



INTERNATIONAL
COMMISSION
OF JURISTS

KENYA: JUDICIAL INDEPENDENCE, CORRUPTION AND REFORM

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SUMMARY AND MAIN FINDINGS

The International Commission of Jurists (ICJ) in partnership with its Kenyan Section (ICJ-Kenya) conducted a high-level fact-finding mission to Kenya in December 2004.

The mission examined the state of judicial independence and accountability following major political changes in 2002 and the election of the current government. The ICJ met with various stakeholders in the government, the judicial and legal system, civil society and the media. This report analyses the impact of what became known as the policy of “*radical surgery*” of the judiciary in light of international standards. The ICJ places its findings on judicial independence and accountability in the broader framework of ongoing judicial, legal and constitutional reforms in Kenya.

Radical surgery and subsequent events

Prior to the 2002 political transition from President Daniel arap Moi to President Mwai Kibaki, the judiciary in Kenya was widely known to be corrupt. Addressing corruption as an obstacle to the rule of law, the new government set up the “Integrity and Anti-Corruption Committee of the Judiciary in Kenya” to implement its policy known as “*radical surgery*”. Following the release of the Committee’s report in 2003 (the Ringera Report), five out of nine Court of Appeal justices, 18 out of 36 High Court

justices and 82 out of 254 magistrates were implicated as corrupt. Prior to informing the accused of the allegations against them, the government ordered the publication of their names, which then appeared in the national press. The government refused to release the report. The impugned justices and magistrates were issued a two-week ultimatum either to resign or be dismissed. While many have resigned or “retired”, some have mounted legal challenges against their dismissals. Since the tribunals started to hear these cases, only one case has been resolved, with the acquittal and reinstatement of Justice Waki in late 2004.

In a series of appointments made in 2003/2004, the President used his authority to appoint 28 acting High Court justices to replace the 18 who were dismissed. The appointment process raised concerns as to whether the newly appointed justices were selected in response to political, tribal and/or sectarian interests. Many have also voiced concerns that the lack of transparency in the appointment process undermines public confidence in the quality of those named to the bench.

The ICJ fact-finding mission report analyses these events with regard to international standards on the independence and accountability of the judiciary.

Main findings and conclusions

1. Corruption in the administration of justice, including in the judiciary, has been a serious impediment to the rule of law in Kenya.

While corruption is a principal obstacle to the proper functioning of an independent judiciary in Kenya, anti-corruption measures themselves must be implemented in a way that strengthens and does not weaken the separation of powers and the independence of the judiciary.

2. The anti-corruption measures targeting the judiciary were not conducted in accordance with international standards. In particular, the individualized public naming of allegedly corrupt judges and magistrates before they were notified of the accusations against them and given an opportunity to mount a defense in fair and impartial proceedings, as well as the pressure exercised to force their resignation, violated principles of due process and security of tenure.
3. The ICJ hopes that ongoing constitutional challenges concerning the Investigative Tribunals, established to try cases of alleged corruption, can be resolved as soon as possible in order to allow the remaining open cases to proceed without undue delay and in a fair and impartial manner.

4. The ICJ considers that the practice of appointing temporary and acting judges does not satisfy standards of judicial independence and should be stopped. The ICJ is further concerned about the lack of sufficiently clear criteria and non-transparent procedures regarding the appointment of judges and magistrates.
5. Together with other contentious developments in the course of the “radical surgery”, such as undue interferences with the right to freedom of association and expression of judges and magistrates, these processes have undermined the independence and morale of the judiciary.

It is one of the principal conclusions of the ICJ that the events of the “radical surgery” demonstrate the urgent need for deeper judicial reforms that have the principal objective of fully ensuring judicial independence and accountability in Kenya.

6. Anti-corruption efforts to be effective should address all actors involved in the administration of justice. Reforms need to rectify deeper institutional shortcomings that allow various forms of undue external influence. They must be fully based on the respect for international standards, in particular regarding the independence and accountability of the judiciary.

7. In this regard, the ICJ urges the authorities to adopt as a matter of priority the current provisions on the Judicial and Legal System contained in Chapter 13 of the draft Constitution 2004. These provisions would provide an appropriate and much improved framework for an independent and accountable judiciary.

The government should consider passing the provisions of Chapter 13 as a separate piece of legislation should the adoption of the draft Constitution be further delayed.

8. Central to the necessary package of reforms should be the overhaul of the composition, mandate and functioning of the existing Judicial Service Commission (JSC). The composition and mandate foreseen in the draft Constitution 2004 would provide the appropriate framework for an independent and representative body.

In the meantime, the existing JSC should fundamentally revise its procedures and functioning within the context of its present constitutional mandate. It should in particular establish clear and transparent appointment, promotion and dismissal procedures on the firm basis of international standards. The crisis surrounding the “radical surgery” also indicated the need for an institutionalized complaint mechanism against corrupt judges

and magistrates established by law. In the meantime, the JSC should establish clear rules and procedures to receive and process complaints against magistrates. These procedures must satisfy due process rights and be subject to judicial review.

9. Judicial independence further requires other important changes to reduce the historical legacy of executive dominance of the judiciary. Changes are recommended in particular regarding the financial and administrative autonomy of the judiciary by de-linking its budget and decision-making on terms and conditions of service from the ordinary public service. The budget must furthermore be substantially increased.

10. The ICJ also makes practical recommendations on continuing judicial and legal education for members both of the judiciary and the legal profession, to improve legal competence, culture and judicial and legal ethics.

11. The mission found an urgent need to reform the magistracy, to ensure security of tenure on an equal basis to judges and to substantially improve its competencies and working conditions. Processes of appointment and promotion and discipline must be clearly set out and ensure guarantees of fair process.

12. The ICJ urges that the ongoing

reform efforts, including its GJLOS programme, do not perpetuate executive dominance over the judiciary and that the judiciary asserts its participation as an equal partner. Substantive participation and input by civil society organizations will be essential for the success of any such programme.

A detailed list of specific recommendations is set out at the end of the report. The ICJ considers that many of these recommendations can be incorporated into ongoing judicial and legal reform processes. They should guide Kenya's legal community to entrench and institutionalize judicial independence and accountability as key components of the process of strengthening democracy in Kenya, with the support of the international community.

INTRODUCTION

Objectives of the ICJ Mission to Kenya

From 13-19 December 2004, the International Commission of Jurists (ICJ) conducted a high-level mission to Kenya in partnership with its Kenyan Section (ICJ-Kenya). The mission was asked to examine the state of judicial independence and accountability since the current government was elected in 2002 and to provide concrete recommendations to contribute to the broader process of judicial reform in Kenya.

The ICJ and its Kenyan Section have been concerned about the state of the judiciary in Kenya for many years. Under President Daniel arap Moi, the judiciary in Kenya was widely known to be corrupt, its independence and impartiality effectively compromised. After the political transition in 2002, the new government prioritized addressing corruption in the judiciary through the conduct of what it called the "radical surgery" which sought to identify and remove corrupt judges. The manner in which these anti-corruption measures were carried out raised serious concerns both within and outside Kenya regarding compliance with international standards on judicial independence and accountability.

The ICJ mission evaluated the consequences of this "radical surgery". The mission also looked at further

developments, such as the role of the executive in subsequent judicial appointments and the establishment of investigative tribunals hearing cases of allegedly corrupt judges. The ICJ mission assessed individual anti-corruption measure in the context of ongoing debates in Kenya about long-term constitutional, legal and judicial reforms.

Important issues regarding the independence and accountability of the judiciary include judicial appointments and promotions, the composition and functions of the Judicial Service Commission, the status and conditions of the magistracy and other issues regarding the relationship of the judiciary with the executive, such as the degree of judicial autonomy over administrative and financial matters.

This report contains the findings of the mission and its principal recommendations for reform. These findings and recommendations are based on international standards on judicial independence and accountability that apply to Kenya and on best practices drawn from ICJ's comparative experience around the world.

The mission was composed of the Honourable Justice Dr. George W. Kanyeihamba, Justice of the Supreme Court of Uganda, mission leader¹; Mr.

¹ Justice Dr. George Kanyeihamba, Justice of the Supreme Court of Uganda; Former Minister of Justice and Attorney General of Uganda; Senior

Clement Nwankwo, distinguished practising lawyer from Nigeria²; Mrs. Cecilia Jimenez, Geneva-based lawyer from the Philippines³; and Mr. Philip Kichana, Executive Director of ICJ-Kenya.⁴

The ICJ mission met with a range of key stakeholders, including members of the judicial, executive and legislative branches of the Government of the Republic Kenya, members of the legal profession, other judicial officers, the Law Society of Kenya, academics, the media, relevant non-governmental organizations (NGOs) and the diplomatic corps in Kenya. A full list of interlocutors is provided in Annex 1. The ICJ has also consulted relevant legislation and various past reports on judicial corruption and reform in Kenya.

Presidential Advisor on International Human Rights Affairs; Professor of Law; Chairman of the Legal Drafting Committee of the Constituent Assembly that developed the Constitution of Uganda; and author of leading texts on constitutional and administrative law and government.

² Mr. Clement Nwankwo is a senior advocate from Nigeria; Managing partner at LawMark Partners in Abuja; Member of the International Advisory Committee, Harvard Institute for International Development; Former Executive Director, Constitutional Rights Project in Lagos and Co-founder and National Secretary of the Civil Liberties Organization, Nigeria.

³ Mrs Cecilia Jimenez is a Philippine lawyer specialized in international human rights law; Independent human rights consultant for a range of international organizations; former Programme Director of the Association for the Prevention of Torture (APT) and Deputy Secretary General of the Philippine Alliance of Human Rights Advocates.

⁴ Mr. Philip Kichana is a distinguished senior advocate at the High Court of Kenya and Executive Director of the Kenyan Section of the International Commission of Jurists; former Deputy Director of the Institute for Education in Democracy, Kenya; Public interest litigation counsel, Public Law Institute, Kenya.
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A list of these reports and documents is provided in Annex 2. The mission also received a written submission by the Registrar's Chamber of the High Court of Kenya.

Background

Kenya became independent in 1963. The Constitution of Kenya was adopted in 1964 and provides for the separation of the powers of the executive, legislative and judicial branches of government.

Court Structure

The Kenyan legal system is based on English common law, with significant elements of customary law and Islamic law. Chapter IV of the Constitution entitled "The Judicature", sets out the court structure. The Judicature Act (chapter 7, Laws of Kenya) and the Magistrates Courts Act (chapter 10, Laws of Kenya) further elaborate on the structure. The presiding officers of the different courts are considered judicial authorities and are designated as Justices, Judges, Magistrates or Kadhis.

Under the Kenyan Constitution, the Court of Appeal is the highest-level court followed by the High Court.⁵ The Court of Appeal has jurisdiction to hear appeals from the High Court, which in turn has unlimited original jurisdiction in civil, criminal and other matters, as well as powers of constitutional interpretation and jurisdiction to hear appeals from subordinate courts. The

⁵ Constitution of Kenya, section 60 and 64.

Chief Justice is a member of both courts.

The Constitution provides that parliament may establish subordinate courts and confer jurisdiction upon them.⁶ The Magistrates Courts were created as the primary subordinate courts. They decide on the majority of legal disputes in the country, both criminal and civil.

The Kenyan Constitution formally recognizes the “Kadhis Court”, whose jurisdiction extends “to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.”⁷

Specialized judicial divisions have also been created, concerned with commercial law, criminal law and family law. In 2004, a constitutional division was created within the High Court.

Appointment and Removal of Judges

The chapter in the Constitution on the judicature also sets out the rules for the appointment,⁸ tenure⁹ and removal of judges of the Court of Appeal and the High Court.¹⁰ The Constitution establishes the Judicial Service

Commission (JSC) headed by the Chief Justice.¹¹ The President has the power to appoint the Chief Justice on his own volition and appoints other members of the superior courts upon the advice of the JSC.¹²

Security of tenure is constitutionally guaranteed for the judges of the Court of Appeal and the High Court.¹³ These judges vacate their office only upon retirement age.¹⁴ They may be removed while in office only on grounds of “inability to perform the functions of his office” or for “misbehavior”.¹⁵ In any of these cases, and upon advice of the Chief Justice, the President shall appoint a tribunal, which shall inquire into the matter and recommend whether the judge in question shall be removed.¹⁶ The President can remove the judge only upon the recommendation of such a tribunal.¹⁷

With regard to other judicial officers in subordinate courts (magistrates), the Judicial Service Commission has the authority to appoint and remove judicial officers as well as exercise complete disciplinary control over them.¹⁸ This authority applies to the offices of the Registrar and Deputy Registrar of the

⁶ Constitution of Kenya, section 65.

⁷ Constitution of Kenya, section 66, para. 5.

⁸ Constitution of Kenya, section 61 and 64, para.3.

⁹ Constitution of Kenya, section 62, para. 1 and 2, and section 64, para. 3.

