Annex E

THE INTERNATIONAL CRIMINAL COURT

A COMMENTARY ON THE ROME STATUTE

SECOND EDITION

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OXFORD

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Article 35. Service of judges/Exercice des fonctions des juges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.
2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.
3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.
4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

1. Tous les juges sont élus en tant que membres à plein temps de la Cour et sont disponibles pour exercer leurs fonctions à plein temps dès que commence leur mandat.
2. Les juges qui composent la Présidence exercent leurs fonctions à plein temps dès leur élection.
3. La Présidence peut, en fonction de la charge de travail de la Cour et en consultation avec les autres juges, décider périodiquement de la mesure dans laquelle ceux-ci sont tenus d'exercer leurs fonctions à plein temps. Les décisions prises à cet égard le sont sans préjudice des dispositions de l'article 40.
4. Les arrangements financiers concernant les juges qui ne sont pas tenus d'exercer leurs fonctions à plein temps sont établis conformément à l'article 49.

Introductory Comments

The provision governing service of judges was important in the early years of the Court, but later lost its significance as all judges were required to work full time. While the *Statute* was being drafted, however, a stand-by court composed largely of part-time judges corresponded to the vision of many States participating in the negotiations.

Drafting of the Provision

The issue of service of judges was first discussed in the somewhat different context of whether or not the Court would in fact be a permanent full-time institution at all. In his report to the International Law Commission, Doudou Thiam suggested a provision entitled 'Permanence of the Court' that established that the Court was permanent in nature, but that 'not all of its organs would function on a permanent basis'.[1] Thiam explained that a permanent court would be easier to convene, citing 'all the delays that the international community is presently facing in setting up a court to judge the war crimes committed in the former Yugoslavia'.[2] Thiam proposed an institution where only the Registrar and possibly the President would reside at the seat of the Court and exercise their functions full time. The rationale was entirely economic.[3] The Working Group of the International Law Commission also accepted the idea of a permanent court, but one that would not operate full time.[4] The commentary accompanying the final draft of the International Law

[1] Thiam, Eleventh Report, paras 47–8. [2] Ibid., paras 49–50. [3] Ibid., para. 53.
[4] Report of the Working Group on the Question of an International Criminal Jurisdiction, UN Doc. A/47/10, Annex, para. 46; also ILC 1993 Working Group Report, p. 103.

Commission noted differences of views as to whether the President of the Court should work full time, with some members stressing 'flexibility' and 'the character of the court as a body which would only be convened as necessary'. There was concern that requiring a full-time President might unnecessarily restrict the available candidates for such a position.[5] The provision in the Commission's draft concerning independence of the judiciary said that on the recommendation of the Presidency, the States Parties could decide that the workload of the Court required judges to serve on a full-time basis.[6] The issue of service of judges was being framed as one relevant to the matter of judicial independence.

Service of judges appears to have arisen only incidentally during the sessions of the Ad Hoc Committee, in the context of discussion about the permanent nature of the Court. According to the Committee's Report to the General Assembly, '[i]t was suggested that the permanence and independence of the court would be enhanced if some officials, such as the judges, the Presidency, the Registrar and/or the prosecutor, were appointed on a full-time basis'.[7] In the course of the work of the Preparatory Committee, the issue of service of judges took on a life of its own, reflecting the growing ambitions of those who were campaigning for a permanent institution.[8] But as late as the Zutphen draft, in early 1998, the issue was being considered within the context of article 4 and the existence of the Court as a permanent institution,[9] and in the provision governing judicial independence.[10] The real ancestor of article 35 of the *Statute* only emerged in the last session of the Preparatory Committee.[11] The final draft of the Preparatory Committee contained the following provision:

Article 36. Judges serving on a full-time basis

The judges composing the Presidency[1] shall serve on a full-time basis as soon as they are elected. [The judges composing [the] [a] Pre-Trial Chamber shall serve on a full-time basis [once the Court[2] is seized of a matter] [when required in the view of the President].] [On the recommendation of the Presidency, the States Parties] [The Presidency] may [by a two-thirds majority] decide that the workload of the Court requires that the judges [composing any of the other Chambers] should serve on a full-time [or part-time] basis.

