Corruption in the Judiciary:

Balancing Accountability and Judicial Independence

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Abstract

A non-corrupt judiciary is a fundamental condition for the endorsement of rule of law and the ability to guarantee basic human rights in society. The judiciary must therefore be an independent and fair body that fights corruption, not the other way around. This essay systematizes different binding and non-binding international, and to some extent regional, norms and standards regarding corruption in the judiciary and judicial independence, and presents potential factors and effects of judicial corruption, through an inventory of documents recognized by organizations such as the United Nations and the Council of Europe. Further, the essay presents different anti-corruption strategies and the dilemma of implementing such strategies with regard to judicial independence. The advantages and disadvantages of different anti-corruption strategies are reviewed through the study of some successful and unsuccessful examples.

There are several definitions of corruption, this essay emanates from the definition of ‘abuse of office for personal or private gain’, a definition that is wide but yet well recognized. The factors of judicial corruption are many and often overlapping, but they vary from state to state and must hence be analyzed individually to find the factual reasons for what generates corruption. The effects are detrimental and break down the very core of rule of law and corrupt judges neglect fundamental principles such as equality, impartiality, propriety and integrity. With regard to the different factors and effects, the norms and standards, and the anti-corruption strategies, a discussion follows about how to rid the judiciary from corruption with preservation of the respect of judicial independence. The discussion also raises the predicament that malpractice of various fundamental principles e.g. judicial independence can occur and further distort unhealthy judiciaries. The main conclusion regarding anti-corruption strategies is that they must be carefully weighed against the principle of independence.
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List of Acronyms

CCPC  Committee on Crime Prevention and Control
CiLCC  Civil Law Convention on Corruption
CoE  Council of Europe
CrLCC  Criminal Law Convention on Corruption
ECHR  Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR  European Court of Human Rights
GPAC  Global Programme against Corruption
GRECO  Group of States against Corruption
ICAC  Independent Commission against Corruption (Hong Kong)
ICCPR  International Covenant on Civil and Political Rights
JP  Justice of the Peace (Liberia)
NGO  Non-Governmental Organization
OAS  Organization of American States
TI  Transparency International
UDHR  Universal Declaration of Human Rights
UN  United Nations
UNCAC  United Nations Convention against Corruption
UNECA  United Nations Economic Commission for Africa
UNHCHR  Office of the United Nations High Commissioner for Human Rights
UNMIK  United Nations Interim Administration Mission in Kosovo
UNMIL  United Nations Mission in Liberia
UNODC  United Nations Office on Drugs and Crime
1 Introduction

_Equal treatment before the law is a pillar of democratic societies. When courts are corrupted by greed or political expediency, the scales of justice are tipped, and ordinary people suffer. Judicial corruption means the voice of the innocent goes unheard, while the guilty act with impunity._

–Huguette Labelle, Chair of Transparency International (TI), 2007

Corruption damages judicial systems and thousands of people worldwide are denied access to justice and protection of their individual rights. A well functioning government, with the citizens’ best in mind, requires not only the rule of law, but also an independent judiciary that enforce the law impartially and equally. When the judiciary is corrupt, it facilitates corruption in other sectors of government and it transmits to the general public the message that corruption is accepted.¹ In such countries judicial corruption might even be socially accepted. ‘Why hire a lawyer when you can buy a judge?’ is a famous saying in Kenya.²

TI’s Global Corruption Barometer of 2006 surveyed 59,661 persons in 62 states and 8 per cent of respondents who had been in contact with the judiciary affirmed that they had paid a bribe in order to receive a positive decision in a judicial case.³ In Africa and Latin America, the percentages were as high as 21, respectively 18 per cent.⁴ Numbers are however irrelevant from the victim’s viewpoint. Judicial corruption violates the right to fair trial, which is essential for an effective implementation of all other human rights.

Judicial independence is a necessity for a non-corrupt judiciary, but it is not enough, since an independent judiciary itself might be corrupt. Judges must also be impartial, honest and competent.⁵ It is hard to exaggerate the negative consequences of judicial corruption, both nationally and internationally: combating transnational crime and terrorism becomes unfeasible; it diminishes economic and human development; and it denies citizens their long recognized right to impartial dispute settlements.⁶

1.1 Purpose

An independent, impartial, fair and equitable legal system and a non-corrupt judiciary is the core of the rule of law, human rights implementation, supervision of the executive, economic development and recovery after war.⁷ Corruption in the judiciary is one of the biggest threats against effective protection of rights, since people depend on independent and impartial courts when claiming breaches of individual rights. Courts have an enormous responsibility with their monopoly to resolve all conflicts of judicial nature and corrupt courts cannot take that

¹ TI, Global Corruption Report 2007, p. XVI and XXI.
² Ibid. p. 4.
³ TI, Report on the Global Corruption Barometer 2006, Figure 1.
⁴ TI, Global Corruption Report 2007, Table 1, p. 11.
⁵ Ibid. p. 16.
⁶ Ibid. p. XXI.
The effective enforcement of law, including human rights regulations, depends in large part on the independence and impartiality of the judiciary. If the judiciary is corrupt, then many other rights lose their significance; a corrupt judiciary leads to individual rights becoming just rights on paper. The judiciary is the ultimate upholder of individual rights and it is therefore supposed to fight corruption, not be a part of it.

The seriousness of judicial corruption shows through the policies and methods adopted by many international governmental organs and non-governmental organizations (NGOs), to name a few: the United Nations (UN), the World Bank, the Council of Europe (CoE), the Organization of American States (OAS), TI and the Group of States Against Corruption (GRECO).

Anti-corruption strategies must be implemented carefully, since they can be used against their own purpose. Politicians may use them as a tool to penetrate the judiciary with their own agenda. Therefore, even if corruption in the judiciary is so corrosive, the fight against it cannot be carried out without bearing in mind the consequences; that it will collide with fundamental rule of law principles. In order to rid the court system from corrupt behaviour, one has to consider intrusion on principles such as judicial independence and judicial immunity.

The purpose of this essay is to systematize the different norms, standards and strategies regarding corruption in the judiciary in relation to judicial independence, and the response from international actors. The purpose is moreover to consider accountability and to look into the dilemma of strategies implemented towards the aim of strengthening judicial integrity, in particular how anti-corruption norms, standards and strategies can be balanced against the principle of judicial independence.

The questions that will be in focus include:

1. What are some of the most relevant international norms and standards concerning corruption in the judiciary and judicial independence?
2. What are some of the mainly discussed factors of judicial corruption and what effect can judicial corruption have on the rule of law and essential principles concerning a fair and independent judiciary?
3. What are some of the most salient internationally supported strategies to eliminate judicial corruption and how do they affect the principle of judicial independence?

1.2 Method and Demarcation

This essay will inventory some of the main international and regional norms and standards regarding corruption in the judiciary, which will be systemized by their scope and relevance. The inventory and systematization will also include some of the main norms and standards concerning judicial independence and codes of conduct for judges. The international and regional norms and standards regarding corruption in the judiciary and judicial independence consist not only of legally binding legislations, but also of a great amount of non-binding documents. Therefore also declarations, charters and other non-binding instruments will be

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9 UNCAC, Article 11.
presented. Case-law is primarily derived from the European Court of Human Rights (ECtHR), since it is the only transnational court handling individual human rights cases. Case-law from certain national courts will also be used in order to clarify important principles.

The essay will also introduce some of the different anti-corruption strategies, toolkits and standard-setting programs that seem to be used frequently. Their effect will be evaluated through a few examples of states that have applied them. The examples presented reflect the dilemma of the clash between anti-corruption strategies and important principles based on the rule of law.

The widest term of corruption in the judiciary will be used throughout the essay, namely the abuse of office for personal or private gain, since corrupt behaviour can have different faces and the outcome can vary in different situations, all such behaviour will be included.

The rule of law definition of the UN, consisting of procedural, institutional, and substantive principles, will be used in this essay. The term seems to be controversial among different cultures, but the UN definition seems to generally mirror the international notion.

The international norms and standards of corruption in other parts of state administrations than the judiciary will not be presented, since corruption in the judiciary is one of the most severe threats to effective human rights implementation. Corruption therein does severe damage, since other justice institutions, such as prosecutors and police, depend on the judiciary’s correct behaviour. It is therefore important to recognize that changes therein can guide other institutions to eliminate corruption.

There are several regional norms and standards regarding corruption in the judiciary and judicial independence. The CoE’s standards will be closer revised, since they are among the most developed and they are widely recognized in comparison with other regional instruments. The CoE conventions that will be presented are also open for signatories outside of Europe. Other regional norms and standards will be used in a less conspicuous way, e.g. when trying to find common consensus of terms.

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13 CrLCC, Article 33 and CiLCC, Article 16.
2 Factors and Effects of Judicial Corruption

There is no doubt that a corrupt judiciary distorts the effective implementation of rights and obligations. How far the consequences of corruption reach is hard to measure. Even so, it is difficult to overstate the negative impacts of judicial corruption, since the damages on society are so grave: corruption segregates communities, violates human rights, makes the fight against transnational crime impossible, reduces trade, economic and human development and most significantly, it rejects persons from fair dispute settlements. The effects are harmful and many and the factors vary from state to state. However, there are factors that form patterns and the detrimental effects of judicial corruption on some fundamental principles are evident. Before looking into the international and regional norms and standards regulating corruption in the judiciary, definitions, possible factors and effects of it will be presented.

2.1 Defining Corruption

There is no absolute, general definition of the term corruption that is universally accepted. Nevertheless, corruption has been defined, although somewhat vague, in such terms as abuse of office for personal or private gain. The common consensus in doctrine and in international standards seems to be that corruption is divided into grand and petty corruption. Grand corruption involves the highest level of a government, while petty corruption is the exchange of smaller amounts of money or other favours, e.g. employment in minor positions given to relatives. The central difference between the two is that grand corruption is a form of destruction of the governmental functions while the latter exists therein.

The United Nations Convention against Corruption of 2003 (UNCAC) does not define corruption as such, but it lists certain acts of corruption; intentional active and passive bribery, deliberate embezzlement, trading in influence, abuse of functions and illicit enrichment. However, the list of the corrupt behaviour just mentioned is not exhaustive; State Parties may implement measures that go further than the UNCAC in order to prevent and combat corruption. Other practices that are considered as corruption in other instruments are extortion, theft, fraud, favouritism, nepotism and clientelism or other conducts that create or exploit conflicting interests. These conducts are overlapping in some senses and sometimes they fall outside the scope of corruption. In the Civil Law Convention against Corruption of 1999 (CiLCC) of the CoE, for example, the term is explicitly defined for the purpose of that specific convention, namely: “requesting, offering, giving or accepting,...

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14 TI, Global Corruption Report 2007, p. XXI
15 See e.g. TI’s definition of corruption for their Corruption Perception Index, available at: http://www.transparency.org/policy_research/surveys_indices/cpi/2007/faq#general2 (100510) and UNECA, Deepening the Judiciary’s Effectiveness in Combating Corruption, p. 2.
16 UNODC, Anti-Corruption Toolkit, p. 10-11.
18 We have used the terms active and passive bribery according to e.g. Articles 2 and 3 of the CiLCC, namely promising, offering or giving (active) and request or receipt (passive) of any undue advantage that influence the exercise of his or her functions. In criminal law terminology those terms might be understood in a different way, but we will use the above presented, since it is the most common, according to UNODC, Anti-Corruption Toolkit, p. 11.
19 UNCAC, Articles 15 and 17-20.
20 UNCAC, Article 65.
22 Civil Law Convention against Corruption, CETS No. 174, adopted by the Council of Europe, Strasbourg 1999.
directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty”.

Even if corruption is not clearly defined, there seem to be a common consensus in international anti-corruption norms and standards that bribery is included in the term. It takes at least two persons involved for the bribery crime to be completed, but an act from either side of the transaction is enough for the crime bribery to be committed. Article 15 (a) of the UNCAC prohibits active bribery, more precisely, “The promise, offering or giving to public official, directly or indirectly, of an undue advantage, for the official himself or herself or for another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties” when committed deliberately. Article 15 (b) prohibits the mirror crime of active bribery; the acceptance or solicitation of a bribe or passive bribery. Article 17 of the UNCAC prohibits intentional “embezzlement, misappropriation or other diversion by a public official for his or her benefit … of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.”