¹⁰ Constitution of Kenya, section 62, para. 3 and 9, and section 64, para.3.

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¹¹ Constitution of Kenya, section 68.

¹² Constitution of Kenya, section 62, para.1 and 2.

¹³ Constitution of Kenya, section 62 and section 64, para.3.

¹⁴ Constitution of Kenya, section 62, para 1.

¹⁵ Constitution of Kenya, section 66, para 3.

¹⁶ Constitution of Kenya, section 62, para 4 and 6.

¹⁷ Constitution of Kenya, section 62, para 4.

¹⁸ Constitution of Kenya, section 69.

High Court, the Magistrates, the Kadhis and other subordinate judicial offices.¹⁹

Kenya's international legal obligations

Kenya is a State Party to several international human rights treaties, including to the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR)²⁰ and the African Charter on Human and Peoples' Rights (ACHPR).²¹ The ICCPR and the ACHPR guarantee equality before the law and relevant fair trial rights, such as the right to be tried by a competent, independent and impartial tribunal, and the presumption of innocence.

The most comprehensive universal standards on the independence of the justice system are set out in the UN Basic Principles on the Independence of the Judiciary (1985)²², the Basic Principles on the Role of Lawyers (1990)²³ and the Guidelines on the Role of Prosecutors (1990).²⁴

¹⁹ Constitution of Kenya, section 69, para.3.

²⁰ Date of accession: 01 May 1972 (hereinafter ICCPR).

²¹ Date of accession: 23 January 1992 (hereinafter ACPHR).

²² Adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by General Assembly resolutions 40/32 and 40/146, 1985 (hereinafter UN Basic Principles).

²³ Adopted by the Eight UN Congress on the Prevention of Crime and the Treatment of Offenders, 1990.

²⁴ Adopted by the Eight UN Congress on the Prevention of Crime and the Treatment of Offenders, 1990.

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Many of the guarantees in these three instruments are echoed in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted by the African Commission on Human and Peoples' Rights in 2003.²⁵ In the Commonwealth, the Latimer House guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence (1998)²⁶ and the Latimer House Principles on the Accountability of and the Relationship between the Three Branches of Government (2003),²⁷ are also applicable to Kenya. The Bangalore Principles on Judicial Conduct,²⁸ adopted by an international gathering of Chief Justices in 2001, sets out other important standards for the ethical conduct of judges. These standards together with further details are contained in ICJ's Guide on International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors.²⁹

Kenya has signed and ratified the 2003

²⁵ Adopted as part of the African Commission on Human and Peoples' Rights' activity report at the 2nd Summit and meeting of heads of state of the African Union, 2003.

²⁶ Adopted at a meeting of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association, 1998.

²⁷ Adopted by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, 2003.

²⁸ Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices, 2002.

²⁹ International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, A Practitioners' Guide, Geneva 2004, available at http://www.icj.org/news.php?id_article=3649&lang=en.

UN Convention against Corruption³⁰ and has also signed, but not ratified, the 2003 African Union Convention on Combating Corruption.³¹ Although neither of these two treaties has entered into force, they provide useful guidance on the policies accepted by Kenya. The UN Convention against Corruption contains an explicit reference to the important relationship between judicial independence and accountability. It stipulates:

*"Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental legal principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary."*³²

³⁰ UN Doc. A/58/422; Ratified by Kenya on December 9, 2003.

³¹ Signed on December 17, 2003.

³² See Article 11.1.

JUDICIAL INDEPENDENCE AND THE REFORM PROCESS IN KENYA

Overcoming executive dominance over the judiciary

The ICJ believes that the historical dominance of the executive branch over the judiciary in Kenya must be unambiguously repudiated in words and deeds and made no more than a memory of the past. The legacy has deeply damaged the separation of powers and the role of the judiciary as a democratic check and balance on executive action. It has also gravely undermined the integrity of the judiciary itself.

Principle 1 of UN Basic Principles on the Independence of the Judiciary reads:

"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."

The UN Basic Principles on the Independence of the Judiciary further provide that neither should there be *"any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision."*³³ The judiciary itself is exhorted to assert its judicial independence in Principle 2:

"The judiciary shall decide matters before them impartially, on the basis of facts and in

accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."

Judicial independence is regarded as a requirement in the dispensation of justice:

*"The principle of the 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."*³⁴

The ICJ is convinced that a sustained process of political, judicial and constitutional reform is necessary to re-establish and institutionalize judicial independence in Kenya. The reform of the judiciary should be carried out with faithfulness to the principles of judicial independence. This would involve all branches of government, with a strong involvement of the judiciary itself. The role of civil society organizations and the media is indispensable, as public vigilance and discussion will help to ensure accountability and respect for the rule of law.

Judicial independence as a central component of reform

³³ UN Basic Principles on the Independence of the Judiciary, principle 4.

³⁴ UN Basic Principles on the Independence of the Judiciary, principle 6.

Judicial reform in Kenya is an urgent task in the process of strengthening democracy in the country. This reform must seek to establish a framework for a truly independent and accountable judiciary. The considerable commitment of many stakeholders in the legal and judicial sector to such reforms is promising. The ICJ recognizes the value of on-going initiatives and efforts to reform the judiciary, alongside other, much-needed reforms in the legal sector.

This includes the adoption of a Strategic Plan by the judiciary and the support provided by the international community of donors through the Governance, Justice, Law and Order Sector-wide Reform Programme (GJLOS) which co-ordinates judicial and legal reform. It is based on the government's anti-corruption plan and includes the reform of the judiciary as one of its priority institutions.³⁵

The role of donors in encouraging irreversible reform is of great importance to the success of these reforms.³⁶ At present, the programme seems to emphasize mainly administrative reforms and judicial independence should be made one of its key components. Moreover, its success will depend on the quality and accountability of the reform process itself. The ICJ is concerned by

the apparent dominance of the executive branch, through the Ministry of Justice and Constitutional Affairs, in the policy formulation and implementation of this legal and judicial reform programme. The ICJ mission was given the impression that the judiciary participates only peripherally in this central process.

Moreover, the ICJ notes that legal civil society organizations³⁷ have recently temporarily withdrawn their participation in the GJLOS reform programme.³⁸ Prompted by the resignation of the Permanent Secretary for Governance and Ethics, the NGOs stated their concerns for the executive's lack of accountability and the selectivity of the government's anti-corruption strategy. Following the NGO withdrawal, there is an ongoing dialogue on the principles of NGO engagement in the GJLOS programme. The ICJ encourages the resolution of this dialogue to result in the substantive involvement of civil society organisations in both policy and implementation levels in the programme.

The recommendations provided in this report by the ICJ should guide these reform processes. They can be integrated into current reform programmes and realized even if the current constitutional reform debate does not progress further.

An improved constitutional framework for an independent judiciary

The ongoing constitutional reform process that has drawn wide attention in

³⁵ Its objective is "to transform and strengthen the sector institutions for efficient, accountable and transparent administration of justice" in a vision of a "secure, democratic, just, corruption free and prosperous Kenya".

³⁶ Concern among some of the largest donor countries - such as Norway, the European Union and the United States of America, on the extent of corruption in Kenya, have led to threats to suspend or delay the release of aid in July 2004. Participating donor countries and agencies are: Canada, Denmark, Finland, Germany, the Netherlands, Sweden, Norway, USAID, the European Commission, UNDP, the World Bank, UN-HABITAT, UNICEF and UNODC.

³⁷ This includes ICJ-Kenya and nine others NGOs.

³⁸ Civil Society Statement for the Governance, Justice Law and Order Sector (GJLOS) Workshop on its Medium Term Strategy (MTS) March 2005.

Kenya since 2002 has resulted in the "Draft Constitution of Kenya 2004", adopted by the National Constitutional Conference in March 2004. However, the Constitutional Review Process appears to have been stalled for political reasons, with uncertain prospects as to whether or not the draft will be put to the people in a plebiscite.

The draft Constitution contains a strengthened Bill of Rights and establishes a clear separation of powers between the three branches of government, in particular through an improved Chapter 13 on the "Judicial and Legal System." In contrast to the current Constitution, the draft expressly vests judicial power in the judiciary³⁹ and unambiguously guarantees its independence.⁴⁰ In addition to restructuring the judiciary, the draft Constitution provides for clear rules and procedures on appointment, tenure and removal of judges, in particular through the establishment of an independent Judicial Service Commission⁴¹ reflecting international standards and general principles of judicial independence.

The current draft Constitution crystallizes many ideals and ideas that have evolved in Kenya in the search for a truly democratic society. The draft reflects the substantive participation of many sectors of society and government in the constitutional reform process. The

ICJ shares a prevailing sentiment encountered during its mission in Kenya, that many of the structural problems connected with judicial independence could be best resolved if the current draft Constitution were adopted.

The proposed provisions on the judiciary would serve as an appropriate institutional framework for guaranteeing judicial independence and accountability in Kenya and would help to better protect human rights.

The ICJ therefore encourages Kenyans to engage democratically and constructively for the adoption of a much-improved new Constitution. The ICJ specifically endorses Chapter 13 of the current draft.

However, given the delay in making this constitutional vision a reality and in light of the fundamental importance for an independent judiciary, the ICJ strongly recommends that the provisions on the Judicial and Legal System in Chapter 13 should be enacted as a separate piece of legislation, pending eventual completion of the constitutional reform process.

³⁹ Draft Constitution of Kenya, section 183, para. (2): "Judicial power vests exclusively in the courts and tribunals established in accordance with this Constitution."

⁴⁰ Draft Constitution of Kenya 2004, section 185, para. (1): "In the exercise of judicial power, the Judiciary shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any other person or authority."

⁴¹ Draft Constitution of Kenya of 2004, section 200 and 201.

Timeline of the Investigation of Judicial Corruption in Kenya 1998-2003

1998

The government appoints a Committee headed by retired Appeal Court Judge Richard Otieno Kwach to investigate "judicial rectitude". The Kwach report⁴² discloses a systematic practice of petty and grand corruption in the Kenyan judiciary, taking the form of "inducing court officials to lose or misplace files, delay trials, judgments and rulings. It notes that there was actual payment of money to judges and magistrates to influence their decisions."⁴³

2002

i) A panel of Commonwealth judges investigating judicial independence in Kenya says they are "shocked and dismayed" by the widespread allegations of bribery of judges.⁴⁴ Acknowledging the Kwach report, the panel provides concrete recommendations of strong measures to achieve an independent and accountable judiciary. Many of the Panel's recommendations on constitutional and legislative reform find their way into the Draft Constitution of Kenya 2004.⁴⁵

ii) Incoming President Mwai Kibaki acts on his election promise to tackle corruption by carrying out what he calls "radical surgery" on the judiciary.

2003

i) The President suspends Chief Justice Bernard Chunga and sets up a tribunal to investigate him on charges of corruption. Judge Evans Gicheru is appointed Acting Chief Justice. Chief Justice Chunga resigns from office in February.

ii) The Acting Chief Justice revives the Judiciary Committee on Reforms and Development. A sub-committee, called the "Integrity and Anti-Corruption Committee" headed by Justice Aaron Ringera, is established in March. Its mandate is to investigate and report on "the magnitude and level of corruption in the judiciary, its nature and forms, causes and impact on the performance of the judiciary" and to identify corrupt members of the judiciary.⁴⁶

iii) In June, President Kibaki appoints eight new High Court judges.

iv) The Ringera Report is published in September and officially transmitted to the Acting Chief Justice. Part I of the Ringera Report sets out evidence of corruption, unethical conduct and other offences at the highest levels. It discusses the nature and forms of both petty and grand corruption in the judiciary. The report identifies poor terms and conditions of service amongst the major causes of judicial corruption. Part II of the Report identifies five out of nine Court of Appeal judges (56%), 18 out of 36 High Court judges (50%), 82 out of 254 magistrates (32%) and 43 paralegal officers implicated in "judicial corruption, misbehavior or want of ethics."⁴⁷

⁴² Report of the Committee on the Administration of Justice 1998.

⁴³ Ibid, page 10.

⁴⁴ Report of the Advisory Panel of Eminent Commonwealth Judicial Experts, Nairobi, "The Kenya Judiciary in the New Constitution", Kenya 2002. Published by the Constitutional Review Commission (hereinafter Report of the Advisory Panel of Eminent Commonwealth Judicial Experts).

⁴⁵ Draft Constitution of Kenya 2004, section 13.