[1] The view was expressed that reference should be made here to the 'President' rather than the 'Presidency'.
[2] Delegations agreed that this reference to 'the Court' means the whole Court, as set out in article 35.[12]

In the general debate within the Committee of the Whole at the Rome Conference, many delegations did not even address the provision. Those that did seemed generally favourable, in principle, to a Court composed of full-time judges,[13] while a few expressed support for a part-time or stand-by approach.[14] A variety of concerns were reflected, although the

[5] ILC 1994 Final Report, p. 31. [6] Ibid., p. 33. [7] Ad Hoc Committee Report, para. 19.
[8] Preparatory Committee 1996 Report, Vol. I, para. 22. Also: Preparatory Committee 1996 Report, Vol. II, pp. 6, 28.
[9] Zutphen Report, p. 15. [10] Ibid., pp. 76–7.
[11] Rolling text on Independence of the Judges (Article 34), Excusing and Disqualification of Judges (Article 35) and Loss of Office (Article 39), 20 March 2008; Rolling text on the Part-time/Full-time Operation of the Court, Article 33 (bis), 25 March 1998; Consolidated text for articles 29 (bis), 34, 35, 39 and 39 (bis), UN Doc. A/AC.249/1998/WG.7/CRP.2/Add.2 and Corr.1.
[12] Preparatory Committee Draft Statute, p. 61.
[13] UN Doc. A/CONF.183/C.1/SR.14, paras 14 (United Kingdom), 56 (Venezuela), 58 (Niger), 70 (Qatar), 75 (Czech Republic), 83 (Greece), 88 (Afghanistan), 90 (Senegal), 94 (Israel), 98 (United Arab Emirates); UN Doc. A/CONF.183/C.1/SR.15, paras 5 (Togo), 6 (Chile), 8 (Oman), 13 (Kuwait), 16 (Morocco), 17 (Portugal), 18 (Thailand), 20 (Libya), 26 (Iraq), 28 (Mozambique), 31 (Algeria), 32 (Uruguay), 34 (Ghana).
[14] UN Doc. A/CONF.183/C.1/SR.14, paras 19 (Madagascar), 44 (Syria), 85 (Pakistan); UN Doc. A/CONF.183/C.1/SR.15, para. 38 (Russia).

independence that would be protected by a full-time judiciary featured in the remarks of delegates, as did concerns about the financial implications. After informal consultations, the Coordinator produced a four-sentence text that met with consensus. A footnote was attached to the provision, for the attention of the Drafting Committee: 'This article was recognized to have a close connection with the independence of the judges (article 41) and the financial arrangements for salaries, allowances and expenses (article 50).'[15] The Drafting Committee decided that the four sentences should be formulated in numbered paragraphs.

Analysis and Interpretation

Article 1 of the *Rome Statute* confirms that it is a 'permanent institution'. However, a permanent international criminal tribunal can operate with a skeleton staff, with judges available to serve as required. The UN Mechanism for International Criminal Tribunals functions on this basis. Taking over responsibilities that were previously assigned to the ad hoc international criminal tribunals, it is competent to deal with various residual issues, hold hearings dealing with revision and treatment of detainees, and try any remaining fugitives if they can be apprehended.[16]

The provision on service of judges reflects a debate during the drafting of the *Rome Statute* about the nature of the Court as a permanent institution. There was a strong tendency to view the institution as a body that existed on a stand-by basis, one that would be called into action from time to time as a kind of permanent ad hoc tribunal, waiting for whatever assignments the Security Council might choose to give it. In fact, once the Court was actually established, it soon became clear that all of the eighteen judges elected to the Chambers would be required to work full time. Thus, article 35 operates as more of a transitional provision governing the first few years of the Court's operation. Beginning with a team of six judges working full time, the Court rather quickly moved to one in which all were employed full time. There were no doubt some savings for the budget over a period of a few years, but the distinction between full-time and part-time judges may also have created undesirable tension among the members of the judiciary.