On the basis of UNCAC and other international instruments24 judicial corruption can be understood as an act or omission that profit the judge, court staff or other persons involved in the judiciary and the behaviour leads to inappropriate or unjust court decisions. Such conduct can e.g. be payment or acceptance of bribes, extortion, embezzlement, threats, abuse of the procedural rules or other improper pressure that can affect the independence and impartiality of the judicial outcome by anyone that is involved in the decision-making process.25

2.1.1 Petty Corruption

The exchange of a sum of money or favour between a plaintiff and a judge in order to receive a positive outcome of the judicial matter is petty corruption, even if the amount of money is very small or the favour is diminutive.26 It does not have to be a trial situation. A report from Nigeria shows that the judicial corruption exists also in the administrative departments of the judiciary. Getting a certificate of nationality from the courthouse, a seemingly unproblematic right as a citizen, came about to be a hassle for a person not willing to pay an ‘unofficial charge’ to the person handling the certificates. The solution in that case was contacting a friend who worked as a judge at the court. After the informal meeting, the person had no problem to obtain the certificate of nationality. This case shows petty corruption at different levels of the judiciary and involving a number of persons, some of them willing and others unwilling to get involved in bribery.27 The existence of corruption within established court systems makes it impossible to uphold fundamental principles such as equality, integrity, impartiality and propriety. Arbitrary behaviour of court personnel at all levels makes it hard for the general public to trust the judiciary and the public notion of the judiciary is as important as the actual behaviour therein.28

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23 CiLCC, Article 2.
25 See e.g. TI, Global Corruption Report 2007, p. XXII and UNECA, Deepening the Judiciary’s Effectiveness in Combating Corruption, p. 2-3.
26 UNODC, Anti-Corruption Toolkit, p. 10.
27 G. Blundo & J-P Olivier de Sardan with N B Arifari & M T Alou, 2006, p. 137-140
28 UNODC, Commentary on the Bangalore Principles of Judicial Conduct, p. 57.
2.1.2 Grand Corruption

When the highest level of government gets involved in the work of the judiciary, the central functions of governance get distorted and grand corruption is a matter of fact.\textsuperscript{29} Political interference in judicial matters rocks the very core of judicial independence, since a judge might not have the possibility to refrain from corrupt behaviour without losing his or her position. If politicians are responsible for the appointment of judges, an easy way of controlling the judiciary is to appoint judges that will follow their political agenda. Unjustly blaming uncomfortable judges for involvement in petty corruption and that way ‘legitimately’ remove them from their office can be a weapon for dishonest politicians to destroy the independence of the judiciary. Politicians often need the support of the general public to remain in power and grand corruption is a way of controlling the judiciary and to some extent also the public perception thereof. Corruption on this level is often very well organized with transactions through networks that do not reveal the actual persons behind the offence.\textsuperscript{30}

2.2. Potential Factors

In order to combat corruption in the judiciary, a relevant step is to look at the causes leading to corrupt behaviour. There are no general factors, common for all states, which lead to a corrupt judiciary. On the contrary, the causes seem to be specific to each country.\textsuperscript{31} Theoretically, most countries have criminal laws prohibiting corruption in the judiciary and autonomous auditing mechanisms within the court system that control the registration of cases and the money coming from e.g. court fees, something that should make it harder to get away with corruption. Even so, those mechanisms do not entirely protect citizens from corrupt conduct of the judges and other court personnel, since such behaviour is often hidden or exerted in other ways. The more organized the corrupt behaviour becomes, the harder it is to fight it, since widespread systematic corruption after a while involves more people at different levels and it might even be accepted in society.\textsuperscript{32} Some of the potential factors of judicial corruption that have been lifted in different international legally binding and non-binding documents are:

- Low salaries
- Short terms of office
- Political instability and democratic insecurity
- Non-transparency in the recruitment process
- Absence of technological equipment
- Lack of transparency in the court administration and court procedures
- Complex procedural rules

One possible factor causing corruption in the judiciary can be that the salaries are so low that the judges, law clerks and administrative personnel at the courts are tempted to accept or solicit bribes in order to make their every day life better. Court personnel that earn less than a regular blue-collar salary are more likely to be encouraged to get involved in bribery.\textsuperscript{33} The

\textsuperscript{29} UNODC, Anti-Corruption Toolkit, p. 10-11.
\textsuperscript{31} P. Langseth & O. Stolpe, 2000, p. 6.
\textsuperscript{32} See e.g. UNODC, Anti-Corruption Toolkit, Tool #6 and E. Buscaglia, 2001, p. 4.
\textsuperscript{33} See e.g. E. Buscaglia & M. Dakolias, 2004, p. 203 and TI, Global Corruption Report 2007, p 5-6.
UN Anti-Corruption Toolkit\textsuperscript{34} recognizes low salaries as a problem and that adequate remuneration for persons working within the judiciary will make them less inclined to get involved in corruption.\textsuperscript{35} Other academics claim that the level of judiciary personnel’s wages and corruption in the judicial system are not always connected and that a raise of salaries is no good solution when trying to change the corrupt behaviour in judicial systems where corruption already is deeply rooted.\textsuperscript{36} One scholar argues that the cause to widespread corruption is a mistrusting culture and that economic inequality leads to greater distrust and consequently more corruption, but that a wage raise does not lead to less corruption.\textsuperscript{37}

Another cause that seems to have an effect on the judges’ likeliness to get involved in corruption is the terms of office. Judges that are appointed based on merits, instead of elected and judges that are guaranteed long terms of office seem to be less inclined to corrupt behaviour.\textsuperscript{38} Non-transparency in the recruitment process of judicial personnel is another possible cause to systematic corrupt behaviour, since the court staff then may be influenced by outer interests from the very beginning.\textsuperscript{39} Political instability and democratic insecurity are other potential factors that can affect the independence of the judiciary. Generally, it seems that states with high political competition and with a regular change in power tend to have a higher level of judicial integrity. In states with only one strong political force, that political party is more likely to try to get involved in the work of the judiciary in order to keep its political strength.\textsuperscript{40}

Absence of technological equipment, such as updated databases to keep record of judgements, can be another factor that makes it easier for corrupt behaviour to pass by unnoticed. Insufficient computer systems may also slow down the court processes which can lead to a higher level of corruption, since paying a bribe might be a way to get first in line.\textsuperscript{41} Another potential factor is lack of transparency; if corrupt behaviour is allowed to be hidden within complex procedural systems and the court rooms are closed for the press and therefore never communicated to the public, then it becomes easier to get away with corruption and harder to find evidence against it.\textsuperscript{42} The factors mentioned are not exhaustive nor do they overlap in all countries. To find out the real causes and what can be done to combat corruption, each country must be examined separately and thoroughly.\textsuperscript{43}

\textsuperscript{34} UNODC, Anti-Corruption Toolkit, The Global Programme against Corruption, 3\textsuperscript{rd} edition, Vienna, September 2004.
\textsuperscript{35} UNODC, Anti-Corruption Toolkit, p. 203.
\textsuperscript{37} E. M. Uslaner, 2005, p. 39.
\textsuperscript{39} Transparency in the recruitment process is highlighted in UNCAC, Article 7.1 (a) in conjunction with 2 (a).
\textsuperscript{40} M. C. Stephenson, 2003, p. 30.
\textsuperscript{41} UNODC, Anti-Corruption Toolkit, Tool #6.
\textsuperscript{42} UNCAC, Article 10. See also UNODC, Anti-Corruption Toolkit, p. 206-207 and F.B. William Kelly, 1995, p. 7.
\textsuperscript{43} P. Langseth & O. Stolpe, 2000, p. 6.
2.3 Effects of Judicial Corruption

The poor need legal aid, not pressure to pay bribes. They need proof that everyone is equal before the law. They need a system of justice that is fair and unbiased. This is their right.  

Some potential factors of judicial corruption have now been discussed and in the following sections the focus will be on how corrupt judiciaries affect fundamental rule of law principles. The foundation of a well functioning society is based on the rule of law and many of the core principles in rule of law depend on the correct behaviour of the judiciary. Corrupt judges ignore those fundamental principles and this is why it is so important to effectively rid the judiciary from corruption. When a person considers that his or her rights have been violated, where does he or she turn? The obvious answer should be to the courts, but that would be without effect if the courts are corrupt. The mere existence of rights in theory does not satisfy a person in case of a breach. Rights do only really exist if there is effective implementation of them and hence also a functioning mechanism defending those who suffer from breaches. A corrupt judiciary neglects the very core of the rule of law and some the fundamental justice principles, through which citizens and their rights are supposed to be protected, namely:

- Impartiality and Propriety
- Equality
- Integrity
- Competence and Diligence
- Separation of Powers and Judicial Immunity

Rule of law is generally considered to be crucial in order to achieve several foreign policy goals for e.g. state-building missions, for support strategies for membership of international and regional bodies, and for other significant support strategies in states or organizations in transition and development. Though most would agree upon the necessity of rule of law as a condition in a functioning society, there is still no general definition of it. For centuries legal scholars have argued and tried to put it into place. Still, the rule of law means different things to different people, much since the view of the rule of law in government and society is divided. Even though the rule of law might function, it may not always be legitimate. In states that have written laws, trials are held and the judiciary and other main institutions are functioning, the rule of law is a fact for the minimalist. Some states claim to uphold the law procedurally and that that requirement is enough for the rule of law to be the game in town. The rule of law could in this case be a tool of repression; Zimbabwe is an example of that. This means that laws could still discriminate certain groups and violate human rights. When the judiciary has lost or is on its way to lose its independence and impartiality, the rule of law has become corrupt and dysfunctional. Justice is here only provided for the elite and not the ordinary population. When that happens, the rule of law characteristics disappear even though the appearance of the rule of law continues to subsist. This condition could be illustrated in Bosnia and Herzegovina. When entire legal apparatus collapse and disappear, like in Sierra Leone and Liberia, the rule of law ceases to exist.

46 Ibid. p. 15.
47 Ibid. p. 16.
Randall Peerenboom\(^{48}\) suggests the rule of law to be divided into two types; ‘thin’ and ‘thick’. Which type is implied depends on the political goals and purposes of the state or organ defining it. The ‘thin’ conception mainly consists of formal or instrumental aspects of the rule of law, regardless if the legal system is part of a democratic or authoritarian, secular or theocratic society. However, the laws must be reasonable and acceptable at least to the mainly affected groups. The ‘thick’ conception is just as the name indicates a substantial conception and it consists of all the ‘thin’ elements. Additionally, the ‘thick’ also includes elements conducive to the realisation of certain political or moral visions. The specific conception of human rights is one of them.\(^{49}\) For the rule of law to be used as a development concept, it takes organizations to strive for policy frameworks. After much struggle e.g. the World Bank has now decided to strive for replacing autocratic and state-centred systems with the rule of law that “operates objectively, is accessible, reasonably efficient, transparent, predictable, enforceable, and protects human rights and legitimate state interests, etc”\(^{50}\). When it comes to the rule of law programs carried out by the UN, the objective is to find a common language. Therefore, a report was made in 2004, namely ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’\(^{51}\). The report defines the rule of law, consisting of procedural, institutional and substantive principles;

For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.\(^{52}\)

Most individual rule of law project documents do not deal with how the rule of law should be comprehended, although in some cases the procedural definitions can be considered. It is practically and politically more facilitating to avoid specificity.\(^{53}\) Even if this broad and vague definition makes it easier for societies to cooperate, it is not without risks, as the rule of law could lose its stability when being invoked for too many, possibly conflicting, reasons. To emphasise judicial independence and transparency is difficult from this point of view, as the areas of civil, criminal and administrative law that are politically sensitive, are based upon a more undecided policy. The rule of law is however crucial for the maintenance of a minimum standard of decent society.\(^{54}\)

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\(^{49}\) P. Bergling, 2006, p. 16.

\(^{50}\) Ibid. p. 17.

\(^{51}\) UN Secretary General, report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616.

\(^{52}\) Ibid. p. 4.

\(^{53}\) P. Bergling, 2006, p. 17.