⁴⁶ Ringera Report, 30 September 2003, p. 1

⁴⁷ Ringera Report, p. 46.

v) Parallel to these efforts, the Law Society of Kenya (LSK) appoints a committee to investigate judicial corruption. Its report is completed in October and confidentially submitted to the Acting Chief Justice. It contains the names of a number of judges who need to be investigated. The judiciary does not act on the report.

vi) In October, a "List of Shame" is published in the media, naming judges and justices implicated in the Ringera Report. The Acting Chief Justice publicly advises them to resign quietly within two weeks from 6 October, or be suspended without pay and privileges and face tribunals.

vii) Upon the recommendation of the Chief Justice, President Kibaki appoints two tribunals, one for the Court of Appeal and one for the High Court.⁴⁸

viii) President Kibaki appoints in October 11 judges in an acting capacity, followed by another seven judges in December.

ix) The Attorney-General announces in October that implicated magistrates must resign or face the law. The Kenya Magistrates and Judges Association (KMJA) states that its members have not been officially informed of the charges against them.

x) In December, the media announces that six High Court and two Court of Appeal judges have decided to face the tribunals. Their salaries are indefinitely withdrawn and reinstated only in July 2004.

xi) President Kibaki revokes the tribunals constituted in October and establishes new tribunals,⁴⁹ with different panel members.

xii) In early November, all 82 magistrates are given until 17 November to respond in writing to the Judicial Service Commission (JSC) to "show cause" why they should not be removed.

2004

i) The media reports in January that all implicated magistrates and paralegals have filed their defences with the JSC. In mid-March, 50 of the implicated magistrates, followed by another 20, are "retired" by the JSC in the public interest.

ii) After the reinstatement of 10 implicated magistrates and the promotion of one to Acting High Court Registrar, the Law Society demands to know how they were cleared of the charges. The JSC provides no explanation.

iii) Following protests by the KMJA, Chief Justice Evan Gicheru accuses the Association of acting as a trade union in June and threatens to ban it.

iv) The tribunal for the Court of Appeal judges, which commenced the hearings in April, clears Justice Philip Waki of corruption charges. President Kibaki reinstates him into office.

v) In December, President Kibaki confirms the permanent appointment of two Court of Appeal justices and 16 High Court judges out of 20 judges appointed in an acting capacity.

⁴⁸ The Kenya Gazette Notices nos. 7280 and 7282, October 2003, Vol. CV.

⁴⁹ The Kenya Gazette Notices nos. 8828 and 8829, December 2003, Vol. CV.

Judicial Independence and the “radical surgery”

Judicial corruption undermines the independence and effectiveness of the judiciary. It subverts the judiciary's role as the guardian of rights and good governance. It erodes the ability of the judiciary to act as a check and balance on executive power and to provide the people who come before it with fair and impartial justice. Fighting corruption in Kenya is therefore an essential element in institutionalizing a democratic and open society. The struggle for judicial reforms should be seen as part of, and not in isolation from, the struggle for democracy.⁵⁰

Successive investigations have revealed that corruption is widespread in Kenya's judicial and legal system. For many years now, the judiciary in Kenya has been perceived as one of the most corrupt institutions in Kenya.⁵¹ Although it has slightly improved its standing since 2002,⁵² the judiciary in Kenya is reportedly still largely believed to be corrupt.⁵³ This perception was confirmed by various accounts in the course of the ICJ mission.

Judicial independence goes hand in hand with judicial accountability. The judiciary is primarily responsible for

"the promotion and maintenance of high standards of judicial conduct."⁵⁴ International standards emphasize that a judge should "uphold and exemplify judicial independence in both its individual and institutional aspects."⁵⁵ Judicial corruption also violates the right of the parties to be tried by an independent and impartial tribunal.

However, the manner in which judicial corruption is tackled, just as much as the underlying political will and motivation in dealing with it, will determine whether or not it is successful and seen to be successful. While it is important to ensure that persons occupying judicial positions are disciplined for misconduct, subsequently removed and made accountable, anti-corruption measures must not compromise judicial independence, including security of tenure and the right of judges to due process.

Security of tenure and due process in the “radical surgery”

The "radical surgery" carried out on the judiciary was principally focused on the removal of allegedly corrupt judges and magistrates and the appointment of new persons to replace them. The

⁵⁰ Transparency International, Case Study: Kenya October 2004.

⁵¹ Transparency International, Kenya, Indexes 2001, 2002, 2003, 2004.

⁵² Transparency International, Kenya, Index 2004.

⁵³ See also ICJ-Kenya Strengthening Judicial Reforms in Kenya Vol. IX, p. 41.

⁵⁴ Bangalore Principles on Judicial Conduct, Preamble, paragraph 8.

⁵⁵ Bangalore Principles on Judicial Conduct, Value 1: Independence, Principle.

individualized public naming of judges and magistrates as corrupt, without them having been first notified of the charges and heard, as well as various subsequent forms of pressure to force these judges and magistrates to resign from office, violated international standards of due process and security of tenure.

Security of tenure is a core element for an independent judiciary and is firmly guaranteed by international standards.⁵⁶ Tenure for life or until a mandatory retirement age is expressly provided by commonwealth standards⁵⁷ and by the African Guidelines on the Right to a Fair Trial and Legal Assistance,⁵⁸ which provide:

"Judges or members of judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office."

It is also guaranteed under the Kenyan Constitution for judges of the superior courts.⁵⁹

Security of tenure is not meant to protect judges *per se*, but to protect the interest of the public in the independent and impartial exercise of judicial

functions without undue interference. Accordingly, judges and magistrates can be removed from office only for serious misconduct and only following a legally prescribed procedure. States have a duty to establish clear grounds for removal and appropriate procedures to this end. The determination as to whether the particular behavior or the ability of a judge constitutes a cause for removal must be taken by an independent and impartial body pursuant to a fair hearing. Its decision should be subject to independent review.⁶⁰

The ICJ mission found that the names of the judges and magistrates implicated in the Ringera Report were published, some with photographs, without these judges and magistrates having been officially informed that they were accused of judicial corruption. The media reported the Acting Chief Justice as having said that he had privately spoken to the judges. Deliberations in the disciplinary tribunals, however, later revealed that the suspected judges were not notified of the allegations against them before the Chief Justice made recommendations to the President, nor before their names appeared in the media. In one particular case, a suspected judge of the Court of Appeal, whose chambers were located beside those of the Chief Justice, learned of the allegations against him directly through the newspapers. Matters were made worse, when the Chief Justice publicly issued a two-week ultimatum, calling on the suspected judges to resign or face trial. The announcement of this

⁵⁶ UN Basic Principles on the Independence of the Judiciary, Conditions of service and tenure, principles 11 and 12.

⁵⁷ Commonwealth Latimer Guidelines 1998 II.1 Judicial appointments.

⁵⁸ See principle A.4 (1): "Judges or members of judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office."

⁵⁹ Kenyan Constitution, Chapter IV, Part 2, section 62.

⁶⁰ UN Basic Principles on the Independence of the Judiciary "Discipline, suspension and removal" principles 17 to 20.

ultimatum was immediately followed by the withdrawal of benefits and other privileges from the judges, which were re-instated only eight to ten months later. The Attorney General issued a similar ultimatum, addressed to the implicated magistrates. The allegedly corrupt magistrates received notification of the charges against them only after the ultimatum had expired.

Violations of due process

An important principle in the discipline, suspension and removal of judges is respect for procedures to notify the judges of the allegation. The UN Basic Principles on the Independence of the Judiciary provide that in cases where a charge or complaint is leveled against a judge "*The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.*"⁶¹ Commonwealth standards further provide that "*Disciplinary procedures should not include the public admonitions of judges. Any admonitions should be delivered in private, by the chief judge.*"⁶² African standards provide the same level of guarantee.⁶³ Moreover, an implicated judge should have an opportunity to be heard and comment on a complaint at an early stage.⁶⁴ The lack

of notification violated these principles.

Judges and magistrates should be removed only following fair proceedings. The notion of fair proceedings means that disciplinary measures for alleged corruption, in particular if leading to removal from office, must not be made without the minimum procedural guarantees provided under human rights law, such as the presumption of innocence.⁶⁵ It is recognized under international human rights law that the presumption of innocence requires all public authorities not to prejudge the outcome of proceedings or the guilt of the accused, in particular through public statements.⁶⁶ The publication of names without proper process, the issuance of the ultimatum and various public statements presuming those affected as corrupted, violated this principle.

Violations of the security of tenure

Security of tenure is not only violated by an official decision to remove a judge or magistrate from office, but also by other forms of undue pressure to force judges to resign from office. The premature public naming and admonition of individual judges and magistrates as corrupt and the subsequent pressure on them to resign through an ultimatum, constituted such a violation of the security of tenure.

⁶¹ UN Basic Principles on the Independence of the Judiciary, principle 17.

⁶² Commonwealth Latimer 1998, VI Accountability Mechanisms, I Judicial Accountability a) iii.

⁶³ The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A.4 (q).

⁶⁴ Draft Universal Declaration on the Independence of Judges ("Singhvi Declaration"), principle 26, reprinted in International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors,

A Practitioners' Guide, Geneva 2004, page 111 et. seq.

⁶⁵ Article 14, paragraph 2 ICCPR.

⁶⁶ UN Human Rights Committee, General Comment 13, par.7, available at <http://www.unhchr.ch/tbs/doc/nsf>.

Such undue pressure was amplified by the immediate withdrawal of salaries and benefits from judges and magistrates and the clear warnings that they could retain their benefits only if they accepted retirement. Furthermore, the ultimatum to magistrates to resign or defend themselves expired long before they were even notified of the accusations by the Judicial Service Commission. After they submitted written defenses to the JSC, the majority of the magistrates have been retired ostensibly in the public interest, but without any hearing.

Moreover, the withdrawal of such benefits was apparently undertaken in accordance with the terms and conditions of service applicable to civil public servants under the Services Commission Act. The ICJ believes that it is inappropriate to apply the same Act to judges and magistrates who belong to a separate branch of government. Conditions of service of the judiciary, including procedures for suspension and discipline, should be prescribed and secured by a law applicable to the judiciary alone, separate from the executive branch of government.⁶⁷

Impact on the judiciary

The violation of security of tenure and due process rights of judges and magistrates has engendered a low sense of morale among members of the judiciary and the legal profession. During the mission, some of the judges conveyed to the ICJ a distinct and continuing sense of insecurity about their

tenure, which was affecting the way they carried out their judicial functions. They described their anxiety over the developments, as well as their regret that the way their colleagues on the bench had been treated was intended to maximize shame and humiliation of the judiciary. The possibility that they could be next in line to be publicly castigated and removed from office without due process has lowered the general *esprit de corps* of the judiciary as a whole.

Moreover, the "radical surgery" on the judiciary does not appear to have reversed the prevailing loss of confidence in the judiciary by the public. Initially, the new government had received overwhelming and widespread support in its anti-corruption efforts. However, a recent survey on the impact of the government's programme of judicial reform and the way it was conducted, revealed that 59% of the respondents believed that the efforts made would only transform the judiciary to a small extent.⁶⁸ 9% believed that it would not make any difference, adding that the programme was "*a political move*" aimed to advance the government's popularity and to ensure "*that friendlier judges to the current administration were appointed.*"⁶⁹ In one of the ICJ mission's meetings, one interlocutor summed up the situation as follows: "*Kenya has gone through radical transformation but has remained the same.*"⁷⁰

⁶⁷ See also *infra* at VII, 2.

⁶⁸ ICJ-K "Strengthening Judicial Reforms in Kenya" VIX p. 41.

⁶⁹ *Ibid.*

⁷⁰ Meeting with Senior Advocate.

The role of the investigative tribunals

Disciplinary proceedings that might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness.⁷¹ These include the composition, the conduct of the members of the tribunals as well as the accused persons and their counsel and clear procedures that are fairly and objectively administered.⁷²

In the exercise of this constitutional authority⁷³ and upon the recommendation of the Chief Justice, President Kibaki set up the two tribunals in October 2003. These tribunals were mandated to investigate the conduct of the named judges *"including, but not limited, to the allegations that the said Judges had been involved in corruption, unethical practices and absence of integrity in the performance of their functions of office."*⁷⁴ The tribunals were given authority to make recommendations to the President on whether the accused judges should be removed. In December 2003, the two tribunals already constituted were revoked and new ones established with different panel members, but with the

same mandate and powers.⁷⁵ These tribunals proceeded to conduct the hearings with effect from April 2004. By the time the ICJ mission arrived in the country in December 2004, the hearings before the tribunals were suspended due to legal challenges arising from constitutional references filed in the High Court. The ICJ was informed that the hearings are set to resume in 2005.

Meanwhile, out of the total of eight judges who are to face the tribunals, only one case, that of Justice Philip Waki of the Court of Appeal has been resolved. In October 2004, the tribunal cleared him of the accusations and President Kibaki subsequently reinstated him as a justice of the Court of Appeal.

