal justice and ensure adherence to the constitution.
2. The participants at the Rule of Law/Separation of Powers Conference, held at Blantyre, Malawi, from 28 to 31 January 2003, have examined in depth the extent to which good governance and the rule of law depends upon certain fundamental norms, in particular the separation of powers and the independence of the judiciary.
3. What renders the conference of particular significance is that it was attended by members of the executive, legislative and judicial branches, as well as many representatives of civil society, not only of the Republic of Malawi, but also of many countries in the SADC region, including Namibia, Zambia, Democratic Republic of Congo, South Africa and Angola. Civil society representatives included representatives of the media, of human rights organizations, law societies and of other non-governmental bodies. The conference was also attended by experts from Canada, the USA and the United Kingdom, with African and global experience in government and international legal development.⁸
4. After extensive discussion, both in plenary sessions and after sharing experiences and lessons and best practices around the region and beyond, participants at the Blantyre conference have reached a clear consensus on a number of key separation of powers issues confronting many countries in the SADC region.

Underlying Principles

5. The foundation of any democratic form of governance is citizen participation, observance of the constitution and the rule of law.
6. The three branches of a state exercise different functions, but they exist within a single state and they share common goals in promoting the rule of law, peace, security, stability and welfare of the population whom they all serve.

⁸ Conference participants would like to acknowledge the important contributions of Professors Keith Henderson and Anthony Bradley, from the USA and the United Kingdom, as well as Judge Sandra Oxner, from Canada.

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7. Through their interaction, these three branches of the state enable democracy to be exercised under the rule of law.
8. There is no single accepted division of powers, personnel and responsibilities governance model as between the legislative and the executive branches of the state, as can be seen by the differing constitutions of many democracies. But within a democratic society founded upon the rule of law, these two branches must respect the independence of the judiciary, and provide adequate resources to enable it to perform its constitutional duties as the final arbiter of the constitution.
9. For its part, the judiciary must consciously respect the constitutional roles of the legislative and executive and make every effort to be accountable to the public and true to its own constitutional role.
10. These distinct branches of the state function within a system of mutual checks and balances. It is inevitable that healthy tensions develop between the three branches of state government, but these tensions must not develop into a dangerous struggle for power as this would never be for the benefit of the whole people.
11. Such tensions particularly run the risk of exceeding acceptable limits where a state's constitution and democratic institutions are relatively new, where there are profound economic difficulties, or where there are deep-rooted transitional divisions within a state that make it difficult to achieve the goal of sustainable development within a modern democratic society.
12. If the relations between the executive and the judiciary break down, it is likely that the administration of justice in accordance with the rule of law will be impeded. The cause of justice itself is threatened if the executive or legislative branches seek to erode the essential independence of the judiciary, for example, by impugning the legitimacy of decisions that the judiciary have made within the proper sphere of the courts. Such erosion threatens the underlying principle that government ought to be conducted according to law.
13. After extensive discussion, both in plenary sessions and in smaller workshop groups, participants at the Blantyre Conference have reached a clear consensus on a number of key separation of powers issues confronting the SADC region.

Key Consensus Findings

14. The foundation of any democratic form of governance is citizen participation and observance of the constitution and the rule of law.
15. In many countries in the SADC region, the judicial branch remains relatively weak, compared to the executive and legislative branches, which hampers it from fulfilling its constitutional responsibilities to the people. Much of this is due to a lack of basic resources and a lack of sufficient political support.

Universal Principles of Judicial Independence for the SADC Region

16. With the aim of strengthening the ability of the judiciary to perform its constitutional duties, conference participants reached a consensus on a set of universally accepted

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international and constitutional judicial independence norms that should be implemented in countries throughout the SADC region:

