Chapter 2: Courts, Court Administration, and Provisions Relating to Court Proceedings

General Commentary

In most legal systems, the organization of courts is laid out not in a code of criminal procedure but in the country's constitution, in a law on courts, or in both. In a post-conflict setting, a peace agreement may also provide details of the composition and structure of the court system or at least of a temporary, transitional system. In some instances, the country's code of criminal procedure may contain a number of provisions regarding the court system but the code certainly does not contain the majority of such provisions.

The MCCP, along with the other Model Codes (the Model Criminal Code, the Model Detention Act, and the Model Police Powers Act), does not focus on institutional reforms of criminal justice institutions (such as police, courts, prosecutor, and defense counsel) in post-conflict states. Instead, the Model Codes address substantive and procedural laws. The purpose of Chapter 2, therefore, is not to provide a sample law on courts. Instead, this chapter sets out a skeletal and hypothetical court system to demonstrate how the provisions of all the Model Codes might work within a real court system. The inclusion of a hypothetical court system also serves to demonstrate the importance of incorporating certain elements in domestic legislation on courts, particularly elements concerning human rights. For example, Articles 15–20 of the MCCP enshrine the right to trial by an independent tribunal and by independent and impartial judges.

The court system laid out in Chapter 2 consists of trial courts that serve as the courts of first instance and an appeals court to which matters from the various trial courts are appealed. It designates a president and vice president of the court system, in addition to judge administrators who supervise each individual trial court, and a president of the appeals court. It also establishes an individual registry for each court, and provides for additional court staff. Reference should be made to the annex figure 1, for a diagram of the MCCP court system.

Part 1: Organization of Courts

Article 3: Courts in [insert name of state]

The courts in [insert name of state] consist of:

(a) trial courts;

(b) an appeals court; and

(c) [specialized courts].

Commentary

Reference should be made to Articles 4–9 on trial courts and Articles 10–14 on appeals courts. Article 3 sets up a court system with numerous trial courts but only one appeals court. Article 3 also refers to "specialized courts" but does not elaborate upon them. The reference to specialized courts is intended to highlight their potential existence, especially in a post-conflict context. Where such a court is established in a post-conflict state, it is regulated by a law outside the criminal code and criminal procedure code. Specialized courts deal with discrete crimes or groups of crimes. They may be regulated by distinct procedural provisions outside of the criminal procedure code, and, typically, they consolidate specialized knowledge or skills needed to adjudicate what are often complex crimes. For example, the United Nations Transitional Administration in East Timor created the Special Panels for Serious Crimes with jurisdiction over genocide, war crimes, crimes against humanity, torture, murder, and sexual offenses (see UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses). A similar mandate was given to the Special Court for Sierra Leone set up in 2000 by agreement between the United Nations and the government of Sierra Leone. In Iraq, the Central Criminal Court was established in 2003 with jurisdiction over serious crime cases, including terrorism, money laundering, and drug trafficking. There are other so-called special mechanisms to prosecute and try serious criminals, such as the use of international judges or prosecutors. For a more complete discussion on these mechanisms and on special courts, see Colette Rausch, *Combating Serious Crimes in Postconflict Societies: A Manual for Policymakers and Practitioners*, pp. 80–97.

Part 2: Trial Courts

Article 4: Territorial Jurisdiction of Trial Courts

1. Trial courts are established at:
   (a) [insert location] with jurisdiction over [insert area over which the court has jurisdiction];
   (b) [insert location] with jurisdiction over [insert area over which the court has jurisdiction]; and
   (c) [insert location] with jurisdiction over [insert area over which the court has jurisdiction].
2. Where a criminal offense is committed on a vessel or aircraft that is registered in [insert name of state], the trial court of [insert location] has jurisdiction over the criminal offense. If the vessel or aircraft is not registered in [insert name of state], jurisdiction lies with the court with jurisdiction over the first port of arrival in the state.
3. Where a trial court lacks territorial jurisdiction over a case, it must promptly refer the case to the competent trial court.
4. The president of the courts must settle any dispute between two or more trial courts regarding jurisdiction over a case. Where the president determines that a particular trial court does not have jurisdiction over the case, the president must order the transfer of the case to the appropriate trial court.

Commentary

Article 4 of the MCC deals with territorial jurisdiction of the whole court system in a particular state and sets out general principles. In contrast, Article 4 of the MCCP addresses the territorial jurisdiction of individual trial courts within the broader territory of the state. Each trial court should have a specific geographical area over which it has jurisdiction. It may try cases only within its area of jurisdiction. A court that does not have jurisdiction must not try the case and must defer jurisdiction to the competent court. Any disputes should be settled by the president of the courts, who has the power to order which court should hear the case.

Article 5: Subject Matter Jurisdiction of Trial Courts

Trial courts have jurisdiction in all matters as courts of first instance.

Commentary

A "court of first instance" is the court where a criminal case commences. All criminal cases under the MCCP should be heard at first instance in the trial courts. In some states, different cases are heard in different courts of first instance. For example, less serious criminal offenses may be heard in a town court, district court, or county court, while more serious criminal offenses may be tried only before the high court. Appeals may go to a supreme court or a constitutional court. Because the MCCP does not deal with minor offenses and because it is creating only a skeletal court system, the drafters chose to provide the simplest court structure possible, namely, trial courts as the courts of first instance and appeals courts as the courts of second and final instance.

Article 6: Composition of Trial Courts

1. Each trial court is composed of judges who are appointed by the [insert appointing authority].
2. Except as otherwise provided in Paragraphs 3 and 4, the trial of an accused must be conducted by a single judge.
3. Where an offense is punishable by a penalty of imprisonment exceeding five years, the trial of the accused must be conducted by a panel of three judges.
4. An extradition hearing under Article 315 must be conducted by a panel of judges.
5. Where a case is being determined by a panel of judges, the panel must determine the criminal responsibility of the accused by a majority vote, with the vote of each judge having equal weight.

Commentary

Paragraph 1: The way in which judges are appointed—which varies greatly from one state to another—is not elaborated upon in this paragraph. This issue should be addressed in legislation outside of a criminal procedure code, either in the state's constitution, a law on courts, or a separate piece of legislation. The appointment of judges in many post-conflict states has involved the establishment of judicial councils or judicial commissions as part of overall institutional reforms efforts.

Paragraphs 2 and 3: A single judge should sit on a case where the penalty range for the criminal offense concerned is one to five years' imprisonment (reference should be made to Article 38 of the MCC for a discussion of penalty ranges). For all other criminal offenses, the case should be heard by a panel of three judges.

The jury system that is used in some legal systems has not been adopted in the MCCP. One reason for this is that the drafters concluded that in the aftermath of an ethnic or religious conflict that may have occurred in some post-conflict settings, it might be difficult to convene a jury free of bias against an accused who is not from their ethnic or religious group. Another reason is that operating a viable jury system is expensive and requires that jury members be compensated for their expenses for travel, sustenance, and so forth. In a resource-poor post-conflict state, the authorities may simply not have the means to sustain the jury system. In post-conflict Liberia, for example, victims of crime were reportedly forced to pay judges and juries to hear cases against the alleged perpetrators. Yet another reason why the MCCP's drafters opted not to embrace the jury system is because of the potential for corruption or intimidation of juries in states without adequate safeguards to prevent this. In some instances, accused persons have paid the jury to secure a not-guilty conviction. Having a case heard by a professional judge will not eliminate the threat of corruption, but it will reduce the number of people who are potential targets for bribes.

Paragraph 4: Given the complexity of requests for extradition, all such requests, irrespective of the potential penalty that may be imposed for the criminal offense in question, must be heard by a panel of three judges. Reference should be made to Chapter 14, Part 2, on "Extradition" and its accompanying commentaries.