\(^{54}\) Ibid. p. 18-19.
2.3.1 Impartiality and Propriety

A judge accepting a bribe from a plaintiff and in exchange decides in his or her favour can never be impartial. The distinction between the terms judicial independence and impartiality have been expressed by the Supreme Court of Canada, who stated that “impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case” while judicial independence “connotes not merely a state of mind or attitude in the actual exercise of the judicial functions, but a status or relationship to others--particularly to the executive branch of government--that rests on objective conditions or guarantees”\textsuperscript{55}. Even if the two terms represent different values, they are closely interrelated. Impartiality cannot exist without independence, although some level of case to case independence can be achieved without impartiality.

The ECtHR stresses the fundamental importance of public confidence in the courts and that the courts must be impartial, both subjectively and objectively. Subjective impartiality means that no court member should have any personal prejudice, while objective impartiality means that the court must be viewed as impartial by the general public without any reasonable doubts.\textsuperscript{56} However, judges are not robots and by the time they reach the office of the judiciary, they probably have some personal notions and that cannot disqualify them from positions as judges. As long as judges are human beings, there will be no completely blank mind in the judiciary and perhaps that is nothing to strive for either. As Justice Rehnquist stated in \textit{Laird v. Tatum}, “Proof that a Justice’s mind at the time he joined the Court was a complete tabula rasa … would be evidence of lack of qualification, not lack of bias.”\textsuperscript{57}

Judicial propriety is how the general public perceives judges’ behaviour. The essential feature of a judge and of the judiciary is impartiality and it must exist \textit{de facto} but also, not less importantly, in the perception of the public. The confidence of the judicial system will be destroyed if partiality is observed by the general public.\textsuperscript{58} If a judge is seen talking privately with a petitioner in a pending case, people might speculate that the judgement will be tinted by the conversation, even if it had nothing to do with the actual case. Corrupt judges may be very good at hiding their business, but systematic corrupt behaviour would endanger the propriety and in the long-term, unavoidably destroy the public perception of the judge. Even if the general public continues without knowing, the mere fact that the persons involved in the corruption knows about it, questions the judge’s propriety, since the scope of the term is so extensive.\textsuperscript{59} Any gift or favour to the judge or to a member of the judge’s family given in order to gain favour in a case therefore distorts the propriety.\textsuperscript{60}

Judges are human beings with different interests and they have the same rights to freedom of expression, association and assembly as everyone else, but they do have a responsibility to protect their appearance in the eyes of the general public. They must avoid relationships that may question their propriety as a judge. Both professionally and privately, judges must consider propriety and the emergence of propriety. He or she shall e.g. never get publicly

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\textsuperscript{57} Laird \textit{v. Tatum}, United States Supreme Court, 409 U.S. 824 (1972).
\textsuperscript{58} UNODC, Commentary on the Bangalore Principles of Judicial Conduct, p. 57.
\textsuperscript{59} Ibid. p. 85-86.
\textsuperscript{60} Ibid. p. 117.
\end{footnotesize}
involved in controversies, since that could question their impartiality and jeopardize the propriety.  

Judges must accept that there are some restrictions on what kind of behaviour is tolerable. A judge must, inter alia, live a cautionary life and must behave with self-control in public, also when he or she is not in office. They shall also exercise discretion when it comes to visiting bars, engaging in gambling or entering clubs, especially if such venues are connected with some kind of unlawful activities or persons or in other ways can be seen as indecent in the eyes of an imaginary, reasonable observer. Judges shall also be careful with socializing with lawyers and litigants that frequently appear before them in court, especially when they are part of a pending case. If a person of a judge’s family participates in any way in a case, the judge shall recuse himself or herself from the case in order to avoid suspicions of partiality.

2.3.2 Equality before the Law

Any kind of discrimination before the law is incompatible with everyone’s long recognized right to fair and equal treatment of justice, but discriminatory practices are effectively supported by corrupt judges. Judges shall treat everyone equally, regardless of gender, race, sexuality, age, religious beliefs, social background and other such characteristics. Equality is strongly correlated with judges’ impartiality and he or she must not give in to prejudices about stereotypes. Such attitudes shall on the contrary be recognized and corrected by the judges. They must also pay attention to, and be familiar with diversity of different kinds in society. Judges shall always refrain from humiliating gestures, statements and other derogatory behaviour and they shall also prevent lawyers from such manners in court proceedings.

Equality before the law is one of the core principles in a democratic society. Corrupt judges do not necessarily share the opinion of the bribing party, but to judge in anyone’s favour on basis other than the merits of the case, distorts the very essence of the principle of equality. The very first article of the Universal Declaration of Human Rights of 1948 (UDHR) states that everyone is equal in dignity and rights and judges have several other international instruments to consider when it comes to equality, something that shows the magnitude of the principle and why the fight against corruption in the judiciary is so vital, since many groups protected by the international instruments are generally fragile.

2.3.3 Integrity

Two components can be found within the definition of integrity, namely judicial morality and honesty. Judges shall always behave honourably, also in their private life. They shall not be involved in fraud or other corrupt behaviour, since it contradicts the very essence of integrity.

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61 Ibid. p. 95-96.
62 Ibid. p. 87-93.
63 Ibid. p. 121-124 and 127.
64 Universal Declaration of Human Rights, General Assembly resolution 217A (III) of 10 December 1948.
Integrity is unconditional and necessary for the judiciary to function in a satisfactory way. It is important that judges always consider their behaviour in the eyes of a realistic observer. A judge with high integrity must show it at all times, otherwise he or she can be considered as a hypocrite, and that would damage the court’s appearance. Judges’ integrity can be measured from their actual conduct in certain situations. 

Society expects a lot of a judge and he or she must not only be a good judge, but also a good person. A judge must handle the society’s high demand of integrity carefully, since “a judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law.” The judicial integrity de facto is very important, but so are the parties’ and the public perceptions of judges’ integrity. Parties standing before the court have to believe in the honesty of the judge. This is as important as the judge’s actual knowledge about the law and the independent and impartial interpretation and application of it. Evidently, a corrupt judge cannot be considered honest.

2.3.4 Competence and Diligence

A problem in many corrupt judicial systems is that the judges lack in competence. They may not have the necessary education, insufficient experience or they may have personality or temperament problems, which makes them unsuitable as judges. Judicial diligence is fundamental for the impartial application of the law; to consider the facts of a case soberly, to decide a case based only on the facts and the law, to act efficiently, and to thwart abuses of the process. Judges must take the responsibility to educate themselves also during their times of office, not only in national law, but also in international norms and standards. A judge cannot ignore e.g. human rights regulations, whether deriving from customary law, international treaties or regional instruments even if the local law differs from such laws. The lack of competence is also a potential factor of corruption and states with unsatisfying educational systems might be trapped in a circle of low education culture and a dysfunctional judiciary.

2.3.5 Separation of Powers and Judicial Immunity

Persons working within the judiciary are not special people but they do hold a special office which implies the responsibility of guarding the independence and requires them to be separate from other governmental institutions. For the rule of law to be reigned, the judiciary’s freedom from outside influences is essential. A judge cannot live with the fear of repercussion or revenge when deciding a case. A court can only be accepted as just and fair if the public has its confidence, it is therefore not only essential for the court to be independent but also to appear independent. As the proverb says, ‘justice must not only be done, but also

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66 UNODC, Commentary on the Bangalore Principles of Judicial Conduct, p.79-80.
68 UNODC, Commentary on the Bangalore Principles of Judicial Conduct, Preface.
69 Ibid. p. 83.
70 Ibid. p.129.
71 Ibid. p.134-135 and 137.
must be seen to be done’. Therefore, it is important for court personnel to refrain from any kind of contact with political parties. The judiciary must be effectively and authentically independent, not only from political pressure, but also from economic and social pressures. Therefore it is important that enough resources are provided so that the judiciary can keep a high quality. It is also important that the judges exercise their judicial powers without interference from other judges or court personnel.

The appointment procedure of judges is very important when it comes to separation of powers. Politicians may appoint judges who they know will follow their agenda. A judge can then feel threatened and he or she might take decisions that are unlawful in order to please the politician that is responsible for his or her appointment. If the judge decides not to follow the politician’s recommendations, he or she might have less future possibilities such as career prospects, appointment to more interesting courts and other promotions. This is a complex area, e.g. in the United States, where judges are elected on the basis of party sponsorship. There are strict limitations though; judges shall refrain from all inappropriate political activity.

It is a difficult task to balance the necessity to protect the judicial process from distortion e.g. through pressure from the media and to the freedom of the press and the open discussion of matters that may be in the general public’s interest. In the light of this, the nature of a judge cannot be too fragile; a judge is a public figure and must accept criticism from the media without letting it affect his or her judicial decisions. Immunity does not include the absence of criticism from public office holders concerning their decisions, reasons, and conduct of a case, with reservation from limits fixed by law. The Bangalore Principles on Judicial Conduct (hereinafter the Bangalore Principles), emphasizes this through the first principle stated therein, regarding judicial independence. Furthermore, the UN Basic Principles on the Independence of the Judiciary (hereinafter the UN Basic Principles), emphasize the importance of immunity.

Even if a judge is clearly corrupt and there is loads of evidence, the judicial immunity sometimes makes it hard to impeach a judge. The UN Anti-Corruption Toolkit recognizes that the nature of judges’ office needs a certain level of immunity to function properly. It holds that such immunity shall not extend to criminal investigations and procedures, but that improper criminal procedures against judges can threaten their independence. Therefore the UN Anti-Corruption Toolkit advises states that criminal proceedings against judges shall be carried out by independent prosecutors in collaboration with judicial councils in order to secure a correct review. The special responsibility of judges in society is identified and a

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74 Ibid. p. 5.
75 Central Council of the International Association of Judges, Universal Charter of the Judge, Article 2.
78 UNODC, Commentary on the Bangalore Principles of Judicial Conduct, p. 43.
80 Bangalore Principles of Judicial Conduct, Application 1.1.
82 Ibid. Principles 15 and 16.
suggestion is that judges may be discharged from their positions if there is significant evidence to prove misconduct, even if it is not sufficient for a conviction.\textsuperscript{83}

3 International Norms and Standards on Corruption and Judicial Independence

While the factors and effects of corruption in the judiciary are many and diverse, international efforts to uphold a fair judiciary have typically focused on principles such as judicial independence, impartiality and equality. However, lately a number of instruments that criminalize corruption have been adopted globally. There is no doubt that corruption is one problematic hurdle to effective human rights implementation, rule of law, democracy, sustainable development and the fight against poverty.\textsuperscript{84} The many instruments and standards adopted by international and regional organs show that it is time to start the fight against corruption. At same time the dilemma of interference with judicial independence must be considered. Independence of the judiciary is essential for the rule of law, human rights implementation etc. However, corrupt judges might misuse their special office and its independence to get away with corruption. In another scenario, non-corrupt judges might be affected in a negative way by the anti-corruption mechanisms, which are powerful instruments that in the wrong hands can be used against their purpose; an independent judiciary.