- (a) There shall not be any inappropriate interference with the judicial process by either public officials of other branches of government or private individuals or entities. Nor shall judicial decisions be subject to revision, except upon appellate review.
- (b) Judges shall perform their duties free from improper influences and without undue delay. They shall ensure that judicial proceedings are conducted fairly and that the rights of parties are respected.
- (c) Not only must judges be impartial, they must be seen by all to be impartial. Accordingly, in the exercise of their rights to freedom of expression, belief, association and assembly, judges shall conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
- (d) Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction of the ordinary courts.
- (e) Governments are obliged to provide adequate resources to enable the judiciary to perform its functions properly. Resources and career incentives at present, including salaries, benefits and court facilities, are not adequate and they should never be reduced.
- (f) Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection or promotion shall be based on objective factors, in particular, ability, integrity and experience, and shall include safeguards against improper influences.
- (g) Judges shall have guaranteed tenure until retirement or the expiration of their term of office, where such exists.
- (h) Judges should enjoy personal immunity from civil suits for acts or omissions in the exercise of their judicial functions.
- (i) Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that render them unfit to discharge their duties. Judges have the right to a fair and expeditious hearing concerning complaints or charges against them. All disciplinary, suspension and removal proceedings shall be determined in accordance with established standards of judicial conduct.
- (j) Legislation, judicial information and court decisions shall be made available to the public.
- (k) Decisions of the courts shall be enforced fairly and effectively.

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Key Recommendations

17. **The Rule of Law.** Governmental and Non-Governmental groups must vigilantly safeguard the independence of the judiciary and the rule of the law. The three branches of government, individually and collectively, all have a solemn and legal responsibility to respect and uphold a state's constitution.
18. **Implementation and Monitoring.** Implementing these goals and giving real meaning to the concept of the rule of law and judicial independence will require on-going attention and oversight by individuals, governmental and non-governmental groups, as well as an independent media.
19. **Collective Societal Responsibility.** Therefore, participants of this conference call upon the leadership of each country's three branches of government, as well as civil society and the media, to make every effort to ensure these constitutional principles are respected and implemented in practice.
20. **Country Working Groups .** Each country should support the creation of Country Rule of Law Working Groups that bring together well respected representatives of all three branches of government, as well as civil society, to promote, monitor and annually publicly report on each country's progress in implementing these principles.
21. **Regional Working Groups .** SADC is also respectfully but urgently requested to create a Rule of Law Working Group that has sufficient resources to undertake this important regional task, as well as to promote other fundamental rule of law reforms throughout the SADC region. Regional support, including country and comparative public reporting and monitoring, would further promote the implementation of these principles.
22. **Inter-Related Reform Agenda.** In this regard, select committees of the Blantyre conference made a number of additional legal and policy recommendations related to the implementation of the rule of law and judicial independence. They are included as an important part of the Blantyre Conference Report and should be given serious consideration by Country and SADC Working Groups, reformers and policymakers and the people of the SADC region.
23. **Open Government.** The Blantyre Conference Report recommendations highlight the need to promote open government laws and policies, such as those related to access to information, open meeting laws and whistle-blowing that are necessary to enable meaningful public participation and informed oversight of the fair and effective implementation of all reforms.
24. **Universally Accepted Constitutional Norms.** While the judicial independence principles and recommended reforms are not exhaustive by any means, the consensus was that these were all fundamental, universally accepted and relatively non-controversial. Further, participants believed their implementation would serve as a catalyst and useful strategic guidepost for moving a rule of law agenda forward in the SADC region.

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25. **Political and Financial Support.** The donor community at-large is called upon to respond to this important need throughout the SADC region. Governmental and International political and financial support for Country and Regional working groups, other reform initiatives, and meaningful civil society engagement will be necessary in the current environment.
26. **Sustainable Political, Economic and Legal Reform.** Country and regional support for the practical implementation of these constitutional and international principles will promote country and regional sustainable economic and political reform, stability, trade and investment, a democratic system of checks-and-balances and anti-corruption efforts through-out the SADC region.

The Blantyre Rule of Law/Separations of Powers Communiqué was approved for release to the people and leadership of the SADC region by wide acclamation and is hereby publicly submitted for immediate consideration the 31st day of January 2003.⁹

Attested to by: The Honorable Chief Justice Leonard Unyolo, Malawi Supreme Court of Appeal.

⁹ Blantyre Conference participants urge that these principles be incorporated into any new draft constitutions or constitutional amendments under consideration in the SADC region.