Paragraph 5: At the end of the trial, the panel of judges will deliberate and then vote on each count in the indictment, as provided for in Article 263. The decision on whether an accused person is criminally responsible will be determined by the majority vote of the panel; two votes in favor will secure a conviction or acquittal on each count of the indictment. Reference should be made to Article 263 and its accompanying commentary.

Article 7: Judge Administrator of Each Trial Court

1. The [insert appointing authority] must designate a judge in each trial court to serve as the judge administrator.
2. The judge administrator is responsible to the president of the courts in [insert name of state] and is under his or her direction and control.
3. The judge administrator is responsible for all administrative matters in the trial court and must submit periodic reports to the president of the courts.
4. The judge administrator is also responsible for such other duties as provided for in the MCCP.

Commentary

For each trial court under the MCCP, a judge administrator must be appointed. A judge administrator is responsible for overseeing the administrative functioning of the particular trial court and plays a key role in overseeing the operations of the court, promoting its efficiency, and ensuring accountability to the public. He or she is required to make executive decisions on procedural or administrative matters concerning the trial court and to evaluate and analyze information leading to improved court administration. The judge administrator is also responsible for hearing complaints regarding court procedures or administrative procedures from prosecutors, defense counsel, or a member of the general public. The judge administrator will be responsible for developing an administrative plan for the proper, efficient, and prompt disposition of cases. His or her duties will also include the drawing up of a judges' roster that determines the duties of each judge on any given day, including those judges who are assigned to particular courts on a particular day and those assigned to "paper duties" (i.e., responding to applications and motions to the court); the roster also includes the weekend duty roster, which shows which judge is responsible for dealing with urgent matters on weekends and public holidays. Moreover, the judge administrator may be responsible for outlining the amount of cases each court can be expected to deal with effectively each month or year. This may involve the compilation of statistics, which would be included in the periodic report that the judge administrator is required to submit to the president under Paragraph 3, along with statistics on the number of motions and applications submitted to the court and the number of court staff. A proposed budget would also need to be compiled and included in the periodic report.

Paragraph 4: The "other duties as provided for in the MCCP" are laid out in Article 25 (on the duty of the judge administrator to oversee the work of court staff). Article 154 (on the assignment of a replacement judge to determine whether protected materials can be released in the absence of the judge who originally made the order for protective measures), Article 189 (on the extension of the maximum period of preindictment detention or house arrest), and Article 272 (on the assignment of a replacement judge to supervise imprisonment where the originally assigned judge is no longer available). Reference should be made to these articles and their accompanying commentaries.

Article 8: Presiding Judge of Each Panel in a Trial Court

1. Each panel of judges in a trial court has a presiding judge, designated by the judge administrator.
2. The presiding judge must lead the proceedings of the panel.
3. The presiding judge must not give directions to the other judges of the panel on substantive matters of law, their assessment of the evidence, or their findings in a case.
4. The presiding judge must nominate one judge of the panel as the judge rapporteur. The judge rapporteur has the primary responsibility for preparation of the final written judgment in the case.
5. The presiding judge must ensure order in the courtroom.

Commentary

Article 6(3) requires that a criminal offense punishable by a penalty of imprisonment exceeding five years must be conducted by a panel of three judges. In such cases, all matters relating to the criminal investigation (including motions and applications to permit certain investigatory actions, such as search and seizure) and the indictment hearing will be conducted by a single judge. At the trial stage, a panel must be assigned, and, in accordance with Article 8, each panel must have a presiding judge. The presiding judge will be designated by the judge administrator when he or she is assigned the case. The presiding judge will, in turn, nominate a judge rapporteur to prepare the judge in the case. The presiding judge will be responsible for leading the supervision of the trial proceedings, including ensuring order in the courtroom; however, the presiding judge may not direct or order the other two judges on the panel with regard to the law, the evidence, or the findings in the case.

Paragraph 5: Reference should be made to Article 41, which provides the court with the power to sanction persons for misconduct before the court.

Article 9: Cooperation between Trial Courts

1. Each trial court in [insert name of state] must cooperate with a request of another trial court in the state, including for the following measures:
   (a) service of orders, warrants, decisions, motions, or summonses of the requesting court on persons in the jurisdiction of the requested trial court;
   (b) reenactment of a criminal offense in the jurisdiction of the requested trial court;
   (c) access to the case files of the requested trial court; and
   (d) execution of a decision of the requesting court if the subject of the decision is located in the jurisdiction of the requested trial court.
2. A request for cooperation may only be denied where:
   (a) the requested trial court does not have jurisdiction to comply with the request; or
   (b) release of the information requested under Paragraph 1(c) is otherwise precluded by the MCCP.

Commentary

International cooperation (i.e., cooperation between domestic courts and the courts in another state) is addressed in Chapter 14, Part 1, of the MCCP. Article 9, in contrast, deals with cooperation between different courts within the same state. Paragraph 1 provides a nonexhaustive list of different measures a trial court can request another trial court in the domestic jurisdiction to undertake. For example, if a trial court in one location issues an order for protective measures in a case where a suspect or an accused (who must be served with the order under Article 153 of the MCCP) lives within the jurisdiction of another trial court, the requesting trial court can request that the other trial court serve the order on the suspect or the accused. In addition to service of documents, a trial court may request another court to execute a decision, to reenact a criminal offense (reference should be made to Article 240 that gives the court the power to order the reenactment of a criminal offense) or to access documentation

in the court's possession. The requested trial court may refuse a request for cooperation only where the requested court does not have jurisdiction to undertake the request or where it is legally precluded from doing so—for example, where a trial court requests the release of protected materials relating to an order for protective measures without the legal release order required under Article 155.

Part 3: The Appeals Court

Article 10: Territorial Jurisdiction of the Appeals Court

An appeals court is established at [insert location] with jurisdiction over [insert name of state].

Commentary

Under the MCCP, there is one appeals court, which has jurisdiction over the entire state. Typically, an appeals court is located in the capital city of the state.

Article 11: Subject Matter Jurisdiction of the Appeals Court

The appeals court has jurisdiction to hear appeals from trial courts and extraordinary legal remedies as provided for in Chapter 12 of the MCCP.

Commentary

Chapter 12 of the MCCP sets out the various types of appeals and extraordinary legal remedies that are permissible under the MCCP, including appeals against acquittal or conviction or against a particular penalty (Part 1), which come into play after the final judgment of the trial court; applications to reopen criminal proceedings (Part 2); and interlocutory appeals, which can be made prior to the final judgment (Part 3). Reference should be made to the general commentaries to Chapter 12, Parts 1–3 , for a discussion of the meaning and scope of appeals and extraordinary legal remedies within the context of the MCCP.

Article 12: Composition of the Appeals Court

1. The appeals court is composed of judges who are appointed to the relevant panel by the [insert appointing authority].
2. The judges of the appeals court must sit in panels of three judges designated by the president of the appeals court.
3. The panel must take all decisions by a majority vote, with the vote of each judge having equal weight.

Commentary

Paragraph 1: The way in which appeals court judges are appointed—which varies greatly from one country to another—is not elaborated upon in this paragraph. This issue should be addressed in legislation outside a criminal procedure code, either in a country's constitution, a law on courts, or a separate piece of legislation.

Paragraph 2: All cases on appeal must be heard by a panel of judges rather than by a single judge. This stipulation applies irrespective of the penalty range for the particular offense.

Article 13: President of the Appeals Court

1. The [insert appointing authority] must designate a judge as the president of the appeals court.
2. The duties of the president of the appeals court are set out in Article 21, Article 22, and Article 25.

Commentary

Paragraph 1: The way in which the president is appointed—which varies greatly from one country to another—is not elaborated upon in this paragraph. This issue should be addressed in legislation outside a criminal procedure code, either in a country's constitution, a law on courts, or a separate piece of legislation.