3.1 Corruption

It is nowadays clear that judicial corruption is a global problem and that it therefore must be combated at that level.\textsuperscript{85} The CoE was one of the first regional organs to adopt a legally binding convention against corrupt behaviour. The UN followed and a few years later the UNODC’s list of UNCAC signatories, available at: http://www.unodc.org/unodc/en/treaties/CAC/signatories.html\textsuperscript{86} In the following sections some of the most salient international and regional instruments on corruption will be presented, these include the UNCAC, the Criminal Law Convention on Corruption of 1999\textsuperscript{87} (CrLCC) and the CiLCC.\textsuperscript{88}

3.1.1 United Nations Convention against Corruption

The UNCAC was adopted by the General Assembly in 2003 and it entered into force on 14 December 2005. It was developed from Articles 8 and 9 the United Nations Convention against Organized Transnational Crime of 2000\textsuperscript{89}, which generally requires anti-corruption...
and preventive measures. Since corruption was considered to be too complex to be regulated effectively in such general terms, it was decided that a specific anti-corruption convention should be created.\textsuperscript{90} Said and done. The purpose of the UNCAC is to prevent and effectively combat corruption through international cooperation. All legislative, executive, administrative and judicial staff of the State Parties is considered ‘public officials’ and shall hence be regarded as targets of the UNCAC in case of a breach of the rules stated therein.\textsuperscript{91} State Parties have the responsibility to fulfil the aim of the UNCAC through development and implementation of anti-corruption policies that mirrors the principles of e.g. transparency, the rule of law, integrity and accountability. The judiciary is bound by such policies and they shall be implemented and supervised by specialized staff through independent auditing bodies.\textsuperscript{92} Education of court personnel about the correct and honourable performance of their duties is seen as a core factor for effective implementation of anti-corruption policies.\textsuperscript{93}

As mentioned before, the UNCAC does not define corruption, but it obliges State Parties to prohibit certain acts of corruption; intentional active and passive bribery and deliberate embezzlement.\textsuperscript{94} State Parties shall also consider adopting legislative or other measures prohibiting trading in influence, abuse of functions and illicit enrichment, but there is no mandatory requirement in the UNCAC to prohibit such behaviour.\textsuperscript{95} In some jurisdictions it is seen as a breach against the right to be presumed innocent\textsuperscript{96} to criminalize behaviour such as illicit enrichment, since it places the burden of proof on the person accused of the offence.\textsuperscript{97}

Codes of conduct for the judiciary are to be developed and applied and a report system for breaches against such codes shall be at hand as well as a system for court staff to declare their activities outside their official occupation, such as other employments, investments, assets and substantial gifts or benefits that might raise a conflict of interest with their duty at the court.\textsuperscript{98} It is important that the decision-making process is as simple as possible and that the general public is well informed about the court processes, the legal documents, and the case decisions. Publications from the court administration may also include the risks of corruption in order to keep the general public well informed about the issue. When highlighting the issue of corruption, State Parties shall promote participation of NGOs and community-based organizations outside the public sector to raise awareness about the negative effects of corruption in society.\textsuperscript{99} All above mentioned measures are general and concern all public officials and they shall be in accordance with the fundamental principles of their national law.\textsuperscript{100}

The UNCAC recognizes the special position of the judiciary in the fight against corruption; its Article 11 states:

\textit{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}

\textsuperscript{90} UN Anti-Corruption Toolkit, p. 24.
\textsuperscript{91} UNCAC, Articles 1 and 2.
\textsuperscript{92} Ibid. Articles 5, 6 and 36.
\textsuperscript{93} Ibid. Article 7.1 (b) and (d).
\textsuperscript{94} Ibid. Articles 15 and 17.
\textsuperscript{95} Ibid. Articles 18-20.
\textsuperscript{96} ICCPR, Article 12, paragraph 2.
\textsuperscript{97} UN Anti-Corruption Toolkit, p. 115.
\textsuperscript{98} UNCAC, Article 8.
\textsuperscript{99} Ibid. Articles 10 and 13.
\textsuperscript{100} Ibid. Article 65.
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 rules may include rules with respect to the conduct of members of the judiciary.

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.\(^{101}\)

The implementation of UNCAC shall be assessed through country review processes, carried out by the reviewed State Party and two other State Parties.\(^{102}\) The report shall be summarized by the reviewing states in close cooperation with the reviewed state and the summary shall be submitted to the Implementation Review Group after agreement between the three State Parties. The report is confidential and can only be used by the Implementation Review Group for information purposes.\(^{103}\)

### 3.1.2 Criminal Law Convention on Corruption

The CoE was convinced that an effective fight against corruption at international level through cooperation in criminal matters had to be carried out in order to protect society from the harm that corruption lead to. The CrLCC entered into force in 2002 and it is open to states also outside the borders of Europe. Today the CrLCC has been ratified by 43 states and another 7 have signed it.\(^{104}\) The CrLCC prohibits both active and passive bribery of state officials, including judges.\(^ {105}\) Article 11 of the CrLCC specifically obliges State Parties to criminalize bribery of judges and officials of international courts whose jurisdiction has been recognized by the State Party.\(^ {106}\)

The CrLCC goes further than the UNCAC in prohibiting other behaviour than bribery and embezzlement; it also compels State Parties to adopt measures that establish trading in influence, money laundering of proceeds from corruption, account offences and participatory acts as criminal offences, and also create liability for legal persons.\(^ {107}\) The CrLCC have also amended an Additional Protocol\(^ {108}\) which prohibits active and passive bribery of arbitrators who take legally binding decisions after agreement by parties in dispute and jurors, meaning members of collegial bodies that decide whether or not an accused person is guilty in the trial framework.\(^ {109}\)

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101 Ibid. Article 11.
103 Ibid. Articles 33-37.
105 CrLCC, Articles 2 and 3 in conjunction with Article 1.
106 Ibid. Article 11.
107 Ibid. Articles 12-15 and 18.
108 CoE, Additional Protocol to the Criminal Law Convention on Corruption, CETS No. 191.
109 Ibid. Chapters I and II.
The GRECO\textsuperscript{110}, to which State Parties of the CrLCC automatically become members,\textsuperscript{111} is responsible for the monitoring of the CrLCC and its Additional Protocol.\textsuperscript{112} GRECO’s objective is to help members of the anti-corruption standards to improve their compliance with them.\textsuperscript{113} The monitoring process consists of two parts; one evaluation procedure and one compliance procedure. The evaluation procedure is divided into different rounds treating different themes, e.g. independence, immunities of public officials and prevention, where all State Parties to the CrLCC are evaluated. After the evaluation round, a group of experts assesses the State Party and the conclusions lead to either recommendations or observations. The recommendations require a formal implementation, which will be examined in the compliance procedure.\textsuperscript{114} The evaluation reports are confidential.\textsuperscript{115} However, the Statutory Committee\textsuperscript{116}, which is composed of representatives from GRECO members, may make public statements if it considers that a State Party does not take sufficient action regarding the recommendations.\textsuperscript{117}

### 3.1.3 Civil Law Convention on Corruption

The CoE opened the CiLCC for signature the same year as the CrLCC. CiLCC entered into force in 2003 and 34 states have ratified it and another 8 have signed it.\textsuperscript{118} The CiLCC highlights the importance of civil law in the fight against corruption\textsuperscript{119} and its purpose is to oblige State Parties to provide effective remedies for those who have suffered because of corrupt behaviour and, where appropriate, make it possible to get compensation for damages.\textsuperscript{120} A person shall be held liable and compensate the damage if he or she has committed or authorized corrupt behaviour, or if reasonable steps to avoid such behaviour was not taken and the claimant therefore has suffered damage. There must hence be a causal link between the damage and the corrupt behaviour.\textsuperscript{121} The GRECO is responsible for monitoring the implementation of the CiLCC.\textsuperscript{122}

### 3.2 Judicial independence

Contrary to international regulations on corruption, judicial independence is not regulated in specific treaties, but scattered in different human rights conventions and declarations, e.g. the

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\textsuperscript{110} The GRECO was established by the Council of Europe in 1999. It currently consists of 46 European States and the United States of America, all State Parties to the CrLCC. Information available at: http://www.coe.int/t/dghl/monitoring/greco/general/3.%20What%20is%20GRECO_en.asp 100505.
\textsuperscript{111} CrLCC, Article 32.4.
\textsuperscript{112} CrLCC, Article 24 and Additional Protocol to the CrLCC, Article 7.
\textsuperscript{113} Statute of the Group of States against Corruption, Appendix to Resolution (99) 5, Article 1.
\textsuperscript{114} Ibid. Articles 8, 10, 12, 14-15.
\textsuperscript{115} Ibid. Article 15.5.
\textsuperscript{116} CrLCC, Article 33.
\textsuperscript{117} Statute of the GRECO, Article 16.
\textsuperscript{118} CoE’s list of signatories to the CiLCC of 1999, available at: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=174&CM=8&DF=05/05/2010&CL=ENG 100505.
\textsuperscript{119} CiLCC, Preamble.
\textsuperscript{120} Ibid. Articles 1 and 3.
\textsuperscript{121} Ibid. Article 4.
\textsuperscript{122} Ibid. Article 14.
To guard the principle of judicial independence, it is essential to prevent both grand and petty corruption. Independence of the judiciary is one of the most important conditions for the effective implementation of human rights and the rule of law. The public perception of the judiciary’s independence and judges’ impartiality is just as essential to their legitimacy as the actual behaviour. If the credence for the authority and legitimacy of the judiciary is low then citizens will not appeal to them. The following sections will present some of the most central legally binding and non-binding documents regarding judicial independence.

### 3.2.1 Universal Declaration of Human Rights

Although the UDHR is not legally binding, it is generally understood to consist of somehow universally accepted principles, since almost all states in the world have proclaimed it through membership of the UN. The human rights recognized in the UDHR would become meaningless if there were no mechanisms securing them. The judiciary and judicial principles have been given central space in the UDHR. Article 7 establishes the principle that everyone is equal before the law. Article 8 recognizes the importance of competent courts and their task to guarantee everyone an effective remedy if their rights have been violated. Article 10 of the UDHR states: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” The meaning of the principles stated in Articles 7, 8 and 10 is the core of the rule of law; the principle of equality before the law, the effectiveness of the courts and the crucial independence and impartiality of them in order to decide a case in a correct and fair manner. Corrupt courts cannot uphold the principles laid down in the world’s most widespread human rights declaration.

### 3.2.2 International Covenant on Civil and Political Rights

In accordance with its Article 49, the ICCPR entered into force on 23 March 1976 and today it has 165 State Parties worldwide. Article 14 regulates one of the key principles; equality before the law and the right to a fair hearing by a competent, independent and impartial tribunal. It also states that all hearings shall be public, with exemptions e.g. when confronting the private integrity of children. The ICCPR reaches further than the UDHR with regard to

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123 UN, International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI) of 16 December 1966.
126 Open Society Institute, Monitoring the EU Accession Process: Judicial Independence, p. 11
127 Bangalore Principles of Judicial Conduct, application 3.2.
128 See e.g. UNCAC, Preamble, CrLCC, Preamble, CiLCC, Preamble, and CoE recommendation No. R (94) 12.
130 ICCPR, Article 14.
the remedial structure. Its Article 2 states that State Parties shall ‘ensure’ all rights in the Covenant to the persons in their territory. This means that signatories to the ICCPR have to adopt all necessary measures, legislative and others, to realize that goal, whereas the UDHR only recognizes that everyone has a right to fair trial.\textsuperscript{131}

The aim of Article 14 is primarily to ensure the proper administration of justice. It does not only uphold the provision of equality before the law but also the recognition of rights and duties to legal procedures. However, State Parties have failed to recognize the last mentioned provision, something that shows since they have not provided information and explained how they interpret the concepts of ‘criminal charge’ and ‘rights and obligations in law’ in relation to their respective legal systems in their state reports. Therefore, as the UN Human Rights Committee stresses, it would be useful if the states could provide more information in their future reports on how their respective measures are developed to secure efficient judicial independence from the executive branch and the legislator, not only \textit{de jure} but also \textit{de facto}. An adequate assumption is that military and special courts, which in some countries try civilians, could generate serious problems as the judicial independence could be neglected and thereby strongly challenged. Some of these courts do not guarantee the proper administration of justice in accordance to the essential principle of an independent judiciary. Article 14, paragraph 5 declares that every man and woman convicted of a crime shall have the possibility to appeal to a higher tribunal for a review of his or her conviction and sentence. This is important since it opens up a possibility to appeal an unjust decision based on corruption and not the facts, to a higher instance. It must be taken with greater consideration as State Parties so far do not generate sufficient information on how they manage to provide and guarantee this right.\textsuperscript{132}

\textbf{3.2.3 European Convention on Human Rights}

The right to fair trial is stated in Article 6 of the ECHR, which entered into force in September 1953 and today it has 47 State Parties.\textsuperscript{133} Article 6 § 1 states that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” when determining civil or criminal judicial matters. Corruption in the judiciary eliminates the fairness in the court procedure, since other factors than the law and the merits of the case become central in the decision-making. A corrupt judge cannot serve the general public in a fair way, something that is crucial for the rule of law in a democratic society.