The ICJ notes that the President set up the tribunals in accordance with his constitutional authority.⁷⁶ The ICJ acknowledges that those responsible for the current tribunals have endeavored to establish procedural and substantive rules of justice and due process. Moreover, the ICJ welcomes the resolution of the case against Justice Waki and his reinstatement by the President, again in accordance with the constitution.⁷⁷

During the mission, the ICJ found that some concerns have been raised concerning the lack of transparency in the disbanding of the first tribunals and establishment of new tribunals with new

⁷¹ Commonwealth Latimer Principles 2004 VII-b) Judicial Accountability; see also Commonwealth Latimer Principles 1998 VI-1 (a) on Judicial Discipline; see also African standards in The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A. 4 (q) and (r).

⁷² Commonwealth Latimer Principles 2004, *ibid*.

⁷³ Constitution of Kenya section 62, para. 5.

⁷⁴ The Kenya Gazette Notices nos. 7280 and 7282, October 2003, Vol. CV.

⁷⁵ The Kenya Gazette Notices 8828 and 8829, Vol. CV, December 2003.

⁷⁶ Constitution of Kenya, section 62, para. 5.

⁷⁷ Constitution of Kenya, section 62, para. 6.

members. The ICJ notes that the legal challenges mounted against the tribunals involve issues relating to their constitutionality and legality, the validity of any rules and procedures adopted and whether or not their findings are subject to judicial review. While some of these issues have been resolved,⁷⁸ the remaining challenges to the tribunals' legality and constitutionality have significantly prolonged the life of these tribunals.

The UN Basic Principles on the Independence of the Judiciary provide that *"a charge or complaint made against a judge in his/her judicial and professional capacity shall be proceeded with expeditiously and fairly under an appropriate procedure. The judge shall have a right to a fair hearing."*⁷⁹ Regional standards provide that such complaints shall be processed "promptly, expeditiously and fairly"⁸⁰ and that s/he shall have guarantees of fair hearing.⁸¹

The ICJ believes that if the delay continues, the right of the accused judges to a fair and expeditious hearing may be under threat. Moreover, the ICJ is concerned that the delay arising from these challenges makes the resolution of the cases uncertain and the restoration of confidence in the judiciary more difficult.

⁷⁸ Legal challenges regarding the question of judicial review have been resolved.

⁷⁹ UN Basic Principles on the Independence of the Judiciary, principle 17.

⁸⁰ The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A. 4 (r).

⁸¹ Ibid, principle A.4 (q).

The ICJ hopes that the High Court will resolve all the legal challenges as soon as possible. If the tribunals are declared constitutional and resume their work, the ICJ urges them to resolve the other pending cases without delay and in a fair, resolute and impartial manner.

The ICJ further believes that it is important for these tribunals to create legal precedents upholding both judicial independence and accountability in Kenya. The results of the Kenya experiment may be instructive for the rest of East African courts and the rest of the continent. The ICJ therefore urges the tribunals to ensure the conduct of fair and expeditious hearings with the appropriate guarantees for due process.

Lack of public complaints procedures

The problems encountered with the anti-corruption measures illustrate above all the need to establish clear and transparent legal processes to address judicial corruption in a way that preserves judicial independence and integrity. In this regard it is notable that there is no appropriate legal mechanism or procedure that enables the public to lodge complaints in cases of alleged misconduct of judges and magistrates.

International standards require such a mechanism and its procedures to be prescribed by law.⁸² The need for such a mechanism in Kenya is acute. The ICJ learned that although the mandate of the

⁸² Ibid, principle A. 4 (r).

investigative tribunals is limited to the findings of the Ringera Report, they have received additional complaints against those judges presently being considered. The ICJ is of the view that it is proper and necessary for the tribunals to consider these additional complaints provided that those affected are accorded due process and the right to rebut the accusations. In any event, no other credible bodies exist in Kenya today with which the public can lodge complaints against allegedly corrupt judges in the superior courts.

On the other hand, the Judicial Service Commission (JSC), has disciplinary, suspension and removal authority over magistrates and other members of the subordinate courts⁸³ and can receive complaints from the public against magistrates. However, the procedures for receiving complaints, as well as the conduct of disciplinary, suspension and removal procedures are not clearly institutionalized. A vivid illustration of the lack of procedures is reflected in the events in 2003 when the implicated magistrates were issued a similar ultimatum to magistrates “to resign or face the law” without being informed of the charges leveled against them. It was only one month later that these magistrates were given the chance to defend themselves in writing to the JSC.

The lack of complaint procedures became particularly evident when the Law Society of Kenya (LSK) submitted a report in October 2003 to the Chief Justice, containing yet to be disclosed

names of judicial officers who the JSC recommend to be investigated. So far, no action has been taken on the report.

In order to assure appropriate judicial accountability, the public should have recourse to a mechanism that can receive substantiated complaints and investigate against both judges and magistrates. The ICJ recommends that a law be enacted to establish such a permanent mechanism. The law should prescribe grounds for complaints for misbehavior and misconduct against judges and magistrates. In accordance with standards on judicial independence and the right to a fair trial, the law should clearly prescribe procedures for handling the complaints.⁸⁴ The establishment of such a mechanism would also facilitate any future disciplinary processes that may be initiated by the Chief Justice or other officials.

In the meantime, the Judicial Service Commission should promulgate and publicize clear rules and procedures for receiving and handling substantiated complaints against allegedly corrupt magistrates and other judicial officers. These procedures should ensure sufficient guarantees for a fair hearing and the expeditious resolution of any cases. The ICJ welcomes that under the draft Constitution of Kenya, the JSC would have the authority to receive and act on such complaints against both judges and magistrates.⁸⁵

⁸³ Constitution of Kenya, section 69, para. 1 and 3.

⁸⁴ The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A.4 (r).

⁸⁵ Draft Constitution of Kenya 2004, section 196 and 201.

Undue interference with freedom of association and expression

Statements by the Chief Justice in the course of the “radical surgery”, threatening to ban Kenya’s Magistrates and Judges Association, constitute an undue interference with the rights to freedom of expression and association of judges and magistrates.

Judges enjoy the same fundamental freedoms as other individuals, including the rights to freedom of expression and association.⁸⁶ These rights require that judges and magistrates conduct themselves so “*as to preserve the dignity of their office and the impartiality and independence of the judiciary.*”⁸⁷ Due to their fundamental role in the administration of justice, freedom of expression and association are particularly important. Associations of judges play an essential role in upholding the independence of the judiciary and the rule of law. They bring judges together and allow them to organize to defend their independence and that of the judicial profession more effectively.⁸⁸ The UN Basic Principles on the Independence of the Judiciary recognize both the general right to association and

expression as well as the specific role of judges association. Principle 9 reads:

*"Judges shall be free to form and join associations of judges and other organizations to represent their interests, to promote professional training and to protect their judicial independence."*⁸⁹

Various other international documents contain equivalent provisions confirming this right and the role of judges associations in defending the interests of their members.⁹⁰ The right to association of judges in Kenya extends beyond national associations, to the participation of Kenyan judges and magistrates in the East Africa Magistrates’ and Judges’ Association, as well as the Commonwealth Magistrates’ and Judges’ Association (CMJA).

In March 2004, following publication of the names of the implicated judges and magistrates, the Kenya Magistrates’ and Judges’ Association (KMJA) protested against the way its members were treated. The KMJA also conducted a

⁸⁶ See in particular article 19 and 22 ICCPR; UN Basic Principles on the Independence of the Judiciary, principle 8.

⁸⁷ UN Basic Principles on the Independence of the Judiciary, principle 8.

⁸⁸ See also, International Commission of Jurists, International Principles on the Independence and Accountability of the Judges, Lawyers and Prosecutors, A Practitioner’s Guide, Geneva 2004, at 37 et seq.

⁸⁹ UN Basic Principles on the Independence of the Judiciary, principle 9.

⁹⁰ See Bangalore Principles, Article 4.13: “A judge may form or join associations of judges or participate in other organizations representing the interests of judges.” See Universal Charter of a Judge, Article 12: “The right of a judge to belong to a professional association must be recognized in order to permit the judges to be consulted, especially concerning the application of their statutes, ethical and otherwise, and the means of justice, and in order to permit them to defend their legitimate interests.” See The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A. 4 (s): “Judicial officers are entitled to freedom of expression, belief, association and assembly.”

"purple ribbon" campaign to mark its protest. The ICJ considers that such a protest does not undermine the dignity, nor the impartiality and independence, of judicial office. It constitutes a legitimate exercise of the right of the KMJA to protect the interests of its members. In June, the Chief Justice publicly threatened to ban the KMJA, accusing it of acting as a trade union.⁹¹ The threat to ban the organization undermines the right of association of judges and magistrates.

The ICJ urges the Chief Justice of Kenya to revisit his statement in light of international standards and encourages him to actively support the effective exercise of the right of association by members of the judiciary.

The ICJ is further concerned about events following the ICJ mission, in which magistrates conducted a strike/boycott to demonstrate against their poor working conditions for which they later received interdictions from the Judicial Service Commission. In light of the circumstance, the ICJ is concerned about the excessiveness of the interdictions. The ICJ notes that a meeting between the Chief Justice and the KMJA was scheduled to discuss conditions of work of the magistracy, which may also resolve these cases.⁹²

⁹¹ The Nation, June 12, 2004 "CJ's threat to ban judges' association" by Jillo Kadida; *see also* The Standard, June 12, 2004 "CJ threatens to ban judges' union."

⁹² The Nation, March 16, 2005 "Now striking magistrates suspended" and the East African Standard March 14, 2005 "Magistrates down tools as national strike looms".

In light of the ongoing difficulties, the ICJ considers that a regular dialogue between the Chief Justice, the Judicial Service Commission and the KMJA would allow an exchange of views and would facilitate the resolution of any emerging disputes between the parties. The ICJ also suggests that within the judicial administration and the Judicial Service Commission, persons should be clearly designated to be responsible for matters related to relationships with the KMJA.

Reinforcing ethical behavior of the judiciary

An important way to strengthen judicial ethics is the promulgation and enforcement of a code of ethics and conduct. Commonwealth standards urge each judiciary to adopt such a code.⁹³ The Bangalore Principles of Judicial Conduct provides guidance on the content of such codes.

The Kenyan judiciary has taken some steps to eradicate judicial corruption and to entrench judicial ethics, through the promulgation of a Judicial Service Code of Conduct and Ethics. This Code was adopted in February 2005. This marks a welcome and necessary step towards the accountability of judges. The Code contains guidelines for the proper conduct of judicial officers and other provisions for strengthening ethics and integrity in the judiciary.⁹⁴

⁹³ Commonwealth Latimer Principles 2004 VI) Ethical Governance, and Commonwealth Latimer Guidelines 1998 V.1 Judicial Ethics (a).

⁹⁴ Written submission, Registrar's Chambers, High Court of Kenya, 16 December 2004, page 4.

The ICJ is encouraged by the Chief Justice's statement that compliance by judges and magistrates with the code of conduct will be strictly observed.⁹⁵ Implementation and monitoring of compliance with the Code of Ethics should entail the establishment of clear control procedures to ensure judicial accountability. During the mission, the ICJ was informed that "judicial staff" prepare and submit annual wealth declaration forms "as a method of detection of corrupt practices."⁹⁶ The Chief Justice has also said that in 2005 the Integrity and Anti-Corruption Committee of the judiciary will be reconstituted,

expanded and upgraded to the status of a standing committee.⁹⁷

The ICJ commends any efforts to reform the judiciary from within, including the adoption and implementation of the Judicial Service Code. Members of the judiciary should strictly comply with the new code. The ICJ recommends that the new code be periodically reviewed to ensure it complies with international principles of judicial ethics set out in the Bangalore Principles on Judicial Conduct. It further recommends that any reconstituted Judicial Integrity and Anti-Corruption Committee, or other body entrusted to supervise implementation of

⁹⁵ Speech of the Chief Justice, February 27, 2005, Mombasa during the induction of new magistrates.

⁹⁶ Written submission, Registrar's Chambers, High Court of Kenya, 16 December 2004, page 4.

⁹⁷ Speech of the Chief Justice, February 27, 2005, Mombasa during the induction of new magistrates.

the code, should establish transparent and fair rules and procedures.

Role of the media and civil society in judicial accountability

In addition to the establishment of mechanisms and proper procedures, legitimate public criticism of judicial performance⁹⁸ by the press⁹⁹ and civil society¹⁰⁰ is essential to ensure judicial accountability.

The ICJ was informed that some members of the judiciary had threatened contempt proceedings against members of the media covering issues on the administration of justice.¹⁰¹ The judicial system should not be used to curtail the right to information and expression, nor should criminal law or contempt of court proceedings be used to restrict legitimate criticism of the performance of judicial functions.¹⁰² The ICJ draws the attention of the judiciary and the media to the Madrid Principles on the Relationship between the Media and Judicial Independence, adopted under the auspices of the International Commission of Jurists. The Principles

⁹⁸ Commonwealth Latimer Principles 1998 VI) Accountability Mechanisms 1. Judicial Accountability (b) Public Criticism (i).

⁹⁹ Commonwealth Latimer Principles 2004 IX) Oversight of government (b).