Article 14: Presiding Judge of Each Panel in the Appeals Court

1. Each panel of judges in the appeals court has a presiding judge, designated by the president of the appeals court, who is the judge to whom the case is initially assigned.
2. Each presiding judge must lead the proceedings of the panel.
3. The presiding judge must not give directions to the other judges of the panel on substantive matters of law, their assessment of the evidence, or their findings in a case.
4. The presiding judge must nominate one judge of the panel as the judge rapporteur. The judge rapporteur has the primary responsibility for preparation of the final written judgment.
5. The presiding judge must ensure order in the courtroom.

Commentary

Reference should be made to the commentary accompanying Article 8.

Part 4: Judicial Independence and Impartiality

General Commentary

This part addresses the topic of judicial independence and impartiality. The right to a trial by an independent and impartial tribunal is a core element of international human rights norms and standards, first articulated in 1948. According to the Bangalore Principles of Judicial Conduct, the right to judicial independence is essential in upholding the rule of law in a state (Preamble), while the Suva Statement on the Principles of Judicial Independence and Access to Justice declares that it is essential for the protection of all human rights (Preamble). The right to an independent and impartial tribunal is set out in a variety of other treaties including the Universal Declaration of Human Rights (Article 10), the International Covenant on Civil and Political Rights (Article 14[1]), the African Charter on Human and Peoples' Rights (Article 7[1]), the American Declaration of the Rights and Duties of Man (Article XXVI[2]), the American Convention on Human Rights (Article 8[1]), the European Convention on Human Rights and Fundamental Freedoms (Article 6[1]), and the United Nations Convention on the Rights of the Child (Article 37[d]). In addition, the right to judicial independence and impartiality is generally enshrined in the constitutions of most states. This right has also been elaborated upon in a number of nonbinding resolutions and declarations from both within the United Nations system and outside. Reference may be made to the United Nations Basic Principles on the Independence of the Judiciary (and the related Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary), the United Nations Draft Declaration on the Right to a Fair Trial and a Remedy (paragraphs 13–24), the Suva Statement on the Principles of Judicial Independence and Access to Justice (2004), the Bangalore Principles of Judicial Conduct (2002), the International Bar Association Minimum Standards of Judicial Independence (1982), the Latimer House Guidelines for the Commonwealth (1998), the Council of Europe Recommendation No. R(94)12 (1994), and the African Commission Resolution on the Respect and Strengthening on the Independence of the Judiciary (1996).

Further elaboration on the meaning of judicial independence and impartiality may be distilled from the case law of the various international and regional human rights bodies and courts. For a comprehensive discussion of this case law and the international and regional binding and nonbinding documents on judicial independence and impartiality, reference can be made to Jonas Grimheden, *Assessing Judicial Independence in the Peoples' Republic of China under International Human Rights Law.* Other useful tools are listed in the section "Further Reading and Resources" near the end of this volume.

Initially, the provisions of Part 4 contained merely the broad principle that judges should be independent and impartial. During the course of the MCCP vetting process, various experts suggested that this provision be expanded to elucidate the various fac-

ets of judicial independence and impartiality. The MCCP drafters therefore augmented the broad principles of independence and impartiality. There are, of course, limits to this, because many provisions relating to judicial independence and impartiality are ordinarily found outside of a criminal procedure code. For example, the principles of judicial independence and impartiality and other related principles may be set out in a country's constitution, its laws on courts, court rules and procedures, codes of conduct, or codes of ethics. Part 4 thus contains an elaboration on the core aspects of judicial independence and impartiality without addressing the details that are usually outside the scope of a criminal procedure code.

Judicial independence and impartiality include a number of different aspects that may be clustered as follows (this taxonomy is taken from Grimheden, *Assessing Judicial Independence in the Peoples' Republic of China under International Human Rights Law,* p. 51):

- Independence
  - Collective independence
    - Structural
    - Resources
  - Individual independence
    - Occupational
    - Internal Structure
    - Rights of Judges
- Impartiality
  - Recusal
  - Nonconflicting Assignment
- Public confidence
  - Transparency
  - Representativity

Judicial independence, impartiality, and public confidence are all addressed in Part 4. Article 15 addresses judicial independence, along with Article 16 that deals with the related issue of insulation from pressure. Article 17 relates to judicial impartiality. Article 17 is complemented by Articles 18 and 19, which provide both a voluntary and an involuntary mechanism for a judge to be removed from a particular case for lack of impartiality. Finally, Article 20 deals with the issue of public confidence that relates to the twin principles of judicial independence and impartiality. It is worth noting that these twin principles are related and therefore overlap conceptually to some degree. Generally speaking, independence relates to insulation from pressure (hence the inclusion of Article 16) at an institutional level, while impartiality relates to the neutrality and lack of bias of individual judges. However, independence, as is outlined in the taxonomy above, may also apply to the individual. For the purposes of the MCCP, a distinction has been made between independence and impartiality, although readers should be aware of the linkages.

Article 15: Judicial Independence

1. The judiciary, meaning the courts and the judges, must be independent.
2. Independence entails:
   (a) institutional guarantees of insulation from pressure;
   (b) guarantees of actual as well as the appearance of unbiased adjudication; and
   (c) procedures that instill public confidence.

Commentary

As discussed above in the general commentary to Part 4 (and as set out in the taxonomy above), the concept of judicial independence has collective, or institutional, aspects as well as individual ones. These aspects are sometimes termed *institutional independence* and *functional independence*. The International Bar Association Minimum Standards of Judicial Independence terms them *personal independence* and *substantive independence,* respectively. According to paragraph 1(b) of the standards, "personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control." Substantive independence, on the other hand, means that "in the discharge of his/her judicial function a judge is subject to nothing but the law and the commands of his/her conscience." Article 15(2) of the MCCP addresses both personal and substantive independence.

Paragraph 2(a) requires that judges and the courts as an institution (i.e., the judiciary) be insulated from outside pressure. This requirement is addressed more fully in Article 16 and its accompanying commentary.

Paragraph 2(b) requires that guarantees be set in place to ensure unbiased adjudication as well as the appearance of unbiased adjudication. This paragraph underscores a very important sentiment: judicial independence must be assessed from both an objective and a subjective perspective. Objectively, an assessment of judicial independence entails looking at factors such as the appointment of judges, duration of their terms of office, and guarantees against external pressure laid out in Paragraph 2(a) and Article 16 (see *Campbell and Fell v. United Kingdom,* Judgment, European Court of Human Rights [ECHR], Application nos. 7819/77 and 7878/77, June 28, 1984). Equally important is the appearance of independence. An old maxim states that "justice must not only be done but must also be seen to be done." The sorts of guarantees envisaged in Paragraph 2 have been articulated by the United Nations Human Rights Committee in its "General Comment no. 13" (paragraph 3), which states that the issue of independence and impartiality raises matters "with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their

functions and the actual independence of the judiciary from the executive branch and the legislative." A number of overlapping and additional guarantees have been elaborated upon in different instruments on judicial independence. The United Nations Basic Principles on the Independence of the Judiciary lists these guarantees under a number of different headings, including "Freedom of Expression and Association"; "Qualifications, Selection, and Training"; "Conditions of Service and Tenure"; "Professional Secrecy and Immunity"; and "Discipline, Suspension, and Removal." Two key principles from this instrument, both found in Principle 11, are that the terms of judges' service and conditions of service must be secured by law and that judges should receive adequate remuneration. The requirement of adequate remuneration is also found in the International Bar Association Minimum Standards of Judicial Independence (paragraphs 14 and 15). The International Bar Association Standards, the United Nations Basic Principles (Principle 7), and Procedure 5 of the United Nations Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary all state that court services as a whole should be adequately financed in order to ensure institutional independence. The United Nations Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary also require that "States shall pay particular attention to the need for adequate resources for the functioning of the judicial system, including appointing a sufficient number of judges in relation to caseloads, providing the courts with necessary support staff and equipment, and offering judges appropriate personal security, and remuneration and emoluments" (Procedure 5). Some experts argue that and without these resources, judiciary independence could be jeopardized because judges might seek to augment their income by accepting money or gifts from interested parties, as has occurred in a number of post-conflict states and territories such as Cambodia, Kosovo, Liberia, the Democratic Republic of the Congo, and Sierra Leone. In addition to receiving security, remuneration, and resources, judges must have immunity from suit to safeguard their independence as laid down by Principle 16 of the United Nations Basic Principles and paragraph 43 of the International Bar Association Minimum Standards of Judicial Independence.