In several cases, the ECtHR stresses the importance of an independent judiciary. One case\textsuperscript{134} in particular lifts the importance of thorough investigations when judges are suspected for bribery. The judge in the case had accepted a bribe of USD 10,500 with a promise to decide in favour of a plaintiff in a civil case. The first meeting between the two had been secretly recorded by the plaintiff. He presented the recordings to the special anti-corruption police unit and they decided to carry out an investigation consisting of authorized secret recordings of future meetings between the judge and the plaintiff, and actual handout of money. After

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\textsuperscript{132} UN Human Rights Committee, General Comment No. 13, 1984.
\textsuperscript{133} CoE’s list of ECHR signatories, available at: \url{http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=18/05/2010&CL=ENG, 100510}.
\textsuperscript{134} \textit{Miliniené v. Lithuania}, Application No. 74355/01, Strasbourg 24 June 2008.
\end{flushleft}
gathering sufficient evidence against the judge, the prosecutor requested the judge’s immunity to be lifted and the judge was convicted for accepting a bribe and for attempting a buy-off of judges in the Court of Appeal. The judge claimed that she had been trapped to accept the bribe through the criminal conduct simulation model used by the anti-corruption unit, but the Lithuanian Supreme Court found that the importance of the general interest of preventing a person to work as a judge if he or she has accepted a bribe, was greater than the authorized crime committed by the plaintiff.\(^{135}\)

The judge appealed to the ECtHR, claiming that she had been provoked to commit the crime and that it was in breach of Article 6 § 1 of the ECHR. She claimed that the authorized model was against the right to a fair hearing, since it created evidence instead of investigating according to her. The Government claimed that the model had been lawfully authorized and implemented in order to secure the general interest and no gratuitous pressure or threats had been used. They also held that the special position of the judge aggravated her culpability, since she very well knew that her actions were unlawful.\(^{136}\) The ECtHR found that there had been no breach of Article 6 § 1 of the ECHR, since the investigation had been carried out in a lawful manner and the judge had the opportunity to confront the evidence against her in the following court procedure. The ECtHR also recognized the corrosive result of corruption in the judiciary on the rule of law and how important it is to combat such behaviour in a democratic society.\(^{137}\)

3.2.4 Declarations, Charters and Non-binding Instruments

As shown, there are several legally binding documents regarding the protection of human rights, the principle of judicial independence, and the impartiality of the judiciary. However, the legislation is supported by a number of non-binding instruments that focus on the principle of independence and what really lies in the wording. Many different associations of states, judges’ organizations and other interest groups have developed instruments for the protection of the independence of the judiciary and a few of the seemingly most important will be presented.\(^{138}\)

3.2.4.1 United Nations Basic Principles on the Independence of the Judiciary

The UN set forth the UN Basic Principles at its Seventh Congress in 1985\(^{139}\), in addition to the UDHR and the ICCPR. Although these principles are not legally binding rights and duties, they offer models for lawmakers to enact them into law and encourage them to implement the UN Basic Principles into their national constitutions.\(^{140}\) Governments shall take into consideration to implement the UN Basic Principles into their national legislation and to make them known within the judiciary.\(^{141}\)

\(^{135}\) Ibid. Paragraph 28.
\(^{136}\) Ibid. Paragraphs 33, 34.
\(^{137}\) Ibid. Paragraph 38.
\(^{138}\) For other regional instruments, see note 12.
\(^{139}\) UN General Assembly resolution 40/146, 1985.
\(^{140}\) UN Department of Public Information, DPI/1837/HR.
\(^{141}\) UN Basic Principles on the Independence of the Judiciary, Principle 1.
According to the UN Basic Principles, all issues of a judicial nature shall be under the jurisdiction of the judiciary and decisions by the courts shall not be subject to arbitrary revision. All women and men have the right to a fair judicial proceeding by ordinary courts or judicial tribunals. States shall guarantee the independence of the judiciary from the government and all other institutions. Impartiality must be respected; pursuant to the second principle there shall not arise any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from anyone or for any reason.\textsuperscript{142}

Members of the judiciary have the right to freedom of expression and association just as every other citizen. However, when exercising those rights, judges must preserve the impartiality and independence of the judiciary.\textsuperscript{143} It is important to protect the dignity of their office but the actual credibility, the citizens’ confidence in the authority, is in a democratic society just as significant.\textsuperscript{144} When looking into judges appropriate qualifications, important conditions are e.g. integrity and adequate knowledge in law. When selecting judges, there should be no discrimination. Race, color, sex, religion, political or other opinion, national or social origin, property, birth or status shall not influence the decision of employment. The candidate need to be a national of the country concerned, which in this matter is a non-discriminatory requirement. The conditions of service and tenures of office for judges shall be adequately secured by law. Judges shall have professional secrecy and not be forced to testify on matters that are confidential. If charges against a judge arise, the case shall be processed fairly and fast.\textsuperscript{145} Judges shall only be subject of removal if they do not fulfill the objective requirements of an appropriate judge. All proceedings regarding removal or suspension of judges must be regulated in compliance with norms and standards regarding judicial conduct and there must be a possibility of an independent review of such decisions.\textsuperscript{146}

\subsection*{3.2.4.2 The Bangalore Principles on Judicial Conduct}

On the invitation of the United Nations Centre for International Crime Prevention a meeting was held with the Judicial Group on Strengthening Judicial Integrity (hereinafter the Judicial Group)\textsuperscript{147} in Vienna in April 2000. There are several codes of judicial conduct and the Judicial Group recognized the need of a report analyzing them to find a common code to agree upon. The aim of the analyzing research was to find the core considerations in the different codes, but also the optional or additional considerations that could be found in some codes and to consider their suitability in a common code. In February 2001, the Judicial Group held its second meeting in Bangalore. With the report on hand, the Judicial Group identified the core values and basic principles and agreed on the Bangalore Draft Code of Judicial Conduct. The Draft was widely spread among judges of both common law systems and civil law systems. Later the Working Party of the Consultative Council of European

\begin{itemize}
\item \textsuperscript{142} Ibid. Principles 2-6.
\item \textsuperscript{143} Ibid. Principles 8 and 9.
\item \textsuperscript{144} Open Society Institute, Monitoring the EU Accession Process: Judicial Independence, p. 11.
\item \textsuperscript{145} UN Basic Principles on the Independence of the Judiciary, Principles 10-17.
\item \textsuperscript{146} Ibid. Principles 19 and 20.
\item \textsuperscript{147} Chief Justice Latifur Rahman of Bangladesh, Chief Justice Bhaskar Rao of Karnataka State in India, Justice Govind Bahadur Shrestha of Nepal, Chief Justice Uwais of Nigeria, Deputy Vice-President Langa of the Constitutional Court of South Africa, Chief Justice Nyalali of Tanzania, and Justice Odoki of Uganda, meeting under the chairmanship of Judge Christopher Weeramantry, Vice-President of the International Court of Justice, with Justice Michael Kirby of the High Court of Australia as rapporteur, and with the participation of Dato’ Param Cumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers.
\end{itemize}
Judges reviewed the Draft and commented it. The Draft was thereafter revised. In November 2002, at a round table meeting in the Netherlands, Chief Justices gathered to confer the norms and standards laid down in the Draft. The result of this meeting became the birth of the Bangalore Principles of Judicial Conduct. The Draft was thereafter revised. In November 2002, at a round table meeting in the Netherlands, Chief Justices gathered to confer the norms and standards laid down in the Draft. The result of this meeting became the birth of the Bangalore Principles of Judicial Conduct. Some states even use the Bangalore Principles as a model to form their own national Principles of Judicial Conduct.

What makes the Bangalore Principles so unique is that they reflect different judicial cultures and legal systems and they could therefore be accepted in many different societies. The United Nations Office on Drugs and Crime (UNODC), the American Bar Association, the International Commission of Jurists, judges of the Member States of the Council of Europe and other international organisations have recognized the Bangalore Principles and they actively support them.

The Bangalore Principles came to existence as many recognized the necessity of common principles regarding competent, independent and impartial judiciaries. As the UN Basic Principles are primarily addressed to states, one could envisage the need to address judicial standards of ethical conduct for judges by judges. The Bangalore Principles intend to provide guidance for judges but also to support members of the executive and the legislative, lawyers and the broad public. The Bangalore Principles lay out specific advice, norms and standards regarding judges’ position. They consist of six values; independence, impartiality, integrity, propriety, equality, and competence and diligence. Beyond the UN Basic Principles requirements concerning judicial independence, the Bangalore Principles specifies that a judge shall not be influenced by judicial colleagues in decisions that must be taken independently. Regarding the value of impartiality, the Bangalore Principles raises a few more concrete advises for judges in comparison to the UN Basic Principles. One is that “A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process”. A judge, who is unable to decide a case without impartiality, shall disqualify himself or herself in specific cases, e.g. if the judge has bias concerning a party or economic interests in the judicial outcome. The Bangalore Principles also emphasizes the great importance of the public’s faith in the

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148 Vice-President Reissner of the Austrian Association of Judges, Judge Fremr of the High Court in the Czech Republic, President Lacabarats of the Cour d’Appel de Paris in France, Judge Mallmann of the Federal Administrative Court of Germany, Magistrate Sabato of Italy, Judge Virgilijus of the Lithuanian Court of Appeal, Premier Conseiller Wiwinius of the Cour d’Appel of Luxembourg, Juge Conseiller Afonso of the Court of Appeal of Portugal, Justice Ogrizek of the Supreme Court of Slovenia, President Hirschfeldt of the Svea Court of Appeal in Sweden, and Lord Justice Mance of the United Kingdom.

149 Judge Vladimir de Freitas of the Federal Court of Appeal of Brazil, Chief Justice Iva Brozova of the Supreme Court of the Czech Republic, Chief Justice Mohammad Fathy Naguib of the Supreme Constitutional Court of Egypt, Conseillere Christine Chanet of the Cour de Cassation of France, President Genaro David Gongora Pimentel of the Suprema Corte de Justicia de la Nacion of Mexico, President Mario Mangaze of the Supreme Court of Mozambique, President Pim Haak of the Hoge Raad der Nederlanden, Justice Trond Dolva of the Supreme Court of Norway, and Chief Justice Hilario Davide of the Supreme Court of the Philippines. Also participating in one session were the following Judges of the International Court of Justice: Judge Ranjeva (Madagascar), Judge Herczegh (Hungary), Judge Fleischhauer (Germany), Judge Koroma (Sierra Leone), Judge Higgins (United Kingdom), Judge Rezek (Brazil), Judge Elaraby (Egypt), and Ad-Hoc Judge Frank (USA). The UN Special Rapporteur was in attendance.