Article 35 is related to article 40, on the independence of judges,[17] and article 49, on salaries, allowances, and expenses.

Full-time Members (Art. 35(1))

Paragraph 1 of article 35 was devised during informal negotiations at the Rome Conference. It couches issues relating to service of judges within the context of a principle, namely that they are engaged by the Court for a full-time position even though they may only actually serve on a part-time basis. Judges are elected to the Court as 'full-time members', requiring that they 'be available to serve on that basis from the commencement of their terms of office'.[18]

[15] Coordinator's rolling text on cluster 1 of part 4 (articles 35*(b)*, 36, 37 and 40), UN Doc. A/CONF.183/C.1/L31/Rev.1.

[16] Statute of the International Residual Mechanism for Criminal Tribunals, UN Doc. S/RES/1966 (2010), Annex I.

[17] Note, particularly, the cross reference in *Rome Statute*, art. 35(3).

[18] *Rome Statute*, art. 35(1).

This does not prevent a judge from retaining other employment, but any obligations to another employer must be subordinated to those of the Court as required. For example, during the first years of his term as a judge of the Court, Adrian Fulford presided over trials in the United Kingdom as a judge of the High Court.[19] Since being elected to the Court in 2011 and taking office in March 2012, Judge Howard Morrison has also been engaged as a member of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia hearing the *Karadžić* case. The hearings only concluded in early October 2014 and judgment is expected in the first quarter of 2016.

The Advisory Committee on Nomination of Judges has attempted to verify 'that judges elected to the Court be in good health and prepared to serve the whole term, and that there be no extraneous duties that could delay their assumption of office or interfere with their discharge of their duties'.[20]

Some international tribunals, such as the European Court of Human Rights, require that judges be resident at the seat of the Court. There is no such obligation in the *Rome Statute*. In 2004, on a proposal from the Presidency, the Assembly of States Parties included in the Conditions of service and compensation of judges of the Court the following: 'Judges shall take up residence in the Netherlands within sufficient proximity to the seat of the Court to be available to attend the Court at short notice in order to discharge their duties under the Rome Statute and the Rules of Procedure and Evidence.' It defined residence status as 'the establishment, through acquisition or long-term lease, of a permanent residence, coupled with the declaration by the judge concerned of resident status'.[21]

Judges Composing the Presidency (Art. 35(2))

That the three judges composing the Presidency[22] would serve full time was accepted early in the drafting of the *Rome Statute*. The concept appeared without square brackets in the draft adopted by the Preparatory Committee. The functions of the Presidency are set out in article 38.

Determination by Presidency of Full-Time Service (Art. 35(3))

Article 35(3) gives the Presidency the authority to determine, on the basis of the workload of the Court and in consultation with its members, the extent to which the other judges are required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40. The Court had hardly become operational before the Presidency decided that the judges of both the Pre-Trial and the Appeals Divisions should be present at the Court on a full-time basis. They were all, in fact, in place at the Court by March 2004.[23] The Pre-Trial Chambers were constituted by the Presidency on 23 June 2004. The *Situation in the Democratic Republic of the Congo* was assigned to

[19] Outside employment of part-time judges is authorized by *Rome Statute*, art. 40(3), *a contrario*. Also: Code of Judicial Ethics, ICC-BD/02-01-05, art. 10(1).

[20] Evaluation of the candidates, ICC-ASP/13/22, Annex I, para. 8; Evaluation of the candidates, ICC-ASP/12/47, Annex I, para. 8.

[21] Conditions of service and compensation of judges of the International Criminal Court, ICC-ASP/3/Res.3, Annex, II. Also: Draft conditions of service and compensation of judges of the International Criminal Court, ICC-ASP/3/12, Annex I, art. II.1.