¹⁰⁰ Commonwealth Latimer Principles 2004 X) Civil society.

¹⁰¹ ICJ Mission Meeting.

¹⁰² Commonwealth Latimer Principles 2004 VII) Accountability Mechanisms (b) Judicial Accountability.

provide useful guidance on the relationship between an independent judiciary and media.¹⁰³

Comprehensive efforts to fight corruption

The ICJ mission found that in the aftermath of the "radical surgery", members of the legal profession continue to voice serious concerns about the independence and efficiency of the administration of justice in the country. While acknowledging that the efforts to rid the judiciary of persistent practices of corruption were, and are, needed, there is genuine concern that the way it was conducted raises questions about the underlying motives.

This perception reflects a major shortcoming of the reform process, namely that the principles of judicial independence and accountability provided by accepted international and Commonwealth standards¹⁰⁴ did not guide the reform efforts. They appear not to have been regarded as priorities by the government of President Kibaki. The ICJ recommends that the anti-corruption

campaign of the government be enhanced by making the respect and guarantee of judicial independence a priority while assuring judicial accountability.

In the experience of the ICJ any credible anti-corruption strategy involving the judicial system must be comprehensive by tackling all branches of government, and in particular all administrative and judicial actors involved in the administration of justice. While members of the legal profession and some of their clients have been victims of judicial corruption, the ICJ mission found sufficient evidence to conclude that many practicing advocates have been willing participants in corruption. The ICJ urges the Law Society of Kenya (LSK) and legal civil society organizations to assess the state of corruption within the legal profession through an independent committee set up for this purpose on the initiative of the LSK. The committee should have the mandate to make recommendations on how to prevent such practices and other unethical behavior and on how to improve relevant legislation¹⁰⁵ or enact new statutory provisions to better regulate professional conduct of advocates in Kenya.

Moreover, the ICJ finds that the removal of corrupt judges, without carrying out equally pressing, simultaneous and inter-related reforms in other sectors of the legal system, including the executive branch, will not yield the expected results. The ICJ concurs with the

¹⁰³ The Madrid Principles on the Relationship between the Media and Judicial Independence, adopted by legal experts and media representatives in 1994. UN document E/CN.4/1994/NGO/36. The Principles provide *inter alia* that the freedom of the media is integral to freedom of expression that obliges the judges to recognise and give effect to this freedom. Subject to reasonable restrictions, to international human rights, such as the right to a fair trial and the presumption of innocence, the right of the media to comment on the administration of justice, should not be curtailed. The values of a free press and fair trial are essential to a democracy and neither can be realised at the expense of the other.

¹⁰⁴ In particular the UN Basic Principles on the Independence of the Judiciary and the Latimer House - Commonwealth Guidelines 1998 and 2002.

¹⁰⁵ In particular the Advocates Act and the Law Society of Kenya Act.

conclusion that limiting reform judges and magistrates without addressing the other parts of the governmental machinery *"creates opportunities for the corrupt to re-invent themselves and to lodge themselves in the new system."*¹⁰⁶

¹⁰⁶ Transparency International, Case Study on Kenya, October 2004.

APPOINTMENTS AND PROMOTIONS IN THE JUDICIARY

The appointment by the government of new and temporary judges to replace those dismissed or suspended as a result of the anti-corruption drive raises considerable concerns with regard to institutional independence. Those concerns relate to the quality and criteria of appointment, the lack of ethnic diversity and gender balance in appointments and the temporary nature of appointments.

Qualification criteria for appointment and promotion

The ICJ mission learned with concern that significant parts of the legal profession were dismayed that following the release of the Ringera report persons with inappropriate qualifications and experience were appointed to judicial office. Subsequently, members of the legal profession and civil society organizations criticized the "non-judicial" nature of some decisions and the low quality of judicial reasoning rendered by some of these newly appointed judges.¹⁰⁷

While the Constitution of Kenya sets out the minimum qualifications for

members of the Higher Courts¹⁰⁸ and the Judicature Act for Magistrates provides some criteria for magistrates, these nominal qualifications are insufficient to ensure the appointment of appropriately qualified and experienced candidates. The required minimum qualifications are so sketchy that a person who does not possess a university degree could be appointed as a magistrate.¹⁰⁹ The ICJ notes that the criteria for judicial appointments have been upgraded in the text of the draft Constitution, requiring additional years of professional experience, intellectual ability and integrity.¹¹⁰

The ICJ mission was also informed that the Chief Justice intends to resolve some of these concerns about appointments and promotions by recommending the future enactment of a Judicial Service Bill. This Bill would provide for a *"strengthened institutional framework, an expanded Judicial Service Commission and appropriate policy guidelines for the recruitment, promotion and deployment practices in the Judiciary."*¹¹¹

The criteria for appointment and

¹⁰⁷ Maina, Wachira "The NARC Government's Performance in the Fight against Corruption: Challenges and Priorities for the Years Ahead", Transparency International, December 2004.

¹⁰⁸ Constitution of Kenya, section 61, para. 3.

¹⁰⁹ Muciimi Mbaka, Judicial Appointments in Kenya, in: ICJ-Kenya Report on Judicial Reform in Kenya 1998-2003, Nairobi 2004.

¹¹⁰ Draft Kenya Constitution 2004, Chapter Thirteen on Judicial and Legal System, section 194.

¹¹¹ Written submission by the Registrar's Chamber, High Court of Kenya, 16 December 2004.

promotion should follow international standards, which provide that selection of individuals for the judiciary should be based on integrity, ability and appropriate qualifications in law.¹¹² There should exist “*objective and transparent criteria based on proper professional qualifications*”¹¹³ which could include moral probity, intellectual ability as demonstrated by academic qualifications, performance and legal writings and experience, appreciation and practice of the law as demonstrated by the quality of previous judicial decisions.

These same principles should govern internal promotions to higher positions of judges, magistrates and other judicial officers and applied to appointments of the Chief Justice. The ICJ mission heard allegations that a good number of previous appointments, including appointments to the highest judicial posts of the land, are said to have benefited persons who had not distinguished themselves either in the legal profession or in the judiciary.

The ICJ therefore recommends that in addition to the nominal qualifications required by law, other criteria should be set out for candidates for judicial positions. These criteria must include those relevant to academic qualifications, integrity, ability and experience, and other objective and transparent criteria based on proper professional

qualifications.

The ICJ recommends that the adoption of clear, transparent and objective criteria be applied to appointments and promotions of all members of the judiciary, including the position of Chief Justice.

Ethnic and gender representation in the judiciary

Many analysts, the media and civil society organizations in Kenya continue to believe that appointments to public office in Kenya are driven by patronage based on ethnic and personal constituencies, which provide incentives for corruption.¹¹⁴ The ICJ mission was repeatedly alerted that appointments to the judiciary are not exempt from this general practice.

In relation to the series of judicial appointments in 2003/2004, the ICJ received statements describing these appointments as the “ethnic tribalisation” of the Judiciary.”¹¹⁵ The critics illustrate their claim by pointing out that the majority of the judges appointed in the first phase of appointments came from ethnic groups in the Central and Eastern parts of Kenya, known as the region of Mount Kenya, to the disadvantage of other tribes in Kenya.¹¹⁶

¹¹² UN Basic Principles on the Independence of the Judiciary, principle 10; see also The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A. 4 (i).

¹¹³ Universal Charter of the Judge Article 9, Appointment.

¹¹⁴ See Transparency International Case Study - Kenya, presented to the GJLOS Reform Programme meeting, October 2004.

¹¹⁵ ICJ Meeting with Senior Advocate.

¹¹⁶ Before the judicial suspension, there were only

An additional concern relates to the fact that there are far too few women occupying judicial positions. There is a higher, but still insufficient, ratio of women in the magistracy. The ICJ also learned that women holding judicial positions are usually assigned to the specialized family courts. The executive, the Judicial Service Commission or the judiciary do not appear to have any policy to actively increase the number of qualified women in the judiciary.

Given the context in Kenya where ethnic considerations and gender imbalances continue to persist, the ICJ is convinced that judicial appointments should follow international standards. The rule of non-discrimination, as provided by treaty law¹¹⁷ and the UN Basic Principles on the Independence of the Judiciary¹¹⁸ should always guide judicial appointment. The imperative to remove discrimination in judicial appointments is recognized by international standards, which state that judicial appointments should be made "on merit with appropriate provision for the progressive removal of gender imbalances and of other historic factors of discrimination."¹¹⁹ This principle has been strengthened in the Commonwealth Latimer Principles 2004 providing for "progressive attainment" of gender

equity and the removal of other discriminatory factors.¹²⁰

The ICJ recommends that the judiciary adopt a clear policy for the progressive attainment of gender equity and removal of discriminatory factors in all judicial appointments in the country.

Appointment of acting judges

The ICJ considers that judicial appointments made between 2003 and 2004 of new judges in an acting capacity, or on contract, do not satisfy international standards.¹²¹ At the time of the visit of the ICJ mission President Kibaki had just confirmed a majority of these as permanent judges in their respective offices.

The ICJ mission was informed that the appointment of these judges on contract or in an acting capacity was merely a temporary step in the revitalization of the judiciary and should be understood within the context of the anti-corruption campaign in the country. The ICJ mission was informed that the system of such appointments "has provided opportunity to the judges to demonstrate, and the Judicial Service Commission to verify, their integrity, ability and fitness to hold judicial office. This would ensure that only those who possess those qualities are confirmed to the office."¹²² The fact that not all of the

three High Court Judges from the Kikuyu tribe. The first set of appointments in 2003 included 16 High Judges from the same tribe.

¹¹⁷ See articles 2, par.3 and 26 ICCPR.

¹¹⁸ UN Basic Principles on the Independence of the Judiciary, principle 10.

¹¹⁹ Commonwealth Latimer Guidelines 1998 II) Preserving Judicial Independence, I. Judicial appointments.

¹²⁰ Commonwealth Latimer Principles 2004 IV) Independence of the Judiciary.

¹²¹ These appointments were criticized by the legal profession and civil society organizations as undermining security of tenure.

¹²² Written submission of the Registrar's Chambers, High Court of Kenya, 16 December 2004.

appointments in an acting capacity were confirmed in December 2004, reflect this belief.

While the Commonwealth Principles envisage the possibility of contract appointments, this is allowed only as an exception to the general rule and is subject to special considerations.¹²³ Fixed term contracts usually cannot be reconciled with the principle of security of tenure of judges, because a judge does not know whether unpopular decisions are going to rebound upon him when the time comes for the contract to be renewed.¹²⁴ The more recent African Guidelines therefore clearly prohibit the practice of fixed term judicial contracts.¹²⁵ In order to guarantee the security of tenure of judges, judicial appointments should be permanent.

The ICJ does not accept the argument that this practice is a useful way to verify judicial performance, and could therefore be repeated. Even within the context of the anti-corruption campaign, the ICJ notes that these appointments have been criticized by anti-corruption campaigners as “likely to hurt rather than to fight against corruption” precisely because of the lack of security of tenure.¹²⁶ The ICJ is concerned that

the appointment of judges on contract or in an acting capacity violates judicial security of tenure and in practice risks undermining the independence of the judiciary.

The ICJ recommends that the government discontinue the appointment of judges on a contractual or acting basis, as well as any other appointment practices that threaten the security of tenure of judges and magistrates.

Transparent and effective consultations

There were some attempts by the Judicial Service Commission in 2003 and 2004 to consult with a wider circle of legal stakeholders about recommendations for judicial appointments. The ICJ was informed that the International Federation of Women Lawyers - Kenya (FIDA) and the Law Society of Kenya were asked to nominate candidates from their ranks for the vacant judicial positions. Although accounts differed¹²⁷ about how the nominations were dealt with, such consultations were a radical departure from past, more secretive practices. The ICJ believes that such relations between the bench and the Bar should continue and be strengthened by being formalized in legislation.

¹²³ Commonwealth Latimer Guidelines 1998, II) Preserving Judicial Independence, I. Judicial Appointments.

¹²⁴ 1999 Symposium "Independence of the Judiciary and Judicial Accountability: The Latimer House Guidelines and other recent Commonwealth Trends". University of London.

¹²⁵ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A, paras. 4 (l), (m) and (n) 3.

¹²⁶ See paper presented by Wachira Maina, “The NARC Governments performance in the fight

against corruption: challenges and priorities for the years ahead”, a presentation to the Transparency International – Kenya Open Public Forum, December 10, 2004.

¹²⁷ Meetings with LSK, FIDA; see also Muciimi Mbaka "Judicial Appointments in Kenya" in: ICJ-Kenya Report, January 2004.

International and commonwealth standards provide that the process of selection should safeguard against appointments for improper motives.¹²⁸ In order to do this, the process should be public, open and transparent.¹²⁹ Vacancies should be publicly announced and deadlines for nominations set. The ICJ mission noted that while vacancies for the positions of magistrates are advertised, the positions for judges are not. Open advertisement for the positions of judges would be in keeping with current international standards¹³⁰ and would be a fair and transparent method of appointment.