The final aspect of judicial independence—public confidence—is articulated in Paragraph 2(c) of Article 15 and specifically addressed in Article 20.

Article 16: Insulation from Pressure

1. Judges must perform their duties independently, and in accordance with the applicable law and their solemn declaration.
2. No state entity, private or public organization, national or international organization, or person may influence, seek to influence, or appear to influence the judiciary.

3. The judiciary, meaning judges and courts, must also be independent from pressure from within the court and from other courts or judges.

Commentary

The insulation of the court system as a whole and the individual judges within it is a crucial element of judicial independence set out in Article 15(2)(a). The necessity to insulate the courts and judges is recognized in Principles 2 and 4 of the United Nations Basic Principles, Values 1.3 and 1.4 of the Bangalore Principles of Judicial Conduct, and paragraphs 16 and 46 of the International Bar Association Minimum Standards of Judicial Independence. The prime referents that judges must have in carrying out their duties are the applicable law and the solemn declaration that they make upon being appointed a judge.

Judges must be insulated from two types of pressure: external and internal. External pressure means pressure from external actors, for example, the executive, the legislature, an international organization, or a private person. The International Bar Association Principles state that the executive and ministers of the government must not control judicial functions (paragraphs 2, 3, 5, and 16). Nor must pressure be brought by international actors. For example, judges in Kosovo complained of undue political pressure by international actors requesting that certain suspects not be released from detention, although evidence was not sufficient to hold them. This type of undue pressure violates the independence of the judiciary. According to the Bangalore Principles, "a judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to the reasonable observer to be free therefrom" (Value 1.3). The second type of pressure that must not be exerted over a judge is internal pressure. Pressure must not be brought to bear on judges from colleagues and those inside the judicial system. Paragraph 46 of the International Bar Association Principles states that, "in the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and supporters."

Where there is any doubt as to impartiality, either objective or subjective, a judge must excuse himself or herself from the case in accordance with Article 18. Where the judge is not forthcoming in exercising this duty, he or she must be disqualified from the case under Article 19, if grounds for disqualification apply.

Article 17: Impartiality of Judges

1. Judges must decide matters before them without prejudice and without improper influence of a direct or indirect nature from any source or for any reason.

2. Judges must uphold the appearance of impartiality by excusing themselves when reasonable to do so under Article 18. A judge who does not excuse himself or herself may be disqualified under Article 19 on the basis of lack of impartiality.
3. Judges must not engage in activities or maintain interests in activities or entities that affect their impartiality or appearance of impartiality.

Commentary

The concept of impartiality requires that a judge act without favor, bias, or prejudice in the adjudication of a case. A judge who holds an actual bias or prejudice against a person who is party to the proceedings (e.g., the accused) or who has personal knowledge of the disputed facts of the case cannot be considered to be impartial. Moreover, a judge must not have a vested interest in a case. A vested interest occurs where a judge has an economic or other interest in the outcome of the case or where he or she has a spousal, parental, or other close family, personal, or professional relationship or a subordinate relationship with any of the parties. As alluded to in Paragraph 2, the judiciary must act to ensure that there exists neither actual nor perceived partiality, otherwise known respectively as "subjective impartiality" and "objective impartiality." A judge's objective impartiality may be called into question where he or she engages in certain activities outside the scope of his or her work or where, for example, he or she has expressed opinions through the media, in writing, or in public actions that could adversely affect his or her required impartiality. In some instances, judges are barred from certain extra-career activities in order to secure the perception of objective independence. This usually does not include teaching but may include involvement in certain business activities (as discussed in paragraph 39 of the International Bar Association Minimum Standards of Judicial Independence).

Article 18: Excusal of a Judge on Account of Lack of Impartiality

1. A judge must not participate in a case if he or she:
   (a) is a victim of the criminal offense;
   (b) is a relative of the defense counsel, the victim, the counsel for the victim, or the accused;
   (c) has taken part in the proceedings as a prosecutor, a defense counsel, or a counsel for the victim, or has been examined as an expert witness or witness; or

(d) in the same case, has taken part in rendering a decision of a lower court, or, if in the same court, has taken part in rendering a decision that is being challenged by appeal.

2. A judge must not participate in the confirmation of an indictment where he or she has ordered the detention of the suspect.

3. A judge must not participate in the trial of an accused if he or she:

   (a) has participated in pretrial proceedings, including proceedings to confirm an indictment in the same case; or

   (b) has participated in pretrial proceedings, including proceedings to confirm an indictment in a different case against the same accused person.

4. A judge must not participate in a case where, apart from the instances set out in Paragraphs 1–3, his or her impartiality might reasonably be doubted on any ground.

5. Where the impartiality of a judge is compromised or is in doubt, the judge must make a request to the president of the courts of [insert name of state] to be excused from participating in a particular case.

6. A judge seeking to be excused from his or her functions must make a written request to the president of the courts of [insert name of state], setting out the grounds for the request.

7. The president of the courts must treat the request as confidential.

8. The president of the courts must deliver a decision on whether the requesting judge will be excused from the particular case in question.

9. Where a request for excusal is granted, the president of the courts must assign a new judge to the proceedings and ensure that the judge who is the subject of the request takes no further part in the proceedings.

10. All the actions of the judge who has been excused are deemed valid until the time at which he or she is excused by the president of the courts.

Commentary

Article 18 provides a mechanism for a judge who believes that his or her or the court's impartiality—real or perceived—may be in doubt to excuse himself or herself from a case. The Bangalore Principles of Judicial Conduct categorically state that "a judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially" (Value 2.5). Paragraphs 1–3 lay out specific instances, based on the general principle set out in Article 17, in which a judge must excuse himself or herself on account of lack of impar-

tiality, either real or perceived. Paragraph 4 provides a general residual provision that requires a judge to excuse himself or herself when, under other circumstances, the impartiality of a judge may be in doubt.

Where there is any doubt as to the impartiality of a judge, the judge must make a request for excusal to the president of the courts, who must consider the grounds of the request and deliver a decision on the matter. If the judge is excused, a new one must be assigned to the case.

Paragraphs 2 and 3: International human rights jurisprudence discusses the issue of whether prior participation in a criminal case renders a judge partial and therefore subject to excusal or disqualification. For example, this issue was discussed by the European Court of Human Rights in *Hauschildt v. Denmark* ([1990] 12 ECHR 266). Involvement in pretrial proceedings by a judge will not necessarily preclude his or her participation in the main trial. According to the European Court, the focus for adjudicating the issue of impartiality should be the "scope and nature" of prior involvement *(Nortier v. The Netherlands* [1994] 17 EHHR 273, paragraph 33).

Under the MCCP, rather than provide for a general provision on a lack of impartiality based on prior participation, the drafters instead decided to enunciate specific instances in Paragraphs 2 and 3 of prior participation that would render a judge partial and therefore subject to excusal or disqualification.