[22] See *Rome Statute*, art. 38.

[23] Report on the activities of the Court, ICC-ASP/3/10, para. 13.

Pre-Trial Chamber I on 5 July 2004. The first genuine judicial activity of the Pre-Trial Chambers dates to 16 September 2004,[24] while that of the Appeals Chamber began on 13 July 2006.[25] However, at that time the Presidency did not consider it necessary for judges of the Trial Division to serve full time, although it was anticipated that this would be the case, based upon assumptions of the Court's future activity.[26]

Financial Arrangements for Part-Time Judges (Art. 35(4))

As the *Statute* explains, the issue of remuneration for part-time judges is governed by article 49.[27] This operated as an essentially transitional provision, although its application to the situation of judges who continue to sit even after their term of office is concluded has been considered, in accordance with article 36(10). That is because a judge whose term expires during an unfinished trial remains at work, but does not engage in any other judicial activities of the Court. By comparison, judges who continue to serve their terms, on the other hand, are often engaged in two trials at a minimum, not to mention pre-trial work. As a result, the judge who continues to serve after completion of his or her term has a relatively light workload compared with the colleagues.[28]

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[24] *Situation in the Democratic Republic of the Congo* (ICC-01/04), Élection d'un Juge Président de la Chambre préliminaire I, 16 September 2004.
[25] *Situation in the Democratic Republic of the Congo* (ICC-01/04), Order on the Registrar's request to transfer certain parts of the case record to the situation record, 16 March 2006.
[26] Report on programme performance of the International Criminal Court for the year 2004, ICC-ASP/4/13.
[27] See this *Commentary*, art. 49.
[28] Report of the Bureau on Salary and all allowances for judges, whose terms have been extended in accordance with article 36, paragraph 10, ICC-ASP/12/56.

Article 36. Qualifications, nomination, and election of judges/ Qualifications, candidature et élection des juges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.
2. a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.
   b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds[1] of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.
   c) i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8,[2] and article 37, paragraph 2;
   ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c)(i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

1. Sous réserve du paragraphe 2, la Cour se compose de 18 juges.
2. a) La Présidence peut au nom de la Cour proposer d'augmenter le nombre des juges fixé au paragraphe 1, en motivant dûment sa proposition. Celle-ci est communiquée sans délai à tous les États Parties par le Greffier.
   b) La proposition est ensuite examinée lors d'une réunion de l'Assemblée des États Parties convoquée conformément à l'article 112. Elle est considérée comme adoptée si elle est approuvée à cette réunion à la majorité des deux tiers des membres de l'Assemblée des États Parties. Elle devient effective à la date que fixe l'Assemblée des États Parties.
   c) i) Quand la proposition d'augmenter le nombre des juges a été adoptée conformément à l'alinéa b), l'élection des juges supplémentaires a lieu à la réunion suivante de l'Assemblée des États Parties, conformément aux paragraphes 3 à 8, et à l'article 37, paragraphe 2;
   ii) Quand la proposition d'augmenter le nombre des juges a été adoptée et est devenue effective conformément aux alinéas b) et c), sous-alinéa i), la Présidence peut proposer à tout moment par la suite, si le travail de la Cour le justifie, de réduire le nombre des juges, mais pas en deçà du nombre fixé au paragraphe 1. La proposition est examinée selon la procédure établie aux alinéas a) et b). Si elle est adoptée, le nombre des juges diminue progressivement à mesure que le mandat des juges en exercice vient à expiration, et ainsi jusqu'à ce que le nombre prévu soit atteint.