150 Bangalore Principles of Judicial Conduct, Explanatory Note.

151 UNODC, Commentary on the Bangalore Principles of Judicial Conduct, p. 5.

152 Bangalore Principles of Judicial Conduct, Preamble.

153 Ibid. 1.4.

154 Ibid. 2.4.

155 Ibid. 2.5.
judiciary. Under the value of integrity, it is stressed that it is not only important to have an independent, impartial and just judiciary, but also that it must appear to be so.\textsuperscript{156} Regarding the value of propriety, much is said about judge’s personal life and how they shall relate to it as their posts require a set of standards for their good manners. Something that recurs a lot in the Bangalore Principles is the importance of no kind of influence from outside. That comprises relations such as family and friends, economic or political interests, and other influences that are inappropriate.\textsuperscript{157} Application 4.15 states the requirement of refusing inappropriate influence, which relates to corruption in a direct and concrete way:

\begin{quote}
A judge shall not knowingly permit court staff or others subject to the judge’s influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.
\end{quote}

Further, the Bangalore Principles raises the value of equality. The clear message is that a judge must, in the performance of judicial duties, be free from bias or prejudice towards any group or person. The judges’ decisions shall not be influenced on the grounds of a person’s or a group’s race, colour, sex, national origin, religion, disability, age, caste, sexual orientation, marital status, social and economic status and other like causes. The last principles mentioned in the Bangalore Principles treat competence and diligence; prerequisites for an appropriate performance of judicial office. For a judge to have the competence needed for his or her task, it requires that he or she is updated, not only with changes in national law, but also regarding relevant developments of international law, including conventions and other instruments establishing, inter alia, human rights norms. The shortage of trust in justice is demolishing for democracy, economic and human development and the distrust of justice could also be an incitement to get involved in corruption. With awareness of this fact, the importance of implementing the Bangalore Principles is crucial.\textsuperscript{158}

### 3.2.4.3 The European Charter on the Statute for Judges

The CoE organized a meeting in July 1998, which led to the adoption of the European Charter for Judges in order to strengthen general principles for judges such as independence, impartiality and competence. The provisions for the judges are aimed to guarantee citizens their individual rights. Judges’ compliance with fundamental rule of law principles is necessary in order to achieve that aim. The European Charter for Judges is not legally binding, but the explanatory memorandum held that the provisions stated therein are the best possible means to ensure protection of above mentioned principles.\textsuperscript{159}

The European Charter for Judges holds that the fundamental principles stated therein shall be implemented at constitutional level and that the norms at least shall receive legislative status.\textsuperscript{160} It further recommends states to create an independent authority, free from legislative and executive influence with at least half of its seats dedicated to judges. The authority’s tasks shall include ensuring that training programmes for judges are effective and appropriate,

\begin{footnotes}
\textsuperscript{156} Ibid. 3.2.
\textsuperscript{157} Ibid. Value 4.
\textsuperscript{158} ECOSOC, Report on Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration of Justice, Impunity, p.15.
\textsuperscript{159} CoE, Explanatory Memorandum to the European Charter on the Statute for Judges, Article 1.1.
\textsuperscript{160} European Charter on the Statute for Judges, Articles 1.1 and 1.2.
\end{footnotes}
controlling appointments, recruitments and promotions of judges, assignments to specific tribunals, and verifying causes leading to termination of office.\textsuperscript{161} The selection of judges must be supported by appropriate criteria; especially importance shall be given to ability to independent thinking and to show impartiality, knowledge of the law, the capacity to apply it, and the respect for human dignity.\textsuperscript{162} The European Charter for Judges recognizes that also judges may exercise their citizen rights, e.g. freedom of expression, outside their judicial function. However, the behaviour must not affect their independence and impartiality or the public confidence of the judges.\textsuperscript{163} All individuals shall be given the chance to complain to an independent body about miscarriages in the justice system in specific cases.\textsuperscript{164} The European Charter for Judges also stresses the importance of a fixed level of appropriate remuneration and social welfare for judges in order to protect them from pressures that might influence their decision-making.\textsuperscript{165}

The European Charter for Judges refers to a recommendation\textsuperscript{166} of the CoE’s Committee of Ministers regarding the Independence, Efficiency and Role of Judges, which lays down a number of general principles for judges and their terms of office, but it also lists some judicial responsibilities that the judges bear. Such responsibilities include e.g. the duty to protect individual rights and freedoms, to apply the law properly, to fairly, efficiently and rapidly deal with cases, to act without outside influence, to assess the facts in relation to the law in an impartial manner, to ensure all parties their procedural rights, to withdraw from cases where their independence can be questioned, to use an understandable language when declaring their decisions, and to undergo training that is necessary for them in order to act properly and efficiently when carrying out their duties.\textsuperscript{167} Furthermore, the recommendation gives examples of measures that shall be taken when judges neglect their responsibilities, e.g. withdrawal of cases, moving to other judicial tasks, economic sanctions and if necessary, suspension. Such measures must not be arbitrary or threaten the judicial independence.\textsuperscript{168}

4 The Dilemma of International Law and Support Strategies

As above passages show, there are several norms and standards regarding anti-corruption and judicial independence, but the implementation of them is complex and they can be used in contradiction to their purpose. Fighting corruption in the judiciary is not a simple procedure, since judges possess, and must possess, a high level of independence and immunity. The judiciary is the final settler of judicial disputes and it must therefore be able to carry out its functions without fear of being interrupted by other state organs, something that could risk their ability to take uncomfortable decisions. Even so, corrupt judges must be prevented from hiding behind the principle of independence. The following sections will treat some of the instruments that have been developed e.g. within the UN, in order to help states to achieve the goals of above mentioned norms and standards.

\textsuperscript{161} Ibid. Articles 1.3, 2.3, 3.1, 4.1 and 7.2 (7.1).
\textsuperscript{162} CoE, Explanatory Memorandum to the European Charter on the Statute for Judges, Article 2.1.
\textsuperscript{163} Ibid. Articles 4.2 and 4.3.
\textsuperscript{164} European Charter on the Statute for Judges, Article 5.3.
\textsuperscript{165} Ibid. Article 6.1.
\textsuperscript{167} Ibid. Principle V.
\textsuperscript{168} Ibid. Principle VI.
4.1 Toolkits and Aid for National Policy-Makers

One way in which international actors have supported anti-corruption strategies is through development of toolkits that assist national policymakers and justice providers. One example is the UNODC’s Global Programme against Corruption (GPAC), adopted in February 1999. The GPAC consists of two parts, one research section and one technical cooperation section. The technical cooperation consists of different ways of helping states to combat corruption, e.g. through international legislation, a pool of recognized experts, and other mechanisms. The GPAC created the UN Anti-Corruption Toolkit consisting of a number of recommendations to states, based on thorough evaluations of case studies of anti-corruption strategies carried out in different states.

The UN Anti-Corruption Toolkit recognizes the diversity of corruption and the necessity to tailor the tools against corruption so that they fit the culture and society in which they are supposed to function. Since there are no general tools, some of the measures in the UN Anti-Corruption Toolkit may in some countries work in the opposite direction than the one intended, why it is very important to make a thorough evaluation of the character and scope of corruption in the specific state before implementing measures against it. First after such assessment can strategies be developed and implemented. The UN Anti-Corruption Toolkit offers sets of measures and information about how good or bad the strategies have worked out in different countries. It also stresses the importance of transparency in the assessment process, since it will show the reality and create credibility of the national strategy, which will lead to participation of those suffering from corruption, often the general public.

The institutional assessment process shall according to Tool #2 early focus on whether or not the judiciary is corrupt, since e.g. prosecution and litigation practices’ correct performance depend on fair and independent outcomes from the judiciary. If the judiciary is corrupt, then the UN Anti-Corruption Toolkit recommends it to be top priority. Another tool for effective implementation of anti-corruption strategies is to create independent auditing mechanisms, ombudsmen, anti-corruption commissions and even specialized anti-corruption agencies. The mere creating of such instances shows a political will of the government, but states have to be careful with such mechanisms and weigh their power with, inter alia, judicial immunity and democratic processes. The importance of action plans with defined goals and timelines is also stressed.

Tool #6 recognizes the importance of the judiciary in the fight against corruption and the protection of the rule of law, since it is the justice institution with the greatest power over the other justice mechanisms. To make the judiciary accountable can hence lead to the greatest improvements in the process. It must however be carefully balanced with the independence of the judiciary. Tool #6 suggests development of codes of conduct, professional competence and integrity training, and education about corruption and its harmful nature for judges. Such measures should be implemented in cooperation with judges and it is also recommended to include e.g. prosecutors, justice ministers and bar associations in the process. Tool #6 also stresses the importance of protecting judges and their families from influential parties with

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170 Ibid. Chapter III A & B.
171 UNODC, Anti-Corruption Toolkit, p. 17.
172 Ibid. p. 44-45.
173 Ibid. Tool #2.
174 Ibid. Tools #3-5, 9 and 11.
lots of resources. The court reforms should therefore include providing adequate salaries for judges and other court personnel, as well as improving their working conditions and the management structures. Another important factor is to facilitate statistical management of cases in order to discover patterns that indicate corruption. The key to success is to raise public awareness of what they can expect from the judiciary through education.\textsuperscript{175}

The UN Anti-Corruption Toolkit recognizes that corruption to a great extent is a social problem and that information about corruption for that reason shall be distributed. It is important with public education, in order to make people aware of the necessity to report corrupt behaviour to the authorities. If anti-corruption measures in the judiciary are to be successful, there also has to be an attentive and well educated media that review court decisions and report doubtful behaviour to the public to raise awareness.\textsuperscript{176} The judiciary shall be independent, since it possesses the ultimate power of deciding judicial matters, but it raises the dilemma of \textit{quis custodiet ipsos custodes?} (who will watch the watchman?). Other state institutions can be observed by the judiciary, but there is no such mechanism controlling the behaviour of the judiciary, since that would interfere with the judicial immunity. Journalists consequently have a great responsibility to review court decisions and inform the public. Another way of controlling the judiciary is to create independent bodies that carry out e.g. financial investigations when they suspect corrupt behaviour.\textsuperscript{177} Since corruption often is hidden, it is hard to find sufficient evidence. The UN Anti-Corruption Toolkit therefore suggests an easing burden of proof and shifting the onus of proving possession of excessive assets. Such measures may under certain circumstances, however, risk violating other rights, such as the right to personal integrity, stated in e.g. Article 12 of the UDHR and Article 17 of the ICCPR.\textsuperscript{178}

The UNCAC does not regulate appointments of judges specifically, but its Article 7 states the general provisions for recruiting and promotion processes. Tool \#6 of the UN Anti-Corruption Toolkit recognizes the importance of a correct appointment procedure for judges. High standard of integrity, fairness and knowledge of the law shall be the essential factors when recruiting judges. It also stresses the importance of transparency in the recruitment process and that judges as a group shall as far as possible represent the varieties in the population, but without interfering with above mentioned qualifications. Tool \#6 also spots the assignment of judges to specific cases as troublesome, since outcomes then can be decided on beforehand. Randomness, transparency as far as possible, regular rotation and reassignment of judges to cases in order to prevent pre-decided court decisions is suggested. It also stresses the importance of appellate courts and their primary function; to review decisions taken at a lower level.

The UN Anti-Corruption Toolkit recognizes and encourages judges to oppose to judicial reforms that originate from non-judicial institutions because of the natural legitimacy concern that arises with such reforms; they may be in conflict with judicial independence and the rule of law. Therefore it is suggested that reforms shall be developed and implemented in cooperation with the judiciary. However, reform resistance may also come from judges that are corrupt, and any reform will probably lead to disadvantages for them, at least short-term and it can subsequently be hard to collaborate with those judges. The UN Anti-Corruption Toolkit suggests that the problem might be solved through inducements for judges that work

\textsuperscript{175} Ibid. Tool \#6.
\textsuperscript{176} Ibid. Tools \#19-21.
\textsuperscript{177} Ibid. Tools \#21 and 25.
\textsuperscript{178} Ibid. Tools \#30 and 33.
together for transparency and accountability reforms, such as development of judicial education and raising judges’ status in society, but also concrete incentives e.g. beneficial retirement deals, promotions, new buildings and a more generous budget.\textsuperscript{179}

4.2 Promoting Standard-Setting

In order to promote states to effectively implement norms and standards, several organs have developed recommendations to achieve that goal. One example is the Economic and Social Council (ECOSOC), which in 1989 developed, on recommendation of the Committee on Crime Prevention and Control (CCPC), a set of procedures\textsuperscript{180} to secure the effective implementation of the UN Basic Principles. First of all, to set the foundation of the Basic Principles, states shall adopt them into their justice system and consider implementing them in their respective constitutions and domestic practices. Secondly, it is of great importance that all citizens are aware of the UN Basic Principles and the concrete existence of them in order to achieve effectiveness and an actual implementation. Therefore, the UN Basic Principles must be publicized and available to all in their respective official language. States shall also promote and encourage information and education through seminars and courses regarding the role of the UN Basic Principles.\textsuperscript{181} Every five years the states shall deposit a report to the Secretary General with information regarding the implementation process of the UN Basic Principles; how far they have disseminated them and if they have incorporated them into national legislation. In the report, states shall also inform about the problems, obstacles and difficulties with implementation, and if the state needs assistance to facilitate the implementation.\textsuperscript{182} Several states that adopted the UN Basic Principles have through the reports asked for assistance with legal education and monitoring of procedures.\textsuperscript{183}

The Secretary General shall hand in individual reports to the CCPC concerning each state every five year. The information is based on the reports received from each government but also from information available within the UN, trough experts and advisers, agencies and intergovernmental organizations, and NGOs. The Secretary General shall spread and make the UN Basic Principles available as well as the reports, both the reports from the governments to the Secretary General and the reports from the Secretary General to the CCPC. The responsibility of the UN is to provide assistance to the governments upon their request and to help them as far as possible with the implementation process of the UN Basic Principles. To strengthen the judicial independence and implement the UN Basic Principles, education is an important instrument. Therefore the UN shall also provide curricula and training materials concerning the UN Basic Principles to legal education programmes at all levels.\textsuperscript{184}