In post-conflict states in which there is a shortage of judges, Paragraphs 2 and 3, while preferable, may not be entirely feasible. In some instances, the potential pool of judges may be exhausted where there is an obligation that the trial judge, for example, must have had no prior involvement in the case. In such states, the drafters of new laws may wish to consider modifying the provisions of Paragraphs 2 and 3, at least in the short term.

Article 19: Disqualification of a Judge on Account of Lack of Impartiality

1. A suspect, an accused, defense counsel for the suspect or accused, a judge, or a prosecutor may at any time object to the participation of a particular judge in a case where the judge's impartiality is in doubt.
2. A request for disqualification of a judge does not suspend the proceedings unless the judge in question decides so.
3. A request for disqualification must be made in writing to the president of the courts of [insert name of state] and must be made as soon as the grounds for impartiality are discovered.

4. A written sworn statement must be prepared that states the grounds upon which the request lies. Any relevant evidence must be attached to the sworn statement.
5. The sworn statement must be filed at the registry of the appeals court. The registry must transmit the request to the president of the courts immediately.
6. The registry must also transmit the request for disqualification to the judge who is the subject of the request, along with a description of the evidence that has been submitted by the party who filed the written statement.
7. The judge who is the subject of the request for disqualification is entitled to present written submissions to the president of the courts.
8. The president of the courts must determine whether to grant the request on the basis of the written sworn statement and the evidence accompanying it and the written submissions of the judge in question, if any were presented.
9. Where a request for disqualification is granted, the president of the courts must assign a new judge to the proceedings and ensure that the judge who is the subject of the request takes no further part in the proceedings.
10. All the actions of the judge who has been disqualified will be deemed valid until the time at which he or she is disqualified by the president of the courts.

Commentary

Where a judge does not voluntarily excuse himself or herself from a case in which there is actual or perceived partiality on his or her part, Article 19 provides a mechanism for a suspect or accused person or his or her defense counsel, any judge, or the prosecutor to file a request for the disqualification of the judge. The request is filed with the registry of the appeals court, which then transmits it to the president of the courts, who is responsible for determining the validity of the claim. This disqualification modality should not be confused with removal from office, where a judge is removed permanently on the grounds of "serious misconduct" or "stated misbehavior," for example, both of which are common grounds for permanent dismissal of a judge. Under Article 19, the judge is disqualified from acting in the course of his or her duties only with regard to the particular case in question. However, the issues of lack of impartiality raised during the course of the proceedings may be grounds for further disciplinary action against the judge or even permanent removal. Permanent dismissal of a judge is normally dealt with in a code of ethics or a separate piece of legislation outside of the criminal procedure code and is thus not addressed in the MCCP.

Article 20: Public Confidence

The judiciary must ensure that there are procedures in place to enhance public confidence, including:

(a) transparency of the judiciary's activities; and

(b) representativity.

Commentary

According to the Bangalore Principles of Judicial Conduct, "public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society" (Preamble). Public confidence is an element of both judicial independence and judicial impartiality. As discussed in the commentaries to Articles 15 and 16, there is an element of objective, or public, perception to both independence and impartiality. A perception of the absence of independence and impartiality is as relevant as their actual absence. References to public confidence are scattered through the various nonbinding sources on judicial independence and impartiality, although it is not specifically mentioned in any of the treaties that refer to judicial independence and impartiality. Based on the case law from various international and regional human rights bodies, and on nonbinding instruments on judicial independence and impartiality, many scholars maintain that the concept of public confidence is best protected by ensuring transparency of the judiciary's actions and representativity in the composition of the judiciary. Procedural transparency may include measures to make rules, procedures, and practices of courts public and available for public reference. It may also include measures to ensure transparency of judgments and decisions of courts (excluding, of course, the internal deliberations of judicial panels and those decisions that are confidential for the purpose of protecting a victim or witness). The creation of designated points of contact with other agencies in the criminal justice system and beyond is an important transparency mechanism. Finally, the publication of court activities, including workload, budget, and staffing allocations, may also be an important element of transparency. Representativity relates to the composition of the judiciary. The judiciary should as a whole reflect different branches of society and include male and female judges from different ethnic and linguistic groups and different geographical locations. This is an issue relating to judicial appointment and should rightly be addressed in a law on courts, for example.

Part 5: Organs of the Courts and Their Competencies

Section 1: President and Vice President of the Courts

Article 21: President and Vice President

1. The [insert appointing authority] must designate a president of the courts in [insert name of state].
2. The [insert appointing authority] must designate a judge as vice president of the courts in [insert name of state] to serve in the place of the president when the president is unable to carry out his or her functions.

Commentary

The manner in which the president and the vice president of the courts are appointed is not elaborated upon in this paragraph because appointment procedures vary worldwide. This issue should be addressed in legislation outside a criminal procedure code, either in the constitution, a law on courts, or a separate piece of legislation.

Article 22: Responsibilities of the President of the Courts

1. The president of the courts in [insert name of state] is responsible for:
   (a) the overall administration of the courts in [insert name of state]. In particular, he or she must supervise the work of the trial courts and the appeals court and submit an annual court activity report to the competent legislative authority;

(b) the preparation of a precise plan outlining the general system of distribution of cases to the judges of the trial courts and the appeals court. The plan must be published and may be reviewed by the president on a regular basis, if necessary; and

(c) such other duties as specifically provided for in the MCCP.

2. Where a matter of administrative practice arises that has not been regulated by the MCCP, the matter must be decided by the president of the courts in [insert name of state].

Commentary

The president of the courts is the most senior judge, being both the president of all the courts in the state and the president of the appeals court. Like the judge administrator (who is responsible only for the administration of an individual trial court), the president is responsible for overseeing administrative functioning. The president must oversee the administration of not only the appeals court but also every trial court in the state. The judge administrators of the trial courts report to the president. The president in turn reports to the competent legislative authority (e.g., the parliament). Whereas the judge administrator prepares the judge's roster in each trial court, the president is responsible for devising a plan for how cases should be distributed (which may be based in part on the data received from the judge administrators on how their courts are functioning).

Paragraph 1(c) refers to other duties of the president of the courts. In this regard, reference should be made to Article 4(4) (on the duty of the president to resolve disputes over territorial jurisdictions of trial courts), Article 273 (on the duty of the president to convene a conditional release panel in certain cases), and Article 322 (on the duty of the president to convene special panels for juveniles).

Section 2: The Registry

Article 23: Registry

A registry for each trial court and the appeals court must be established.

Article 24: Responsibilities of the Registry

The registry of each trial court and the appeals court is responsible for:

(a) the nonjudicial aspects of the administration of each court, including but not limited to the receipt of documents to be filed in the court, the organization and storage of court documents, the security of court documents, and the service of documents; and

(b) such other responsibilities as provided for in the MCCP.

Commentary

Each court will have an individual registry to facilitate its work. A registry's work is varied and includes receipt of filed documents at the public counter (e.g., motions, applications) that are then distributed to the relevant judge; service of documents (e.g., court decisions, court orders, witness summons); receipt of monies (e.g., fines or applicable court fees); payment of witness fees and expenses; case management and tracking (which may include the creation of a case record and file folder, indexing, scheduling of court dates, and the gathering of data and statistics on court activities); dealing with public inquiries; and the organization and storage of official court documents. Staff of the registry may also play an active role in assisting the judge during court proceedings (e.g., by calling the court to order, calling the cases to be heard in turn, swearing in witnesses and interpreters, maintaining log notes and minutes of the proceedings, writing up all warrants or orders for the judge to sign, assisting the judge in scheduling court dates by reference to the court diary, and ensuring that the records of proceedings are preserved). Registry staff, sometimes known as clerks, may have a single assigned role or may play several different roles within the registry. The registry may be divided, for example, into a fines office, a public counter, a typing pool, a records department, a public office, and so forth. In a post-conflict state with limited resources and personnel, this division may not be feasible and staff members may be required to perform a number of different functions.