[1] A hyphen between 'two-thirds' was removed by C.N.577.1998 of 10 November 1998.
[2] The word 'inclusive' following '3 to 8', was deleted pursuant to C.N.577.1998 of 10 November 1998.

drafted by the Presidency, after consultation with the judges of the Court.[80] On 9 March 2005, the Plenary of the judges adopted the Code of Judicial Ethics.[81]

Confronted with the possibility of a problem of perception of impartiality, Judge Ušacka asked for guidance from the Presidency, noting the ambiguity of article 41(2) and the absence of a formal mechanism provided by the Code of Judicial Ethics.[82] The same judge invoked the Code when raising concerns about a colleague who had dealt with the Presidency in what she called 'a wholly inappropriate blurring of the roles of a Judge and another organ of the Court, considering the terms of article 3(1) and 4 of the Code of Judicial Ethics'.[83]

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[80] Code of Judicial Ethics, ICC-BD/02-01-05.

[81] Report on the activities of the Court, ICC-ASP/4/16, para. 40.

[82] *Lubanga* (ICC-01/04-01/06), Decision on the request of 16 September 2009 to be excused from sitting in the appeals against the decision of Trial Chamber I of 14 July 2009 in the case of *The Prosecutor* v. *Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, 23 September 2009, p. 2.

[83] *Bemba* et al. (ICC-01/05-01/13), Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor* v. *Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 28 June 2014, para. 46 (Separate Concurring Opinion of Judge Ušacka).

Article 40. Independence of the judges/Indépendance des juges

1. The judges shall be independent in the performance of their functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.
3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.
4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

1. Les juges exercent leurs fonctions en toute indépendance.
2. Les juges n'exercent aucune activité qui pourrait être incompatible avec leurs fonctions judiciaires ou faire douter de leur indépendance.
3. Les juges tenus d'exercer leurs fonctions à plein temps au siège de la Cour ne doivent se livrer à aucune autre activité de caractère professionnel.
4. Toute question qui soulève l'application des paragraphes 2 et 3 est tranchée à la majorité absolue des juges. Un juge ne participe pas à la décision portant sur une question qui le concerne.

Introductory Comments

The UN Basic Principles on the Independence of the Judiciary declare: 'The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.'[1] The International Covenant on Civil and Political Rights, on which the fair trial provisions in the *Rome Statute* are modelled, states that all persons are entitled to trial before 'a competent, independent and impartial tribunal established by law'.[2] It goes without saying that the judges of the International Criminal Court are 'independent'.[3] The function of the article is to impose norms aimed at ensuring that judges are not exposed to conflicting obligations or loyalties.

Each of the four judges at the International Military Tribunal, and the four alternates, was appointed by one of the parties to the London Agreement.[4] Although their independence and impartiality were not directly challenged by the accused in the Nuremberg trial, there was no formal requirement that the Tribunal be 'independent'. Some of them were judges in their national courts, on leave, and thereby had guarantees of independence by ricochet. In many justice systems, although there may be formal declarations of independence, this may be compromised by political and other pressure, inadequate remuneration, and insecurity of tenure.

[1] Basic Principles on the Independence of the Judiciary, UN Doc A/RES/40/32 and UN Doc A/RES/40/146.

[2] International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, art. 14.

[3] See generally, on the issue with respect to international judges: Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 *Harvard Int'l LJ* 271.

[4] Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279, Annex, art. II.

Drafting of the Provision

The 1993 International Law Commission draft contained a provision entitled 'Independence of judges':

> In their capacity as members of the Court, the judges shall be independent. Judges shall not engage in any activity which interferes with their judicial functions, or which is likely to affect confidence in their independence. In case of doubt, the Court shall decide.

The Working Group seemed to think this a matter of special importance because it did not envisage a court with full-time judges. Thus, members of the Court would not be paid a salary, and it was important to provide precise definition of what was permissible. 'For instance, it was clearly understood that a judge of the Court could not be, at the same time, a member or official of the Executive Branch of Government', said the Commission.[5] The provision became considerably more elaborate in the 1994 draft, adding that judges should not be otherwise engaged in 'a body responsible for the investigation or prosecution of crimes'. Questions concerning application of the provision were to be decided by the Presidency. The text also provided that States Parties could decide that judges should serve on a full-time basis, in which case they should not have other employment.[6]