It is recommended that clear procedures be established for making nominations and for vetting by different legal stakeholders, such as the Law Society of Kenya, based on previously established guidelines. The legal profession, particularly the Law Society of Kenya, should itself set clear criteria for assessing candidates nominated for high office in the judiciary.

¹²⁸ UN Basic Principles on the Independence of the Judiciary, principle 10.

¹²⁹ Commonwealth Latimer Principles 2004 IV) Independence of the Judiciary (a).

¹³⁰ Commonwealth Latimer Guidelines 1998 II) Preserving Judicial Independence 1. Judicial appointments.

STRENGTHENING THE JUDICIAL SERVICE COMMISSION

The reform of the Judicial Service Commission

Judicial Service Commissions play a significant institutional role with regard to the appointment and removal of judicial officers and are instrumental in ensuring full judicial independence and accountability.¹³¹ The composition, functions and practices of the present Judicial Service Commission (JSC) in Kenya require urgent reform.

The main function of the JSC is the appointment, discipline and removal of the Registrar of the High Court, magistrates of subordinate courts and Kadhi courts.¹³² It has only a limited advisory role with regard to the selection of judges to the higher courts, who are appointed by the President.¹³³ The majority of the members of the JSC are direct presidential appointees, including the Chief Justice as chairman, the Attorney-General and the Chairman of the Public Service Commission.¹³⁴

¹³¹ Commonwealth Latimer Guidelines 1998 II.1 Judicial appointments: Jurisdiction should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such as commission.

¹³² Constitution of Kenya, section 69.

¹³³ Constitution of Kenya, section 61.

¹³⁴ Constitution of Kenya, section 68.

Several high-level reports from international experts¹³⁵ and Kenyan organizations¹³⁶ have pointed out that the composition, functions and practices of the JSC do not satisfy standards guaranteeing independence from the executive. The ICJ shares these assessments, in particular as regards the conclusion of the Eminent Panel of Commonwealth Jurists that the present mode of appointment of judges is not effective and suffers from a lack of transparency.¹³⁷ Removal proceedings during the anti-corruption drive and the appointments of new judges and magistrates underline these concerns. The current JSC should be restructured in order to ensure that it is independent and not subject to the direction and control of any other person or authority in the exercise of its functions.¹³⁸

The Judicial Service Commission under the draft Constitution

Most of the recommendations of other previous expert missions regarding the establishment of a fully independent JSC have been integrated into the text of the

¹³⁵ Report of the Eminent Panel of Commonwealth Jurists 2002.

¹³⁶ See, for example, the ICJ-Kenya report on symposium on “Strengthening judicial reforms in Kenya” January 2004.

¹³⁷ Report of the Eminent Panel of Commonwealth Jurists 2002. page 35.

¹³⁸ Ibid.

draft Constitution of Kenya 2004.¹³⁹ Under international standards, membership in an independent JSC should be truly representative.¹⁴⁰ Under the draft Constitution the JSC would be more representative because it would include judges and magistrates elected by their own constituencies, representatives from the legal profession and academia.¹⁴¹ The draft constitution also provides that the chair shall be the elected member from the Supreme Court, not necessarily the Chief Justice as provided in the present Constitution. Only the three judges representing each of the three courts of the Judicature and the Attorney-General would be direct Presidential appointees.

The functions of the proposed JSC have also been expanded in the draft Constitution to ensure it has an active role in securing judicial independence and accountability in Kenya. Under the draft Constitution, the JSC would have statutory powers to make recommendations on judicial appointments to the superior courts¹⁴² to the appointing authority, namely the President, who would be required to act in accordance with this advice. The JSC would provide advice on the establishment of disciplinary tribunals

for judges in the superior courts¹⁴³ and retain disciplinary control over magistrates and judicial officers of the subordinate courts.¹⁴⁴ Finally, the JSC would perform additional advisory functions in the maintenance and strengthening of the independence of the judiciary.¹⁴⁵

The proposed changes in the composition and functions would contribute positively to creating an independent JSC that would be better equipped to ensure an independent judiciary.

Improvement under the current constitutional framework

Important improvements to the JSC should and can be implemented in the interim under the present constitutional framework.

Under the current Constitution the JSC has an advisory role in the appointment of judges of the superior courts, with the exception of the Chief Justice.¹⁴⁶ The ICJ mission did not have enough information to assess how the JSC carries out this advisory role in practice.

The functions of the JSC should be

¹³⁹ Draft Constitution of Kenya 2004, Chapter Thirteen on Judicial and Legal System, Section 193 and 201.

¹⁴⁰ Commonwealth Latimer Guidelines 1998 II Judicial Independence 1. Judicial appointments.

¹⁴¹ Draft Kenya Constitution 2004 Chapter Thirteen Judicial and Legal Service, articles 200 and 201.

¹⁴² Draft Kenya Constitution 2004, Chapter Thirteen Judicial and Legal Service, section 193.

¹⁴³ Draft Kenya Constitution 2004, Chapter Thirteen Judicial and Legal Service, articles 201.

¹⁴⁴ Draft Kenya Constitution 2004, Chapter Thirteen Judicial and Legal Service, articles 201.

¹⁴⁵ Draft Kenya Constitution 2004, Chapter Thirteen Judicial and Legal Service, articles 201.

¹⁴⁶ Constitution of Kenya, section, para. 2.

expanded so it is able to give advice on other issues affecting judicial independence and accountability, for example by making suggestions and recommendations regarding remuneration, appointment, discipline and removal of all judicial officers. The JSC should itself consider how to establish proper public complaints process relating to members of the judiciary over which it has currently disciplinary authority. In the implementation of these expanded functions, the institutionalization of a more transparent consultative process, involving major legal stakeholders such as the legal profession, the Law Society of Kenya, FIDA and the faculties and schools of law of Kenya would be a positive step in the furtherance of judicial independence.

In comparison with its counterparts in the other branches of government, namely the Public Service Commission and the Parliamentary Service Commission, the JSC suffers from the absence of any fully functioning support administration. In order to improve the work of the current JSC, it should have its own full-time secretariat and its own budget allocation. This would also ensure that the JSC's administrative support system is separate from the judicial administration over which the JSC has monitoring and disciplining powers.

The ICJ was informed that under the “Judiciary Strategic Plan 2005 – 2008”, a proposed Judicial Service Bill would expand an independent JSC.¹⁴⁷ Such a

Judicial Service Bill should incorporate the above recommendations, to enhance the credibility and quality of an independent JSC.

¹⁴⁷ Written submission of the Registrar's

Chambers, High Court of Kenya December 16, 2004, page 7.

THE MAGISTRATES AND THE MAGISTRATES COURTS

Many of the discussions in Kenya focus on the state of judicial independence of the higher courts. Insufficient attention has been paid to the state of the magistracy in Kenya, which handles more than 90% of the country's caseload and is the first court of resort for most people coming before the courts to resolve their problems or who face criminal charges. It is imperative to upgrade the status and working conditions of Kenyan magistrates in line with international standards.

Under Kenyan law magistrates exercise judicial authority and are part of the judicial branch of government.¹⁴⁸ Under international standards they are subject to the same standards on judicial independence and accountability as judges.¹⁴⁹ A Chief Justice of India once said that a judge, "even at a low level, is entitled to as much freedom in his functioning as the chief justice".¹⁵⁰ This is possible only if magistrates are considered to be full judicial officers with all necessary guarantees of judicial independence.

¹⁴⁸ Judicature Act.

¹⁴⁹ Bangalore Principles 2002 "Definition: 'Judge' means any person exercising judicial power, however designated."

¹⁵⁰ Verma, J.S., "Ensuring Accountability and the Rule of Law: the Role of the Judiciary", National Endowment for Democracy, Conference January 2003, India, available at <http://www.ned.org/acdg/inaugural/session3.html>.

Security of tenure

Under the Constitution and laws of Kenya magistrates do not enjoy the same protection of their independence as judges. While security of tenure is explicitly guaranteed for the judges of the superior courts, this is not the case with regard to the magistrates. Moreover, magistrates can be dismissed without recourse to a tribunal, with only the opportunity to defend themselves before the JSC.

The ICJ recommends that security of tenure should be expressly guaranteed to magistrates in Kenya. The ICJ further recommends that all other principles of judicial independence and accountability apply to magistrates and all those who exercise judicial authority.

Appointment and promotion of magistrates

The reforms that the ICJ recommends for superior courts relating to appointment and promotion, should also apply to magistrates and magistrates courts, including predetermined criteria based on appropriate qualifications, a transparent process of recruitment, selection and promotion.

Under the Kenyan Constitution, the JSC

is designated as the principal institution with authority to appoint, exercise disciplinary powers over, and remove from office, magistrates and other subordinate judicial officials.¹⁵¹ Currently however, the exercise of these powers lack clearly defined and transparent criteria and procedures.¹⁵² The ICJ mission noted that while vacancies in the magistrates courts and minimum qualifications required by law for applicants are publicly advertised, the actual process in selection and recruitment is not transparent.¹⁵³ The ICJ mission also noted the absence of both clear criteria for the promotion of magistrates and of an institutionalized process to evaluate their performance. Moreover, the practice of promoting magistrates to positions in the superior courts of Kenya is becoming rare.¹⁵⁴

The ICJ recommends that magistrates be recruited and promoted on the basis of both professional qualifications and transparent criteria based on moral integrity, work experience and merit. Clear criteria and a system of periodic evaluation that would encourage legal career development among the magistrates, including promotion to higher judicial positions, should be established. This should include the removal of gender and other imbalances in the representation of the judiciary under non-discriminatory and

transparent policies that recognize merit.

Working conditions of the magistracy

The ICJ mission learned with concern about the poor working conditions of magistrates, especially in comparison with those enjoyed by judges of the higher courts. According to international standards the law should secure adequate remuneration, pensions and other conditions of service.¹⁵⁵ Commonwealth standards underline that appropriate salaries and benefits are essential to the proper functioning of the judiciary.¹⁵⁶

While salaries and other benefits have been regularly increased for judges of the Court of Appeal and the High Court,¹⁵⁷ there have been no equivalent improvements for the magistrates and other judicial officers. The mission was informed that the backlog of cases is precarious. Three years ago, the number of judges was significantly increased but not the number of magistrates, thus further contributing to the backlog of cases at the magistrate level.

These have had dire consequences. In

¹⁵¹ Constitution of Kenya, Chapter IV, Part 3, section 69, para. 1 and 3.

¹⁵² Meeting with legal civil society organisations.

¹⁵³ Latimer 2004 IV) Judicial Independence.

¹⁵⁴ Judges in the superior courts in Kenya are increasingly appointed from persons in legal practice.

¹⁵⁵ See in particular Principles and Guidelines on the Right to a Fair Trial and Legal assistance in Africa, A.4.(m), which reads : «The tenure, adequate remuneration, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service shall be prescribed and guaranteed by law ». See also UN Basic Principles on the Independence of the Judiciary, principle 11.

¹⁵⁶ Commonwealth Latimer Guidelines II.2 Funding.

¹⁵⁷ The ICJ Mission was informed that remuneration, benefits and pensions have improved for the judges of the superior courts.

March 2004, 32 lawyers in private practice turned down government offers of appointments as magistrates because of poor working conditions in magistrates courts. This was followed by threats and protests by lawyers in different parts of the country against the shortage of magistrates and judicial staff. In 2005, magistrates from two areas went on strike as a protest against their low salaries and poor working conditions. At the time of the publication of this report, the Kenya Magistrates' and Judges' Association has been seeking, and was granted, a dialogue with the Chief Justice on the improvement of their work conditions, including their salaries.

The ICJ recommends that the remuneration and benefits of magistrates should be substantially upgraded. The ICJ notes that the present Strategic Plan of the Judiciary 2005-8 identifies that there are 245 vacant positions in the magistracy.¹⁵⁸ The ICJ recommends that these open positions be filled as a matter of urgency.

Structure of the magistrates courts

Unlike other Commonwealth countries such as Uganda and Tanzania, Kenya does not have a geographical and hierarchical system of magistrates with appellate cadres. In Kenya, whether any given magistrates court is a Chief Magistrate's, Senior Magistrate's or Resident Magistrate's court depends on whether the individual magistrate posted

in that location has the necessary rank or seniority. This is cumbersome for litigants and lawyers in Kenya and makes it more difficult for the public to access the necessary courts.

The ICJ recommends that the country should be divided into magisterial areas with resident magistrates of appropriate levels stationed in each area.

Judicial education and training

The ICJ mission found that the two-week training courses currently required in Kenya for new magistrates is insufficient to prepare them for their new positions or to enable them eventually to manage cases and deliver decisions with adequate judicial reasoning. There is no clear policy on continuing judicial education of both judges and magistrates.