Even in a post-conflict context, where only limited resources are available, it is essential that this administrative capacity functions effectively; if it does not, judges and courts will not be able to effectively function.

Section 3: Court Staff

Article 25: Court Staff

1. Each trial court and the appeals court must have such qualified staff as may be required for the proper functioning of the court and the discharge of the responsibilities of the judges.
2. The court staff must exercise their duties under the direction of the judge administrator of the trial court or the president of the appeals court.

Part 6: Administration of Courts

Section 1: Filing Submissions to the Courts

Article 26: Submissions to the Courts

1. All written submissions to the court, including motions, applications, written indictments, appeals, or other statements, must be filed with the registry of the competent court.
2. Where the MCCP provides that a submission may be made orally before the court, the submissions must be entered verbatim into the record of the proceedings.
3. Submissions must be comprehensible, must comply with the provisions of the MCCP, and must contain everything necessasy for them to be acted upon.
4. Where a submission is filed that is incomprehensible or where it does not contain everything necessary for it to be acted upon, the competent court must summons the person making the submission to correct or supplement the submission within a specified period of time.
5. Where a person summonsed to correct or supplement a submission does not do so within the period of time set down by the competent court, the court must reject the submission.
6. The summons to correct or supplement the submission must warn the person making the submission of the consequences of his or her failure to correct or supplement the submission within the period of time set down by the court.

Section 2: Service of Documents by the Courts

Article 27: Service of Documents

1. Service of documents and other official court materials, including summonses, orders, decisions, indictments, judgments, or documents whose

delivery is required under any provision of the MCCP, must be made in the following manner:

(a) where the recipient can be found in [insert name of state], by hand delivery to the recipient, in duplicate, by an appointed document server. The original must be left with the recipient, who must acknowledge service by signing the copy, which shall promptly be filed at the registry of the competent court. If the recipient cannot read or write, a thumbprint will suffice. If the recipient refuses to acknowledge service, service is nevertheless complete if the server certifies the refusal and the time, date, and place of delivery. Such certification may be made on the copy that is filed at the registry; or

(b) if the recipient cannot be found, after reasonable efforts have been made to find the person, service may be effected by affixing the documents in a conspicuous manner to the premises or last address of the recipient in [insert name of state]. Service is complete if the document server witnesses the act and certifies the time, date, place, and manner of service. Such certification may be made on the copy that is filed at the registry of the competent court, together with a statement by the server who attempted to deliver the relevant documents or other official court materials.

2. Documents or other official court materials must be served upon a prosecutor at the office of the prosecutor or the office of the chief prosecutor, depending upon the location of the prosecutor to whom the document is being served upon.

3. Service of documents or other official court materials upon a detainee or a convicted person must be done through the detention center where he or she is detained and upon his or her counsel.

Commentary

The method by which documents are served varies around the world. In some states, where the postal service is reliable, service of documents is effected through the use of registered post. Where there is no reliable postal service (as is often the case in post-conflict states), documents must be served in person by an individual who is appointed by the court registry to serve the document. In exceptional cases in some states, where a person cannot be located or is evading service of a document, service can also be effected through "substituted service," which involves publication either in a newspaper or in the community where the person lives.

The MCCP requires that service be undertaken by a "document server." This person may be employed either full-time or part-time by the registry of the competent court. Documents and other materials should be delivered by hand to the residence of the person being served, except where the person being served is the prosecutor or a detainee or convicted person, as per Paragraphs 2 and 3.

Section 3: Court Summonses

Subsection 1: Summons of a Suspect or an Accused

Article 28: Summons of a Suspect or an Accused

The court must summons a suspect or an accused to appear at court hearings (including a confirmation hearing under Article 201), a trial, or an appeal.

Commentary

Where a suspect or an accused is held in pretrial detention, the detention authority is responsible for bringing the person before the court when required. Where a suspect or an accused is not held in detention, the court must inform the person when his or her presence in court is necessary by way of summons. A summons is an official court-ordered document that legally requires a person who is summonsed to appear in court. Once summonsed, the suspect or the accused has a legal obligation to appear before the court; failure to appear will put the suspect or accused at risk of apprehension under Article 41.

Article 29: Service of a Written Summons on a Suspect or an Accused

1. A written summons must be served on a suspect or an accused in accordance with Article 27.
2. The written summons must indicate:
   (a) the name of the competent court issuing the summons;
   (b) the first name, surname, and address of the suspect or the accused;
   (c) an indication that he or she has been summonsed as a suspect or an accused;
   (d) the criminal offense or offenses for which the person is suspected or accused;

(e) the name of the criminal case and the case number in connection with which he or she is summonsed;

(f) where and when the suspect or accused is to appear;

(g) a warning that the suspect or the accused will be apprehended if he or she fails to appear before the court at the time and place specified by the court and that he or she may be subject to an order for noncompliance with a court order under Article 41 or, in the alternative, may be prosecuted for failure to comply with an order of the court under Article 92 of the MCC;

(h) that the suspect or the accused is required to immediately inform the prosecutor and the competent court of any change in his or her address and of any intention to change address; and

(i) the date and signature of the competent judge.

3. The first time the suspect or accused is summonsed, he or she must be informed of his or her rights under Articles 54–71 and 172.

4. A child under the age of sixteen years old must be summonsed through his or her parents, adoptive parents, foster parents, guardian, or legal representative.

5. Where the suspect or the accused is detained, the summons must be served through the detention center where he or she is detained and upon his or her counsel.

Article 30: Oral Summons of a Suspect or an Accused

1. The competent court may orally serve a summons on a suspect or an accused who is before the court.

2. When an oral summons is delivered to a person who is before the court, the court must give the suspect or the accused instructions that he or she will be apprehended if he or she fails to appear before the court at the time and place specified by the court and he or she may be subject to an order for noncompliance with a court order under Article 41 or, in the alternative, may be prosecuted for failure to comply with an order of the court under Article 92 of the MCC.

Article 31: Apprehension Order against a Suspect or an Accused for Failure to Comply with a Summons

1. Where the suspect or the accused fails to appear at proceedings and does not justify his or her absence, the court may postpone the proceedings and make an apprehension order against the suspect or the accused.
2. The apprehension order must be in writing and must contain:
   (a) the name of the competent court issuing the summons;
   (b) the first name, surname, and address of the suspect or the accused;
   (c) the criminal offense or offenses for which the person is suspected or accused;
   (d) the name of the criminal case and the case number in connection with which he or she is summonsed;
   (e) the grounds for ordering that the person must be apprehended;
   (f) the date and time when and the place where the person is to be brought before the court; and
   (g) the date and signature of the competent judge.
3. The police must execute the apprehension order on the date specified in the order. The police must bring the apprehended person to the court designated in the order at the time specified.
4. The police officer executing an apprehension order must hand the order to the suspect or the accused and instruct him or her to follow the officer. If the suspect or accused refuses, he or she may be apprehended by the use of reasonable force.
5. If the suspect or the accused justifies his or her absence before apprehension, the court must revoke the apprehension order.

Commentary

The purpose of an apprehension order is to make the person who is the subject of the order appear before the court on a certain date. An apprehension order should not be confused with a warrant for detention, which requires that a person be detained in a detention center pending trial. An apprehension order gives the police only the power

to apprehend a person and to bring that person directly before the court. Where a suspect or accused fails to appear before the court, the court may, instead of issuing an apprehension order, issue an arrest warrant under Article 171(2)(b) on the basis that there are grounds justifying the detention of the person who has failed to appear before the court (Article 171[2][b] refers to Article 177[2][a] as a grounds of arrest; Article 177[2][a] provides that a person may be detained if there is reason to believe the person may flee to avoid proceedings which could support a warrant for detention. Where a suspect or an accused has failed to appear before the court when required, this failure may serve to substantiate the belief that the person may flee to avoid proceedings). Where an arrest warrant is issued under Article 171, the procedure set out in Article 172 and Article 173 must be adhered to.

