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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&language=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.