4.3 Institutional Reform and Capacity Enhancement

Beyond toolkits and standard-setting strategies, a much employed approach is to directly reform vital institutions. This includes different dimensions; human resource and capacity,

\begin{itemize}
  \item \textsuperscript{179} Ibid. Tool #6.
  \item \textsuperscript{180} ECOSOC resolution 1989/60, Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, 15\textsuperscript{th} plenary meeting, 24 May 1989.
  \item \textsuperscript{181} Ibid. Procedures 1-6.
  \item \textsuperscript{182} Ibid. Procedure 7.
  \item \textsuperscript{183} UN Department of Public Information, DPI/1837/HR, August 1996.
  \item \textsuperscript{184} ECOSOC resolution 1989/60, Procedure 8-11.
\end{itemize}
legal mandate, and structure of institutions. When a new democratic regime has taken over in a former totalitarian state or after a conflict, a vetting program in the judiciary is typically an approach sought by both the new legitimate regime and by international actors involved in the transition. It is not an easy process to transform judicial institutions that used to abuse the general public and violate their human rights, into trusted, fair and competent judiciaries. Even so, the process is necessary in order to sustain the newborn peace and democracy in the long-term. Vetting programs focus on the reform of the employees in an institution, since it is through the personnel the institution acts and abuses derive from persons within the institution. A reform also includes measuring proficiency and qualifications of the personnel. Even if they are not human rights abusers, they may not have the necessary competence for the position.\(^{185}\) The judiciary is seen as one of the most important institutions to reforms, since they are directly responsible for protecting human rights and strengthening the rule of law. A crucial component for successful vetting programs is transparency. In order to build public confidence in the efforts, objectives and effectiveness of the reform, the general public must be informed about the process.\(^{186}\)

The assessment process of individuals’ suitability for future work within the judiciary is complicated. A high level of integrity and competence is expected of judges and other court personnel and before starting the assessment procedure of individuals, minimum requirements of organizational capacity, individual capacity and individual integrity can be set in order to make the evaluation some-how concrete. Persons that have committed gross human rights violations or other serious offences of international law are generally not suitable for any kind of work within the judiciary. Others might be suitable for another position with less power than the one they had during the former regime, e.g. a judge with insufficient knowledge of the law might be suitable for administrative tasks within the court.\(^{187}\)

There are two main ways of reforming judiciaries’ workforce; through a review process or through a reappointment process. The review process restructures the judiciary through a review of all persons working therein and an evaluation of their suitability for the different positions. The persons who are not suitable will be removed and the others will keep their positions.\(^{188}\) The reappointment process re-establishes the institution completely and all personnel are dismissed and have to re-apply and in that way the positions will be given to those who are most suitable. Such process is of course a more profound intrusion for the individuals, since it turns them into work applicants instead of employees. This process also includes a ceasing of the old institution at an organizational level and a new composition of the institution will be established.\(^{189}\) A large difference between the two is the burden of proof. In the review process, the burden of proof lies upon the evaluator, at least until severe breaches of international human rights standards have been revealed. In the reappointment process the burden of proof shifts to the former employee, who has to prove that he or she is suitable for the position.\(^{190}\)

Many international instruments against corruption recognize the need of international support to countries that want to rid their legal system from corruption. The strategies presented so far are costly and the positive effects of the efforts might not show in several years. Short-term

\(^{185}\) UNHCHR, Rule-of-Law Tools for Post-Conflict States, Vetting: an operational framework, p. 3-5.

\(^{186}\) Ibid. p. 10-11.

\(^{187}\) Ibid. p. 23.

\(^{188}\) Ibid. p. 25.

\(^{189}\) Ibid. p. 27.

\(^{190}\) Ibid. p. 26-27.
advantages of anti-corruption strategies are few and there is no doubt that corrupt behaviour usually brings a lot of advantages to those involved and there is not always an obvious victim.¹⁹¹

International support to e.g. reform processes of the judiciary in new democracies can be both negative and positive. Generally, internal leaders are better at providing local know-how, preventing anger to arise locally against international obligations and to make the reform process sustainable through ensuring local anchoring. However, international actors may bring other advantages to process, such as impartiality, effectiveness and a more objective implementation of the reform. A golden middle way might be the best solution; creating a body consisting of a mix of domestic and international actors. The reach of the international actors depends both on the national political will of international actors’ involvement and the mandate that they actually possess.¹⁹²

A successful anti-corruption campaign was carried out in Hong Kong, starting in 1974 after a long time of widespread corruption. The Hong Kong Government decided to create the Independent Commission against Corruption (ICAC). It was given the task to attack corruption in three ways; through investigation, prevention, and community education campaigns to raise knowledge about corruption. The public awareness became crucial in the process; people went from tolerating corrupt behaviour to be extremely intolerant of it and they started to report corruption to the ICAC. Many trials were held, also for minor corruption offences, both because they wanted corruption to be a high-risk crime, but also to show the general public that their reports were taken care of seriously and to encourage them to keep reporting. 9,000 people were prosecuted for corruption charges and 84 per cent of them were convicted between 1974 and 1993 and the model of the ICAC has been widely recognized. The keys to success in Hong Kong were: a strong political will, support of the general public, the independence of ICAC, proper anti-corruption laws and effective enforcement of them, strengthening of the rule of law, and the threefold strategy of investigation, prevention and public education.¹⁹³

The anti-corruption strategy in Hong Kong was carried out in a state of peace. Anti-corruption judiciary reforms are often carried out in post-conflict states. E.g. in Kosovo, where the reform of the judiciary started immediately after the war, through the creation of an ad hoc Final Court of Appeal until the Supreme Court was re-established.¹⁹⁴ The re-establishment of the already existing Kosovar judiciary was not without problems, since security threats endangered the independence and impartiality of the judiciary and the effectiveness of the courts, which could gravely damage the peace process and the rule of law establishment. The United Nations Interim Administration Mission in Kosovo (UNMIK) adopted a measure to be able to appoint international judges for positions in the Kosovar courts in order to ensure the independence and impartiality of the judiciary in Kosovo.¹⁹⁵ Two vetting programs were carried out in Kosovo. The first one consisted of a thorough examination of judges while the latter focused on the reappointment process.¹⁹⁶ The first program lacked in process guarantees for judges that had been removed, why the Kosovo Judicial Council was created in 2005 in

¹⁹¹ UNODC, Anti-Corruption Toolkit, p. 66.
¹⁹² Ibid. p. 7.
¹⁹⁴ UNMIK/REG/1999/5, Section 1 and 6.
¹⁹⁵ UNMIK/REG/2000/6 and UNMIK/REG/2000/64.
¹⁹⁶ The first one followed UNMIK/REG/1999/7 and the second followed UNMIK/REG/2006/25.
order to make it possible for removed judges to appeal.\textsuperscript{197} When the second vetting program started, the UNMIK recognized that the Kosovar appeal mechanism for removed judges was not living up to international human rights standards, why an administrative direction permitting appeals to the Supreme Court was adopted.\textsuperscript{198} The Kosovar vetting programs have been considered successful with regard to strengthening the independence and efficacy of the judiciary, the development of codes of conduct, and the transfer of certain responsibilities to the independent Kosovo Judicial Council, although there are still concerns with regard to, inter alia, lack of resources and judicial selection.\textsuperscript{199}

The judiciary reforms in Liberia have not been that successful. After fourteen years of civil war, the Liberian judiciary was gravely unhealthy. A reappointment vetting program was carried out in line with the provision of the Accra Peace Agreement of 2003 and all judges had to resign and be reappointed if suitable.\textsuperscript{200} In Liberia there are two different legal authorities, one local customary law system and one statutory law system.\textsuperscript{201} The statutory law system consists of justices of the peace (JP) courts, magistrates’ courts, circuit courts and the Supreme Court. The JPs were created in order to increase access to justice in minor cases for people living far from a magistrate court, but they frequently violate the scope of their jurisdiction. Even though they are only allowed to decide on petty theft cases, the JPs handle all kind of criminal law cases and sentence people to jail even if they are not allowed to do so. Since the JPs are not on the judicial payroll, they have to find alternative financial means, why judicial corruption is probably the worst at this level.\textsuperscript{202} The United Nations Mission in Liberia (UNMIL), which was in charge of the judicial reform process during the transitional period, estimated that half of the 300 JPs were illiterate and that only three out of 130 magistrates had law degrees.\textsuperscript{203} The relation between the statutory law system and the customary law system is not clear, but it seems like ordinary citizens prefer to resolve their disputes through traditional means in the customary law courts. Locally elected town chiefs, clan chiefs and paramount chiefs are judges in the customary law courts. The dual system was created so that the ‘natives’ were governed by the customary law and the ‘civilized’ were governed by the statutory law.\textsuperscript{204} The UNMIL reforms have focused mainly on the statutory law system, including sponsoring of limited court refurbishment, training of judicial officers, and jurisdictional training. The reforms have so far not been very successful and some of the criticisms that they have received are e.g. not enough improvements in the court structures, lack of prisons and low salaries, which have resulted in that UNMIL trained judges have turned to the private sector instead of to the courts.\textsuperscript{205}

\textsuperscript{197} UNMIK/2005/52.
\textsuperscript{198} UNMIK/DIR/2007/7.
\textsuperscript{199} American Bar Association, Judicial Reform Index for Kosovo, Volume III, August 2007, p. 1-3.
\textsuperscript{200} Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties, Accra, 18 August 2003, Article XXVII.
\textsuperscript{201} UNDP, National Human Development Report 2006, Liberia, Mobilizing Capacity for Reconstruction and Development p. 34.
\textsuperscript{202} International Crisis Group, Liberia: Resurrecting the Justice System, Africa Report No. 107, p. 3-4.
\textsuperscript{203} Ibid. p. i and 1.
\textsuperscript{204} Ibid. p. 6-7.
\textsuperscript{205} Ibid. p. 17-18.
5 Analysis and Discussion

Factors of Corruption

Trying to find general features that lead to corrupt behaviour is impossible. However, it seems to be several causes, often overlapping, that tempt judicial personnel to become a part of the corruption, instead of fighting it. The more systematic the corrupt behaviour becomes, the stickier it gets and the harder it is to fight it. Even if corruption is theoretically forbidden in many national systems, it does not exactly mirror the truth. It is widely recognized that corruption is more or less widespread in very many countries over the globe. Based on above mentioned studies, the culture and economic development in a country seem to have a great impact on how widespread corruption is. In an undeveloped country there may be a larger mistrust of the judicial system for understandable reasons. If there are no resources to build a well functioning judiciary and the citizens therefore are neglected their right to justice, it is close at hand to try to find shortcuts to dispute settlement. Such shortcuts may lead to a systemized structure of informal justice processes that functions in one sense, but without considering important principles such as impartiality, equality and integrity. In a structure like that, the theoretical law is weak and insignificant and the judicial outcomes are based merely on financial capacity. When corruption has become systematized, any national laws on paper, anti-corruption prohibitions included, will only become another reason for judges to solicit a bribe. Therefore it is essential that a concrete action plan is made and implemented in reality, so that the anti-corruption laws not just become rules on paper.

Personal interest in controlling the judiciary from a political perspective is another problem, as the principle of independence is not respected. Also in countries with comparatively high level of democracy and economic development, the judicial independence may not be respected. Instead the judiciary is used as a tool to carry out a political agenda and to impair other political competitors. Abuse of power can easily slow down an anti-corruption action plan. As mentioned before, the media is an important instrument, but if it is owned by persons with certain political and/or personal interests, its control mechanism becomes dysfunctional. To rid such systems from grand corruption, a first step is to change the attitude of the politicians in power. It is essential for anti-corruption action plans to be supported by the political will, regardless if they are set out to fight grand or petty corruption. At first glance, it seems obvious that the general will is a non-corrupt judiciary, but the fact is that many times everyone involved in corruption actually get advantages out of it. The politicians can firmly establish their agenda and the judges get satisfying benefits and there is no obvious victim.