Subsection 2: Summons of a Witness or an Expert Witness

Article 32: Summons of a Witness or an Expert Witness

1. A person may be summonsed as a witness to give evidence in criminal proceedings if there is a likelihood that he or she possesses information relevant to the criminal proceedings.
2. An expert witness may be summonsed as a witness to give evidence in criminal proceedings on account of his or her knowledge, skill, experience, training, or education in a particular area of scientific, technical, or other specialized knowledge.
3. Any person summonsed as a witness or expert witness has a duty to respond to the summons and, unless otherwise provided for in the MCCP or in the applicable law, to testify before the court.

Article 33: Service of a Written Summons on a Witness or Expert Witness

1. Except as provided for in Article 34, a written summons must be served on a witness or expert witness in accordance with Article 27.
2. The written summons must indicate:

(a) the name of the competent court issuing the summons;

(b) the first name, surname, and address of the witness;

(c) where and when the witness must appear;

(d) the name of the criminal case and the case number in connection with which the witness or expert witness is summonsed;

(e) an indication that the witness or expert witness has been summonsed as a witness or expert witness;

(f) a warning that the witness or expert witness will be apprehended if he or she fails to appear before the court at the time and place specified by the court and that he or she may be subject to an order for noncompliance with a court order under Article 41 or, in the alternative, may be prosecuted for failure to comply with an order of the court under Article 92 of the MCC; and

(g) the date and signature of the competent judge.

3. A child under the age of sixteen years old must be summonsed through his or her parents, adoptive parents, foster parents, guardian, or legal representative.

Commentary

A summons is an official court-ordered document that legally requires a person to appear in court either as a witness or an expert witness. The person served with a summons must come before the court and testify at the time and location specified in the summons unless there is another legal provision that gives the witness the right not to testify (e.g., where the person falls into the category of those not required to testify under Articles 243 and 244).

Article 34: Oral Summons on a Witness or an Expert Witness

1. The competent court may orally serve a summons on a person who is before the court.

2. When an oral summons is delivered to a person who is before the court, the court must give the witness or the expert witness instructions that he or she will be apprehended if he or she fails to appear before the court at the time

and place specified by the court and that he or she may be subject to an order for noncompliance with a court order under Article 41 or, in the alternative, may be prosecuted for failure to comply with an order of the court under Article 92 of the MCC.

Article 35: Apprehension Order against a Witness or an Expert Witness for Failure to Comply with a Summons

1. Where a witness or expert witness fails to appear or to justify his or her absence, the court may:
   (a) impose a fine of up to [insert amount]; or
   (b) order the apprehension of the witness or expert witness.
2. The apprehension order must be in writing and must contain:
   (a) the name of the competent court issuing the summons;
   (b) the first name, surname, and address of the person to be apprehended;
   (c) the name of the criminal case and the case number in connection with which he or she is summonsed;
   (d) the grounds for ordering that the person must be apprehended;
   (e) the date and time when and the place where the person is to be brought before the court; and
   (f) the date and signature of the competent judge.
3. The police must execute the apprehension order on the date specified in the order. The police must bring the apprehended person to the court designated in the order at the time specified.
4. The police officer executing an apprehension order must hand the order to the person to be apprehended and instruct him or her to follow him or her. If the person refuses, he or she may be apprehended by the use of reasonable force.
5. If the apprehended person justifies his or her absence before apprehension, the court must revoke the apprehension order.

Commentary

If a person fails to appear before the court, he or she may be apprehended on the authority of an apprehension order issued by the judge. As discussed in Article 31, an apprehension order should not be confused with a warrant for detention or an arrest warrant. The sole purpose of an apprehension order is to bring the apprehended person before the court. Once brought before a judge, the judge may impose a sanction upon the witness or expert witness for noncompliance with a court order in accordance with Article 41. In the alternative, he or she could also be liable for the criminal offense of failure to respect an order of the court under Article 197 of the MCC.

Subsection 3: Summons of a Police Officer, a Detention Authority Official, or a Member of the Military

Article 36: Summons of a Police Officer, a Detention Authority Official, or a Member of the Military

A summons must be served on a police officer, a detention authority official, or a member of the military through their command or immediate superior.

Part 7: Provisions Relating to Court Proceedings

Section 1: Court Records

Article 37: Records of Court Proceedings

1. A record of every court hearing must be made.
2. The recording must be made by the court.
3. The record must be in writing or by way of video, digital, or tape recording.
4. The record must contain:
   (a) the time, date, and place of the hearing;
   (b) the name of persons present at the hearing, including the competent judge or judges, the prosecutor, the suspect or accused, counsel for the suspect or the accused, witnesses, expert witnesses, interpreters, and court staff in attendance;
   (c) a written, typed, shorthand, stenographic, digital, video, or tape recordings of the proceedings;
   (d) a verbatim record of any orders made by the court or any orders requested by the prosecutor or the defense;
   (e) a verbatim record of any oral summonses issued by the court in accordance with Article 30 or 34; and
   (f) a verbatim record of any other decision made by the court.
5. Where the record is in writing, the pages must be numbered and the competent judge must read the record made by the recording clerk for accuracy, sign each page, and place the court seal on the document.
6. The written, digital, video, or tape recordings of proceedings must be preserved and stored in a secure location by the registry.
7. Except as otherwise provided in the MCCP, the record of the proceedings must be made available, upon request, to the prosecutor, to the defense, and in appropriate cases to counsel for the victim.

Commentary

As discussed above in the commentary to Article 24, each judge or panel of judges will be assisted during the proceedings by a staff member of the registry. It is the responsibility of the registry staff member to ensure that an accurate record of the proceedings is kept throughout the proceedings.

A variety of methods are currently used to create a court record: handwritten court reports (often in summary form rather than verbatim); cassette or video recording; traditional pen-based stenographic reporting techniques; and verbatim technologies such as stenotyping and video and audio recording. Some of these methods are extremely sophisticated and expensive. For example, computer-aided transcription (CAT) uses a computer steno machine equipped with a diskette drive that must be operated by a court stenographer. Real-time reporting is an even more sophisticated recording technique, which instantly converts the words spoken in the courtroom into computerized text. Given the expense of installing and maintaining such recording methodologies, they may not be suitable for an underresourced criminal justice system in a post-conflict state. There are, however, a variety of other, less expensive options. When considering the options appropriate for a post-conflict state, thought should be given to the cost both of installing and maintaining equipment and of acquiring necessary supplies (e.g., videocassettes, discs, paper, pens, and so forth). Video recording of proceedings may be an option, although probably not in every courtroom and case given its expense. Creating a stenographic record of proceedings either through a machine or through handwritten stenographic notes may also be considered, although this method requires a larger number of competent stenographers than many post-conflict states can muster. Therefore, the most common method of recording court proceedings is to use reel-to-reel audiocassettes or to create a handwritten court report. Audiocassette recording of proceedings is preferable as it provides a verbatim record. It is extremely difficult and labor-intensive to create an accurate handwritten court record; however, it may be the only option in certain states. Paragraph 4 sets out a number of minimum requirements for the written record. In accordance with Paragraph 5, the competent judge is required to thoroughly review and approve the written record by signing and placing the court seal on it. This is an important oversight function and helps prevent the threat of bribery of court officials in exchange for altering the court record, which has proved to be a problem in states where written records are the only means of recording court proceedings.