The ICJ recommends that the training required for new magistrates be reviewed and upgraded. A continuing judicial education programme for magistrates should also be institutionalized and resources should be regularly and adequately provided.¹⁵⁹

¹⁵⁸ Strategic Plan of the Judiciary, page 9.

¹⁵⁹ See also the discussions on judicial education VIII, 1.

FINANCIAL AND ADMINISTRATIVE AUTONOMY OF THE JUDICIARY

Executive dominance

The role of the judiciary in independently and impartially upholding the rule of law is based on the clear separation of powers and the principle of checks and balances. In its various meetings in Kenya, the ICJ was consistently confronted with a dominant perception that the judiciary is too closely related to, or identified, with the executive branch.

The belief persists that the judiciary operates *de facto* as a part of executive branch, reflected in the dominance of the Ministry of Justice and the Presidency. This prevalent perception derives from the long history of executive control of the judiciary since 1963. This is supported by previous survey findings that the executive branch continues to pose a danger to the independence of the judiciary¹⁶⁰ and that political interference is the chief obstacle to judicial reform.¹⁶¹ This perception has been buttressed by the respective roles played by President Kibaki in the “radical surgery” of the judiciary.

Many of the above recommendations, such as those regarding the adoption of

¹⁶⁰ ICJ Kenya Report "Strengthening Judicial Reforms in Kenya" Volume IX., p. 39

¹⁶¹ Ibid. page 38. Up to 80% of the survey respondents indicated that the Ministry of Justice poses a real danger to the independence of the judiciary.

Chapter 13 of the draft Constitution 2004, the reform of the JSC, the revision of appointment and dismissal procedures or the recommendations on the magistracy, are essential elements in a much needed comprehensive policy to enhance the independence of the judiciary. In addition, the ICJ believes that the institutionalization of judicial independence from the executive branch requires stronger financial and administrative autonomy.

Financial autonomy and sufficient resources

The funding of the judiciary, as a separate and distinct branch of the state, is an essential component of judicial independence. It is a state's duty to provide adequate resources to enable the judiciary to properly perform its functions to the highest standards¹⁶² and without undue constraints that may hamper independence.¹⁶³ Furthermore, the allocation of such funds should not be used as a means of exercising improper control over the judiciary.¹⁶⁴

¹⁶² Commonwealth Latimer Guidelines 1998 II) Judicial Independence 2. Funding; UN Basic Principles on the Independence of the Judiciary, principle 7; Principles and Guidelines on the Right to a Fair Trial and Legal assistance in Africa, A.4.(v).

¹⁶³ Commonwealth Latimer Principles 2004 IV) Judicial Independence (b).

¹⁶⁴ Commonwealth Latimer Guidelines 1998 II) Judicial Independence 2. Funding.

competent oversight auditing body.

The ICJ mission was informed that efforts are under-way to de-link the budget of the judiciary from the Treasury,¹⁶⁵ which currently controls both the allocation and management of funds. The ICJ endorses such de-linkage as it would greatly improve the ability of the judiciary to function impartially and independently.

The current 1% budget allocation to the Kenya Judiciary is inadequate and should therefore be appropriately and substantially increased. The funding should meet fully the requirements of adequate salaries and benefits of judges, magistrates and judiciary support staff, and provide the necessary resources for capital development, stationery and equipment.¹⁶⁶

Financial independence of the judiciary includes the ability of the judiciary to manage its own funds according to its programmes and activities. The ICJ recommends that the judiciary establish a competent, efficient and transparent financial management system. It should upgrade its judicial staff managerial capabilities through appropriate training and the employment of qualified staff. The judiciary should set up the necessary internal structures for supervision and auditing. The ICJ also recommends that the final financial accounts of the judiciary may be subjected to an independent and

¹⁶⁵ Closing Speech by the Honorable Chief Justice Evans of Kenya, Judges' Colloquium 2004 Mombasa, page 4.

¹⁶⁶ Commonwealth Latimer Guidelines 1998 II) Judicial Independence 2. Funding.

Administrative independence

Presently, judicial staff are administratively part of the public service. The Public Service Commission determines the terms and conditions of service of judges and magistrates. The ICJ mission learned that the Kenyan judiciary has taken pro-active steps for statutory recognition that they are an autonomous self-accounting institution, de-linked from the Civil Service.¹⁶⁷ This de-linkage of judicial staff from the public service is a necessary component of the administrative separation of the judiciary from the executive branch.

The ICJ reiterates the view that as a matter of principle, an independent body, such as the JSC under the draft Constitution, should be responsible for recommending the terms and conditions of service of the judges, magistrates and other judicial officers and the judiciary support staff, including salaries and benefits.¹⁶⁸ In addition, the terms of office, and other retirement benefits for judges, magistrates, other judicial officers and the judiciary support staff should be adequately secured by law.¹⁶⁹

¹⁶⁷ Written submission by the Registrar's Chambers, High Court of Kenya, 16 December 2004.

¹⁶⁸ Commonwealth Latimer Guidelines 1998 II) Judicial Independence 2. Funding.

¹⁶⁹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa A.4.(m).

ADDITIONAL COMPONENTS OF JUDICIAL AND LEGAL REFORM

The ICJ commends efforts to put into place a Judicial Strategic Plan to strengthen judicial independence.¹⁷⁰ This Strategic Plan was launched in March 2005. The ICJ believes that this is an important step to institutionalize judicial independence and accountability.

Judicial education and training

If judges are to ensure fair judicial proceedings and to uphold the rule of law they must have demonstrated legal competence and knowledge. Thus, modern international standards on judicial independence provide that a “culture of judicial education” should be developed.¹⁷¹

The ICJ mission noted with regret that the general attitude towards continuing judicial education is often negative. One judge expressed great surprise that the ICJ mission was proposing continuing judicial education and refresher courses for judges and magistrates. In his opinion, once you are appointed judge, magistrate or judicial officer, you know about justice and adjudication and do not need re-training. His attitude is not unique in Kenya.

¹⁷⁰ Closing Speech by the Chief Justice, Judges Colloquium, August 2004, Mombasa.

¹⁷¹ Commonwealth Latimer Guidelines 1998 IV) Judicial Independence, 3. Training.

The ICJ is encouraged by the current efforts of the Chief Justice to institute continuing judicial education in the Kenyan judiciary and by his exhortation to fellow judges to “improve our knowledge of the principles of Law, systems of delivery and methods of accountability.”¹⁷² The active revival of the Judiciary Training Committee, which will formulate judicial education policies and the establishment of a sub-committee specifically for “lower cadre staff” of the judiciary¹⁷³ are important institutional developments that need further encouragement and resources.

Standards on judicial integrity and accountability emphasize the importance of taking steps to maintain and enhance the knowledge, skills and personal qualities of judges, taking advantage for this purpose of training and other facilities.¹⁷⁴ Judges should keep themselves informed about relevant developments of international law, including human rights.¹⁷⁵ Judicial training should include the “teaching of law, judicial skills and the social context

¹⁷² Speech of the Honorable Chief Justice of Kenya, Judges' Colloquium 2004, Mombasa.

¹⁷³ Report of the Judges' Colloquium, August 2004, Mombasa.

¹⁷⁴ Bangalore Principles on Judicial Conduct 2002, value 6.3.

¹⁷⁵ Bangalore Principles on Judicial Conduct 2002, value 6.4.

including ethnic and gender issues."¹⁷⁶

Some of the reluctance of judges in Kenya to undergo judicial training or even to attend specialized legal seminars seem to stem from the fact that these events are not directly under judicial control. The ICJ stresses that such training should be "organized, systematic and ongoing and under the control of an adequately funded judicial body."¹⁷⁷ The ICJ is also convinced that a regular programme of continuing judicial education should be open to all members of the judiciary and support staff based on identified needs. However, while it is provided that judicial officers should generally control curriculum, international standards provide that judicial officers should have the assistance of lay specialists.¹⁷⁸ This necessitates collaboration with external specialists as resource persons. Furthermore, for a judge to be kept informed of relevant developments, particularly in international law, specialized outside seminars may be necessary and even essential.

Efforts should also be made to enable judges and magistrates to develop new fields of legal specialization. Access to specialized judicial training should be available to all members of the judiciary, with clear and established criteria for selection. Giving the opportunity for members of the Kenyan judiciary to

specialize in certain areas of law will provide a sound incentive for the progressive development of legal research and judicial interpretation.

Substantive training courses on case and financial management, as well as new legal developments, should be required for new judges and magistrates assuming their positions, as well as courses in computer technology. Budget allowances allocated for training expenses, library acquisitions and computer costs should be increased and extended to magistrates.

Moreover, subject to the proper performance of judicial duties, judges and magistrates should also be allowed to "write, lecture, teach and participate in activities concerning the law, the legal system, and the administration of justice."¹⁷⁹ These are activities that not only enhance the competence of the judges and magistrates, but also facilitate the judiciary's accessibility to other stakeholders in the legal profession as well as to the interested public.

Courses in judicial education should be offered to practising lawyers, as part of the development training of the legal profession.¹⁸⁰ The ICJ recommends that the newly established compulsory Continuing Legal Education programme of the Law Society be further developed to include collaborative seminars with the judiciary.

¹⁷⁶ Commonwealth Latimer Guidelines 1998 IV) Judicial Independence, 3. Training.

¹⁷⁷ Commonwealth Latimer Guidelines 1998 IV) Judicial Independence, 3. Training.

¹⁷⁸ Commonwealth Latimer Guidelines 1998 IV) Judicial Independence, 3. Training.

¹⁷⁹ Bangalore Principles on Judicial Conduct 2002, value 4.11.1

¹⁸⁰ Commonwealth Latimer Guidelines 1998 IV) Judicial Independence, 3. Training.

Public perceptions and access to justice

Judicial independence will not lead to justice if the public cannot easily access courts. Standards on judicial independence expressly provide that people should have easy and unhindered access to courts, particularly to enforce their fundamental rights.¹⁸¹ Barriers to access to justice are not only physical, but also often economic, social, psychological and cultural.

The ICJ mission found that there is a prevailing perception that courts in Kenya are not easily "accessible" to the public, to the extent that up to 80% of respondents in a survey stated that Courts were "inaccessible".¹⁸² In addition to being seen as corrupt, the court system is perceived to be discriminatory against the poor and marginalized sectors of Kenyan society.¹⁸³ The current image of the Kenyan judiciary is that of reclusion and isolation.

Human rights law guarantees victims the right to a remedy in a fair and non-discriminatory manner.¹⁸⁴ The current Kenyan Constitution guarantees the right of everyone to access the High Court for violations under the Bill of Rights.¹⁸⁵ In order to broaden access to justice in

Kenya, many efforts in recent years have been undertaken to establish alternative structures that would enable the public to access justice. This includes the small claims courts, the community justice system and the use of alternative dispute resolution. These initiatives would enhance people's access to justice

¹⁸¹ Commonwealth Latimer Guidelines 1998 I) Parliament and Judiciary, para. 6.

¹⁸² ICJ-Kenya report "Strengthening Judicial Reforms in Kenya" Vol. IX, p. 11

¹⁸³ Legal Resource Foundation, "Balancing the Scales" Executive Summary pp. vii - viii.

¹⁸⁴ Articles 2, 14 and 26 ICCPR.

¹⁸⁵ Constitution of Kenya, section 84.

and should be appropriately recognized and supported.

However, the ICJ recommends that the formal structures and procedures of the judiciary should be reformed equally so that the public can exercise a more effective right to access justice through courts of law. The ICJ was informed that the judiciary is currently undertaking wide consultations to enable the implementation of a specific legislative project to simplify the rules of procedure. The ICJ welcomes this initiative as an important step to improve access to justice. Wide consultations should be held among the different legal organizations and the public at large.

Moreover, the ICJ mission learned of concern about severe restrictions on physical access to court buildings and proceedings. Courts are barricaded and people with legitimate business at the courts have difficulties entering the courts. The general public is largely excluded from attending court hearings, which severely impedes the right of the public to be present and the right of the parties to a public trial.¹⁸⁶ The ICJ recommends that the judiciary ensures the physical accessibility of the public to all courts in Kenya.

The ICJ further recommends that the judiciary and legal service organizations undertake a comprehensive study on the improvement of access to justice in the Kenyan courts.

¹⁸⁶ As guaranteed under article 14, paragraph 1 ICCPR.

CONCLUSIONS AND RECOMMENDATIONS

Deep-seated patterns of corruption in the administration of justice have been a serious impediment to the rule of law in Kenya. The ICJ has noted various efforts by the government, the judiciary and civil society to eliminate this practice.

The so-called “radical surgery” carried out on the judiciary led to the removal and resignation of allegedly corrupt judges and magistrates following the political changes in 2002. However, the manner in which the anti-corruption measures were conducted violated principles of due process and security of tenure. The mission found that the implementation of the policy and subsequent events have in practice undermined, rather than strengthened, the independence of the judiciary in Kenya.