The issue did not receive significant attention during the meetings of the Ad Hoc Committee.[7] The 1996 report of the Preparatory Committee noted that there were many ways to enhance judicial independence, such as the election procedure, length of terms, security of tenure, and appropriate remuneration. Delegates considered that jobs like part-time teaching and writing for publications were not incompatible with judicial independence, but the familiar concerns about activities that might prejudice judicial functions were expressed. Some felt that issues about the outside activity of judges were better addressed by the judges as a group rather than the Presidency, as is the case under the Statute of the International Court of Justice.[8] The final draft adopted by the Preparatory Committee had no square brackets.[9] It corresponds, with only minor changes to the wording that are of no substantive significance, to the text of article 40 of the *Rome Statute*.

Analysis and Interpretation

Independence is closely related to the issue of impartiality and the two concepts are often presented together. The solemn undertaking required of judges by article 45 commits them to exercise their functions 'impartially'. The preamble to the Code of Judicial Ethics of the International Criminal Court recalls 'the principles concerning judicial independence, impartiality and proper conduct specified in the Statute and the Rules'.[10] The Code was adopted in recognition of 'the need for guidelines of general application to contribute to judicial independence and impartiality and with a view to ensuring the legitimacy and effectiveness of the international judicial process'.[11] While independence is desirable in

[5] ILC 1993 Working Group Report, p. 103.
[6] ILC 1994 Final Report, p. 32.
[7] Ad Hoc Committee Report, para. 23.
[8] Preparatory Committee 1996 Report, Vol. I, para. 44; ibid., Vol. II, pp. 28–9.
[9] Preparatory Committee Draft Statute, pp. 66–7.
[10] Code of Judicial Ethics, ICC-BD/02-01-05, preambular para. 2.
[11] Ibid., preambular para. 3.

and of itself, its importance really lies in the fact that it creates the conditions for impartiality.[12] According to the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia:

> [A] Judge should not only be subjectively free from bias, but also … there should be nothing in the surrounding circumstances that objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:
>
> A. A Judge is not impartial if it is shown that actual bias exists.
> B. There is an unacceptable appearance of bias if:
> (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
> (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[13]

Accordingly, the Code of Judicial Ethics declares that '[j]udges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions'.[14] Article 41 of the *Rome Statute* establishes the procedure for recusal, requiring the exclusion of a judge from any case 'in which his or her impartiality', rather than his or her independence, 'might reasonably be doubted on any ground'.

One of the major international instruments in this area is the Basic Principles on the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, in 1985, and subsequently endorsed by the UN General Assembly.[15] The Basic Principles are referenced in the preamble to the Code of Judicial Ethics.[16] The instrument states that '[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law'.[17] It also imposes a duty upon judges: 'The principle of independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.'[18] The UN principles also require that '[t]he term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law'.[19]

Judicial Independence (Art. 40(1))

The general principle that 'judges shall be independent in the performance of their functions' is set out in article 40(1) of the *Rome Statute*. Independence is secured through other provisions of the *Statute*, including articles 36, 41, 46, 47, and 49. In particular, there is an 'interrelationship between articles 40 and 41, with the broader objective of

[12] The distinction between independence and impartiality is discussed at some length in *Norman* (SCSL-2004-14-AR72(E)), Separate Opinion of Justice Geoffrey Robertson, 13 March 2004, para. 2.
[13] *Furundžija* (IT-95-17/1-A), Judgment, 21 July 2000, para. 189.
[14] Code of Judicial Ethics, ICC-BD/02-01-05, art. 4.
[15] Basic Principles on the Independence of the Judiciary, UN Doc A/RES/40/32 and UN Doc A/RES/40/146.
[16] Code of Judicial Ethics, ICC-BD/02-01-05, preambular para. 4.
[17] Ibid., para. 10.
[18] Ibid., para. 6.
[19] Basic Principles on the Independence of the Judiciary, UN Doc A/RES/40/32 and UN Doc A/RES/40/146, Annex, art. 11.