It is the responsibility of the registry to preserve and store records of court proceedings. The registry is also responsible for making the records of proceedings available to the parties and, in certain circumstances, to the victim. Where the court proceedings are recorded by audiocassette, the registry will normally copy the cassettes and provide them to a party requesting the record. In the case of written records, the registry will photocopy the written records or grant the right of access to the original records. Records of proceedings that are closed or confidential (e.g., hearings on cooperative witnesses under Article 166, and hearings on witness protection measures or witness anonymity under Articles 152 and 160) will be made available only to those persons specified in the MCCP. For example, the records of witness anonymity hearings will be available to the competent judge, the prosecutor, and the defense (but only

where the motion for witness anonymity is brought by the defense; where a motion for witness anonymity is brought by the prosecutor, the defense will not have access to the record of the hearings). Such records must be stored separately for general court records under lock and key as required by Article 160.

In some states and particularly in post-conflict states, court proceedings may be monitored by local or international bodies. For example, in post-conflict Liberia, United Nations human rights officers have been tasked with monitoring court proceedings. Similarly in post-conflict Kosovo, the Organization for Security and Cooperation in Europe was given a mandate to monitor and report on the conduct of criminal cases. In other locales, a court monitoring function may be assumed by a non-governmental organization. In post-conflict East Timor, the Judicial System Monitoring Programme was established in April 2001 to monitor the processes of the newly established Ad Hoc Human Rights Tribunal in Indonesia and the Special Panels for Serious Crimes. The Judicial System Monitoring Programme later extended its work to court monitoring and judicial system analysis of domestic courts. Considerable debate surrounds the right of international and national human rights monitoring bodies to have access to court records that are confidential. Some argue that monitoring bodies should have access to all court documents if they are to fully monitor the functioning of the criminal justice system. In contrast, others argue that granting full access to monitors may adversely affect the proceedings. The possibility that external monitors may divulge confidential information and endanger the investigation, prosecution, or safety of victims and witnesses leads many to believe that full access should not be granted to monitors. The MCCP does not contain a provision or statement on the right of access by court monitors to court records, although this issue was discussed in detail during the drafting of the MCCP. In the end, the drafters decided that the relevant national authorities should decide which monitors should have access to court records, in full knowledge of what organization the monitors are from. It is important to balance the need to facilitate oversight of the criminal justice system by human rights monitors against the need to ensure that the investigation of offenses and the safety of victims and witnesses are safeguarded. A directive should be prepared on the issue of human rights monitors' access to the records and safeguarding of sensitive information by the president of the courts, in addition to necessary memoranda of understandings (MOUs) between the court system and the relevant local or international monitoring organization. In post-conflict East Timor, the government's Directive 2005/6 prohibited access to case files, except for persons who are direct parties to a case, have a "legitimate reason justifying such access," and have obtained authorization from the judge handling the case.

The MCCP does not address the issue of what constitutes public records. However, the judgment in a case must be made public in order to comply with Article 62(3) of the MCCP and international human rights law. Beyond this, policies and procedures will need to be set in place to regulate what documents and records can be made available to the public at its request.

Article 38: Records of Other Actions Taken by Judges and the Registry

1. A written record of all actions in a criminal case not covered in Article 37 must be made by an individual judge at the same time as the action is undertaken or, if that is not possible, immediately thereafter.
2. A written record of all actions taken by the registry in a criminal case must be made at the same time as the action is undertaken or, and if that is not possible, immediately thereafter.

Commentary

In order to advance the purposes of effective, efficient, and fair investigations and prosecutions as set out in Article 2 of the MCCP, all criminal justice actors (judges, police, defense counsel, and prosecutors) must be vigilant in their recording of actions taken with regard to each case. Accurate record keeping is important from the perspective of the prosecution in building a sound and thorough case against the accused person. It is also important that the accused person have full information on the actions taken against him or her so that the accused can fully mount his or her defense.

Under Article 29, a judge is required to note any action taken. This note will be placed in the court file prepared by the registry, along with other relevant documentation such as search warrants, applications for search warrants, decisions, and orders.

Section 2: Change of Location of Court Proceedings

Article 39: Change of Location

1. The court may decide to hold a hearing in a place other than the seat of the court when it considers a change of location to be in the interests of justice or where reasons of necessity require a change of location.
2. The prosecutor or the defense in a case may file a motion with the registry of the competent court for a change of location.
3. In deciding upon the motion for a change of location, the court must be guided by the particular circumstances of the case and the responsibility of the court to facilitate equal access to justice.

Commentary

A change of location entails the transfer of a hearing or a trial from the courthouse of the court of competent jurisdiction to another location. The change of location can be initiated by the court itself or through the motion of the prosecutor or the defense. A change in location does not entail a change in the competent judge or panel of judges. The same judge or judges will hear the motion or the case but in a different location.

The court may choose to change locations for various reasons. For example, in a high-profile serious crime case, hearing a case in the regular location may pose a security risk; that risk could be reduced by moving to a more secure courthouse. The change in location may be temporary or it may be permanent. It may involve moving from one courthouse to another, or from a courthouse to a different kind of facility. A common occurrence in states with limited resources (including vehicles to transport prisoners to and from court) is for the judge to relocate to a detention center to hear several applications or motions for detention in one sitting. This is cost-effective and affords detainees due access to justice. This sort of change in location would be permissible under the MCCP.

Section 3: Control of Court Proceedings

Article 40: Sanctions for Misconduct before a Court

1. A court may sanction a person present before it who engages in misconduct before it, including a person who disrupts court proceedings.
2. The court may, after giving a warning as to the consequences of his or her misconduct, sanction a person present before it by:
   (a) permanently or temporarily removing a person from the courtroom; or
   (b) imposing a fine not exceeding [insert amount of fine], or a term of imprisonment not exceeding one week, upon a person who engages in misconduct before a court.
3. A fine or a term of imprisonment imposed under Paragraph 2(b) may be appealed under Article 295 of the MCCP.

Commentary

Reference should be made to Articles 189–197 of the MCC, which set out related administration of justice offenses. In those MCC articles, the offense of failure to respect an order of the court is of particular relevance. In contrast to the sanctions provided under Article 40, which may be imposed summarily during a hearing or during the trial in question, a person must be charged with and tried in a separate trial for the administration of justice offenses contained in the MCC.

Reference should be made to Article 295 on the interlocutory appeal mechanism, by which an order under Article 40(2)(b) may be appealed.

Article 41: Sanctions for Noncompliance with a Court Order

1. A court, after giving a warning as to the consequences of noncompliance with a court order, may:
   (a) detain a person, except a suspect or an accused, who refuses to comply with an order of the court, until such time as he or she complies or until compliance becomes irrelevant; or
   (b) impose a fine upon the person not exceeding [insert amount of fine].
2. The term of detention imposed by the court under Paragraph 1(a) must not exceed four weeks.
3. A term of detention imposed by the court under Paragraph 1(a) may be appealed under Chapter 16 of the MCCP.
4. A fine imposed by the court under Paragraph 1(b) may be appealed under Article 295 of the MCCP.

Commentary

Reference should be made to Article 197 of the MCC, "Failure to Respect an Order of the Court." In contrast to Article 41, which provides for immediate coercive action on the part of the court, Article 197 provides for ex post facto prosecution of a failure to comply with orders of the court and must be addressed by separate criminal proceedings.

Article 41 applies to witnesses and expert witnesses who fail to comply with a summons to appear before the court. It also applies to persons who breach other court orders, such as a production order under Article 131.

As set out in Article 41(3), the provisions on habeas corpus contained in Articles 339–346 apply to a person detained under Article 41 as they apply to all cases where any person is deprived of his or her liberty. Reference should be made to the commentaries to Articles 339–346 for further discussion. Reference should also be made to Article 295 with regard to an appeal of a fine imposed upon a person for noncompliance with a court order.