To rid judicial systems from far-reaching traditions of corruption, the source of the problem must be identified and solved. The attitude towards and confidence in the system must be re-established through a reformation to a healthy and fair judiciary. Education is the key, not only to achieve a high level of integrity, competence and diligence among judges, but also to make the general public aware of what rights they have and what they can expect from the judiciary.

It is easy to criticize corrupt judges’ behaviour, but the reasons behind such behaviour might not be so hard to understand. Imagine a judge who cannot provide the basic needs for his or her family through the remuneration they receive from the state. If an opportunity arises to earn a little extra and in that way e.g. be able to send a sick child to see a doctor, who would not take that deal? A wage raise is probably not enough to change systematic corrupt behaviour among judges, but decent wages seem to be a prerequisite for anti-corruption action
plans to be sustainable. Some scholars may not agree on that there is a clear connection between low salaries and corruption and that other factors are more relevant for engaging in corruption. Low wages may not be the most central factor, but the state that it leads to may rationally generate in finding alternative ways of earning money. It seems like longer terms of office for judges lead to more stability within the judicial system and also in society. If judges are confident that their positions are protected as long as they behave in accordance with the laws and codes of conduct, it most likely makes them less inclined to jeopardize such positions by accepting or soliciting bribes. To make anti-corruption reforms of the judiciary effective, they must be supported by fair working conditions for judges and court personnel.

Anti-Corruption and Judicial Independence

The basis for a well functioning judicial system and the inherent right to fair trial depend on an independent judiciary. As the above presented material shows, many of the fundamental principles and the rule of law, are many times gravely affected by corrupt behaviour. If the principles are upheld in a proper way, then corruption cannot exist within the judiciary. The judiciary is the ultimate protector of justice, human rights, economic and human development, and fair dispute settlement and it is also essential in the fight against transnational organized crime. Corruption in the judiciary robs citizens from that protection. Therefore it is crucial to rid the judiciary from corruption. Judicial independence is one of the main instruments for anti-corruption measures, but in another sense anti-corruption measures violate the judicial independence, although they both strive for the same goal; a just and non-corrupt judiciary. Nevertheless, it is for example impossible to remove a judge from his or her office because of corruption without interfering with the immunity and independence that judges posses and must possess in a well functioning governmental system.

The dilemma is to achieve a non-corrupt judiciary without damaging the principle of judicial independence. Judges must possess a high level independence and he or she must not be afraid of taking uncomfortable decisions. However, giving that power to judges also generates great risks. Judges that misuse their office can easily hide behind the principle of independence to get away with corrupt practices. The purpose of the principle of independence is of course not to protect misbehaving judges, but to protect independent and lawful decisions. If a corrupt judge cannot be removed because of his or her independence, then the system has failed. Therefore it is important that the judiciary is transparent, that judges report the substantial law behind their decisions and that there is some kind of autonomous supervision of the judges. In transparent systems it is much harder to hide systematic corruption. If the public is allowed to follow the legal procedures, it is less likely that judges abuse the principle of independence. Although, the principle of transparency must of course be considered in the light of the need to protect exposed persons and their integrity. Judicial decisions must always be based on the law and if judges cannot defend their decisions, it might be an indication of corruption. Therefore it is good that judgements and the grounds for them are made available for the public. The press is an important control mechanism of all state officials, not least of the judges. They possess a great power of criticising authorities, although this power can be misused if politically or personally influenced or if the journalists do not have the competence to evaluate legal matters accurately. For that reason there should be a constitutional autonomous body which is entitled only to the supervision of the judiciary. This is not without complexity. Can an autonomous body ever be autonomous?
Judicial decisions might not always be in accordance with the public opinion, but they may nevertheless be judicially correct. Judges must always base their decisions on the law and not on political or social pressure. This is a great problem in totalitarian regimes, where the political power also becomes the judicial power and the separation of powers is neglected. When the political power has taken over the judicial and executive powers, it is almost impossible for international anti-corruption instruments to be effective, since they many times are evaluated by the states themselves. The creation of UNCAC shows that there is an international political will to eliminate corruption even though it is a sensitive issue. To establish an international legally binding document is a great start to raise the awareness of the problem and to acknowledge a common basis in the fight against corruption. Even so, it is up to every state to make sure that the objective of the UNCAC is achieved, since it is assessed through confidential state reports. The confidentiality of the reporting mechanism shows the sensitiveness of corruption and the fear of getting accused for it. In the CrLCC there is a possibility to make public statements if a state gravely infringes the purpose, which makes its supervision mechanism stronger than the one of the UNCAC. At the end, political will and self-criticism are essential for effective enforcement of international anti-corruption norms and standards.

Based on above presented materials, it is obviously important that corruption in the judiciary is regulated at an international level even if the regulations themselves are aimed for national legal systems. The support from other states and international organs makes it possible to carry out costly and complicated transitions of judicial systems or harmful patterns therein. The exchange of experiences and the knowledge that countries together possess, is always better and stronger than a single country’s struggle. The effectiveness of other international legislation, e.g. human rights treaties, also depends to a great extent on the national judiciaries. Since there are few international courts handling human rights cases, the national courts are the major protectors of human rights. In a globalized world, the legal decisions in national systems matter also beyond the borders of the state. Transnational crime is enormously harmful and it affects societies as a cluster bomb. The UNCAC was born out of the United Nations Convention against Organized Transnational Crime, which indicates that also corruption is a transnational problem.

The expectations on judges regarding their obligations to respect equality, impartiality, propriety, integrity, competence and diligence are very high. Their special office requires them to consider those principles at all times, also outside of office. This might seem like an excessive burden, but yet decisive. It is not always clear exactly what kind of behaviour falls within the notion of corruption and hence violating the principle of independence. The grey zone is intended to be clarified through codes of conducts for judges, primarily the Bangalore Principles. The Bangalore Principles were created by judges for judges and the intention was to provide guidance for judges personally, but also to provide the judiciaries with frameworks to set out general codes of conducts. The principles in the different guidelines provide a good basis for strengthening the judiciary in all constitutions, regardless of legal traditions and legal systems. The UN shows that the independence of the judiciary is a priority on their agenda, and they have faced the need of guidance for states through e.g. the UN Basic Principles. Even if those norms and standards regarding judicial independence are not legally binding, they should be considered as customary principles or close thereto, since they express the foundation of a healthy judicial system and they have been endorsed by numerous states, judges from different cultures and societies, and international and regional organizations.
Anti-Corruption Strategies

The international support is essential for the reason that it is very hard for individuals to fight systematic corruption within the judiciary. A single person’s capacity should not be diminished, but it is easier to have a greater impact and to transform a systematic wrong-doing if more people, organizations and other forces are involved in the fight against it. International cooperation is a great way to gather knowledge, exchange experiences, and allocate resources. Even so, it is crucial when anti-corruption strategies are under development at an international level to consider the differences of states and their traditions, culture and social environment. What works in one country does not necessarily succeed in another. Therefore, the assessment of a state and the allocation of the actual rub in the system are fundamental to develop an effective strategy. As the UN Anti-Corruption Toolkit recognizes, when the judiciary is spotted as corrupt, it should be given top priority in the overall anti-corruption strategy of the state.

As shown in above mentioned study from Hong Kong, the general public’s engagement in an anti-corruption strategy seem to have a large impact on the outcome of the process. When people are aware of their rights and there are alternatives to corruption when exercising those rights, results can be seen. A crucial factor for the success in Hong Kong seemed to be that the victims of corruption joined the fight against it and got a positive response from the authorities. Also small accusations were dealt with and even if one could imagine that the short-term economic benefit of such cases was diminutive but it helped building the public trust and in the long-run it became worth it. One could uphold that public trust, a strong political will and effective enforcement of anti-corruption laws were decisive for the process in Hong Kong to be successful. It is important to see the whole picture when reforming judicial systems. In Liberia for example, the selective measures of training judicial staff and refurbishment of some courts was not enough for a successful reform. The main law enforcement mechanisms in Liberia in reality were the customary law courts, but the focus of the anti-corruption reforms were on the statutory law system. This is evidently not sustainable since most citizens relied on the traditional customary law and therefore they did not benefit from the refined statutory law system; there was a gap between theory and reality. It is crucial that the system is carefully evaluated and that the reforms are made thereafter. Further important is that all measures are taken in a parallel manner. Even if it is costly, it will probably be worthwhile in the long run, since the reform will have filled out the gaps. Paying judicial training is useless if other measures, such as fair wages and just working conditions, are not taken to secure that the judges will return to their positions after the training.

Vetting programs are intended to help states to ‘clean up’ corrupt systems. The review process is a way to spot the actual wrongdoers and to dismiss them from their positions without restructuring the whole organization of the judiciary. This might be effective if there is lots of evidence that mirrors the real behaviour of both corrupt and non-corrupt judges and personnel. The burden of proof is on the ones carrying out the review program and this way the individual judges have a strong protection against arbitrary dismissals. This, however, might lead to an ineffective reform, since evidence of corruption often is hard to find, especially against well organized grand corruption. The review process results in a smaller organizational interference than the reappointment process, through which all personnel is dismissed and re-hired if they can prove that they are suitable for their former positions. The burden of proof has then shifted to the former employees, which raises the question of the presumption of innocence, since all judges suddenly become suspects. The reappointment process is effective since it cleanses the judiciary from scratch. Although it is adequate to
question this method in the sense that someone has the power to dismiss everyone without proof of malpractice. Can such anti-corruption strategies go too far with regard to judicial independence and who is suitable to make such interfering decisions? As showed in the vetting programs carried out in Kosovo, the UNMIK was not satisfied with the programs lack of possibilities for judges to appeal a dismissal. Even if it is important to rid the judiciary from corrupt judges and personnel, everyone’s individual right to a fair trial should not be violated. Vetting programs may be disputable processes with regard to the protection of judicial independence and the individual right to fair trial, but at the same time they may be necessary in order to rid gravely corrupt judicial systems from the people culpable for the corrupt behaviour. The balancing of the long-term benefits for the main goal, to make the judiciary accountable and free from corruption and the importance of principles, such as judicial independence and integrity must be carefully weighed.

6 Conclusion

There are several international and regional norms and standards, which have been well recognized worldwide, regarding judicial independence and corruption of state officials, including judges and court personnel. The different documents presented above show that there is a need to rid the judiciaries from corruption and to make them fair and accountable. This can be achieved through measures from different angles; from the state perspective, e.g. UNCAC, CrLCC, from the judges’ perspective, e.g. Bangalore Principles and from the citizens’ perspective, e.g. UDHR, ICCPR. The strength in all those documents is that they have been developed with consideration of different legal systems, cultures, values and social environment. It is probably therefore they have been endorsed by many states and international and regional organs over the globe.

It is impossible to find one common factor of judicial corruption; it seems like the causes are many and over-lapping. Even so, it is crucial to identify the individual factors in the states before developing and implementing actual reforms. The effects of judicial corruption are many and detrimental for the core of rule of law and fundamental principles, e.g. equality, impartiality, integrity and propriety. A central issue is that systemized corruption is very beneficial for everyone involved. The harms are not always visible, but judicial corruption contaminates the fairness of the judicial system indirectly and it destroys the very purpose of the judiciary; to uphold justice. The ones without sufficient resources to be a part of corruption, loses the protection that the judiciary is supposed to secure.

Some of the most salient internationally supported strategies to eliminate judicial corruption include preventive measures, such as education, increase of transparency in the court processes, fair working conditions for judges and court personnel, public information campaigns about corruption, and implementation of anti-corruption norms and standards in the national systems. Such strategies build a solid foundation for a healthy judiciary and they are not very controversial with regard to judicial independence. In some cases, these strategies are not enough to rid the judicial system from corrupt behaviour and other measures must be applied in order to achieve a non-corrupt judiciary. Such measures include reorganization of the judicial system, removal and reappointment of judges and court personnel, and establishment of an independent auditing body for judicial revision. These measures inevitably interfere with the principle of judicial independence and must therefore be carefully considered. The decision must be based on a balancing of possible consequences when interfering with judicial independence to achieve the goal; a fair judiciary.
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