The controversies and difficulties surrounding the removal of judges and magistrates underline a broader need for comprehensive judicial and legal reforms in Kenya to establish an independent and accountable judiciary. It will be essential to establish clear and transparent criteria and procedures for the appointment and dismissal of judges and magistrates. Furthermore, the ICJ mission found that broader aspects of judicial independence and accountability must be addressed in order to strengthen the judiciary. Legal and judicial reform as well as necessary anti-corruption policies must be

comprehensive, addressing all actors in the administration of justice.

The following paragraphs set out the ICJ’s recommendation for the establishment of an independent and accountable judiciary in Kenya.

Constitutional framework of the judiciary

1. The ICJ endorses Chapter 13 of the Draft Constitution of Kenya 2004, on the Judicial and Legal System, which would serve as an appropriate framework for an independent judiciary and the protection of human rights by the judiciary. The ICJ urges that this be adopted as part of a much needed new Kenyan Constitution.
2. In case of further delays in the adoption of the Draft Constitution 2004, the current draft provisions on the Judicial and Legal System (Chapter 13) should be introduced as a separate parliamentary bill and enacted into law as soon as possible.

Judicial independence and accountability

3. The anti-corruption programme should consist of simultaneous and inter-related reforms in all parts of the administration of justice in Kenya. This must include the

executive branch as well as the legal profession.

4. The Law Society of Kenya and legal civil society organizations should assess the state of corruption within the legal profession through an independent committee with the power to make recommendations on how to prevent such practices in the future.
5. The principles of judicial independence and accountability should be strictly observed in the discipline and removal of judges and magistrates. The process of disciplining and removing judges and magistrates should scrupulously comply with the principle of security of tenure and due process.
6. An independent complaints procedure that can receive complaints on alleged misconduct and unethical behavior of judges and magistrates and other judicial staff should be established. The public should have access to such complaint procedure.
7. The procedures for complaints against judges and magistrates and relevant disciplinary procedures should be regulated by law. In the meantime the Judicial Service Commission should promulgate clear rules and procedures for receiving and handling substantiated complaints against magistrates and other judicial officers under their disciplinary control. The procedure must ensure guarantees of a fair

hearing and expeditious resolution of any complaints, with recourse to judicial appeal.

8. The High Court should resolve as soon as possible the legal challenges mounted against the tribunals currently hearing the cases of the judges from the High Court and the Court of Appeal. Once these tribunals resume their work, they should resolve these cases without undue delay and in a fair, resolute and impartial manner.
9. The judiciary is accountable to public scrutiny, including the media and civil society. Contempt of court proceedings should not be used against the legitimate criticism by the media. The Madrid Principles on the Relationship between the Media and Judicial Independence should guide the relationship between an independent judiciary and the press.

On judicial ethics and the right to freedom of association

10. Governmental and judicial authorities should fully respect the right of judges to freedom of association and expression in accordance with international human rights law and guidelines on judicial independence. They should refrain from statements threatening the exercise of these rights.
11. To prevent further confrontation, a

regular dialogue should be established between the Chief Justice, the Judicial Service Commission and the Kenyan Judges' and Magistrates' Association.

12. The members of the judiciary should strictly observe the new Judicial Service Code of Conduct and Ethics. The Code should be regularly reviewed to ensure that it satisfies the Bangalore Principles on Judicial Conduct.
13. The judiciary should set up clear implementation mechanisms to monitor and ensure compliance with the code. Such mechanism should establish clear and transparent rules and procedures.
14. The judiciary, the executive arm of the administration of justice and the legal profession should develop an educational programme that will institutionalize awareness and compliance with judicial ethics and accountability.

On appointment and promotion in the judiciary

15. The appointment and promotion procedures for both judges and magistrates need to be improved to allow clear, transparent and objective criteria to be applied and verified for all judicial positions, including the position of Chief Justice.
16. In addition to nominal qualifications required by law, additional criteria should be required of candidates for judicial positions. These should include those pertaining to academic qualifications, integrity, ability and experience, and other objective criteria based on proper professional qualifications. These criteria should be applied to all appointments and promotions, including the position of the Chief Justice.
17. The judiciary should adopt a policy for the progressive attainment of gender equity and remove discriminatory factors in all judicial appointments in the country.
18. Clear procedures in the nomination, selection and appointment of members of the judiciary should be established. All judicial vacancies, including those of the higher courts, should be advertised with clear deadlines for application. A consultative process must be set up where other stakeholders, such as the Legal Society of Kenya and other organizations, may provide nominations according to previously set criteria. A "vetting procedure" is recommended through the publication of final nominations that would invite any substantiated submissions from the public and other interested parties.
19. Appointments as acting judges or magistrates or on a temporary basis compromise international standards on the independence of the judiciary. Any such practice should be immediately discontinued.

On the Judicial Service Commission

20. The Judicial Service Commission should be reformed as a matter of urgency with respect to its composition, mandate and functioning.

21. Composition and mandate foreseen in the draft Constitution 2004 would provide for a much improved and appropriate framework for a truly independent and representative body. It should serve as the model for any efforts to improve the functioning and composition of an independent JSC.

22. The current JSC should take a more active role in strengthening judicial independence through its advisory role on the appointment of judges, as well as by making recommendations on remuneration, appointment, discipline and removal of all judicial officers.

23 The JSC should establish, in consultation with major legal stakeholders, a consultative procedure in the implementation of these expanded functions, including clear roles of stakeholders in vetting proposed judicial appointments.

24. The JSC should establish a clear public complaint mechanism and should establish transparent and fair standards and procedures for disciplinary proceedings against

magistrates and other persons over whom it exercises disciplinary control.

25 A fully functioning support administration in the form of a secretariat, independent from other civil service institutions, would enhance the capacity of the JSC to fulfill its functions. The secretariat should be provided with sufficient resources for its operations.

On the Magistracy

26. The law should expressly guarantee security of tenure for magistrates in Kenya. Magistrates should be treated as full judicial authorities and all other principles of judicial independence and accountability, including tenure; qualifications and appointments, discipline and removal and judicial ethics should apply to magistrates as they apply to judges.
27. The work conditions of magistrates should be adequately enhanced with regard to remuneration, promotion and training. The two-week training required for new magistrates should be reviewed and upgraded. The judiciary should adopt a clear programme to upgrade the training of new magistrates, and with the co-operation of parliament, to re-structure the magistracy in to areas and render them more accessible to the public. The number of magistrates should be increased in line with the Strategic Plan of the Judiciary, urgently filling the 245 open positions.

Administrative and financial autonomy

28. The judiciary and the executive branches of government must fully uphold the strict separation of powers and implement the guidelines on the relationships between the different branches of government as provided by the Commonwealth Latimer Principles.

29. The financial autonomy of the judiciary needs to be increased in order to ensure its independence. The budget allocation and management of funds should be de-linked from the Treasury and the executive.
30. The budget allocation for the judiciary must be substantially increased from its current 1% of the state budget to meet the requirements for human resources, capital development and equipment necessary for judicial operations in the administration of justice. The judiciary should also develop a sound programme for its financial management that will be accountable to an independent and competent auditing body.
31. The Kenyan judiciary should be de-linked through statutory enactment from the mainstream public service commission determining terms and conditions of judicial service of judges and magistrates.

On judicial education

32. Continuing judicial education should be developed on an institutional and long-term basis. It should be required for all members of the judiciary in the country. Appropriate training for judicial support staff should also be made available.
33. The continuing judicial programme should be guided by the Commonwealth Latimer Principles

and the Bangalore Principles of Judicial Conduct in respect of its objectives, organization and control, and funding.

stakeholders and the interested public.

34. Any continuing judicial programme should support opportunities for the judiciary to develop new fields of legal specialization. Members of the judiciary should be able to attend specialized legal seminars for this purpose.

35. Judges and magistrates should be encouraged to engage in external activities related to writing, lecturing and participation in other activities concerning the law and administration of justice.

On access to justice

36. Access to justice with regard to the formal justice system needs to be further improved. To this end, the judiciary and legal service organizations should consider undertaking a comprehensive study on the improvement of access to justice in Kenya.

37 Physical accessibility for legal professionals and the public is insufficient and needs to be greatly improved to ensure compliance with obligations under international human rights law, such as the right to a public trial.

38. Current efforts to simplify the rules of procedures are welcome and should involve the widest consultation possible among the legal

On the judicial reform process

39. The judicial and legal reform process should have, as its principal objective, the entrenchment of judicial independence and judicial accountability in all aspects of the reform process, and be undertaken in accordance with international and regional standards.
40. The Government, Justice, Law and Order Sector Reform Programme (GJLOS) should systematically incorporate accepted international and regional principles on judicial independence and accountability in its support for judicial reform in Kenya.
41. The co-ordinated approach currently adopted by the GJLOS programme should not perpetuate the current dominance of the executive branch over the judiciary. The judiciary should be provided an equal platform in decision-making in the programme.
42. The participation of civil society organizations should be more substantive and not relegated to the operational phases of the programme as service providers. Civil society organizations should remain independent voices and vigilant monitors in the promotion of the rule of law in the country.

Annex 1:

List of persons met (formally and informally) by the ICJ mission

Court of Appeal, Kenya

The Honorable Justice Riaga S.C Omolo
The Honorable Justice Emmanuel O'Kubasu
The Honorable Justice Philip Tunoi
Mr. Justice (rtd.) A. B. Shah

Ministry of Justice and Constitutional Affairs

The Honorable Minister Kiraitu Murungi, Minister for Justice and Constitutional Affairs
Ms. Dorothy N. Angote, Permanent Secretary
Mr. Gichira Kibara, Director for Legal Affairs

Tribunal Investigating the Conduct of Court of Appeal Judges

The Honorable Justice (rtd.) Akilano Akiwumi
Mr. Mbuthi Gathenji, Assisting Counsel
Mr. Chesie Wachanga (researcher)

Senior Advocates

Mr. Mutula Kilonzo, Senior Counsel (also a nominated Member of Parliament of the Official Opposition Party KANU and its Shadow Minister for Justice and Constitutional Affairs)
Mr. George O. Oraro, Senior Counsel

Advocates

Ms. Agnes K. Murgor

Attorney General's Chambers

Mr. Philip Murgor, Deputy Public Prosecutor
Ms. Muthoni Kimani, Chief Litigation Counsel

Kenya Law Reform Commission

Mr. Kathurima Minoti, Chairman

East Africa Law Society (EALS)

Mr. Don Deya, Executive Director

Law Society of Kenya (LSK)

Mr. Patrick O. Kiage, LSK Council Member
Ms. Amina A. Bashir (Deputy Secretary)
Ms. Grace W. Maingi (Deputy Secretary)
Mr. Omwanza Ombati (Programme Officer)

Diplomatic Corps and Donors

Mr. Gerd Bossen, Konrad Adenauer Stiftung (Resident Representative)
Ms. Margeurite Garling, British High Commission (First Secretary)
Ms. Sue Lane, British High Commission (Senior Governance Adviser)
Mr. Arthur Mattli, Embassy of Switzerland (Deputy Head of Mission, Counsellor) and co-chair of Limid-P (group of donor countries)

International Commission of Jurists - Kenya Section

Mr. Kathurima M'Inoti, ICJ Commissioner
Mr. Amollo Otiende, Chairperson
Mr. Wilfred Nderitu, vice chairman
Mr. Kanyi Kimondo, Secretary
Mr. Elijah Ileri, Treasurer
Ms. Mukami Mwangi, Council Member
Mr. Kanyi Gachoka, Council Member
Mr. Albert Kamunde, Council Member

Other Civil Society Organisations

Ms. Jane Onyango, Federation of Women Lawyers - Kenya / FIDA (Executive Director)
Ms. Mary Njeri Gichuru, Kenya Tuitakayo (4Cs) - Citizens Coalition for Constitutional Change (Deputy Executive Director)
Mr. Haron M. Ndubi, Kituo Cha Sheria - Legal Advice Centre (Executive Director)
Ms. Jedida Wakonyo Warihui, Legal Resources Foundation Kenya (Executive Director)
Ms. Gladwel Otieno, Transparency International Kenya (Executive Director)
Mr. Mwalimu Mati, Transparency International Kenya (Deputy Executive Director)
Mr. Jack Muriuki, Transparency International Kenya (Programme Officer, Advocacy and Coalition Building)
Mr. Stephen Riech Community Service Order
Ms. Miriam Kahiga, Amnesty International, Nairobi Office

Media

Mr. Tom Mshindi, Standard Group Limited (Group Managing Director/CEO)

Academic institutions

Prof. W. Kulundu-Bitonye, Kenya School of Law (Principal)

Annex 2:

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International Commission of Jurists - Kenya Section <http://www.icj-kenya.org>

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