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**INTERNATIONAL COMMISSION OF JURISTS' SUBMISSION TO THE
UNIVERSAL PERIODIC REVIEW OF LESOTHO**

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Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

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ICJ'S SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW OF LESOTHO

1. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the Human Rights Council's Universal Periodic Review (UPR) of Lesotho. In this submission, the ICJ brings to the attention of the Human Rights Council's Working Group on the UPR (Working Group) and to the Human Rights Council (Council) issues concerning: (1) the competence, independence and impartiality of the judiciary; (2) the right to freedom from torture or other ill-treatment; and (3) international instruments and mechanisms.

Independence of the judiciary and right to a fair trial

2. In all states justice must administered by means of a judiciary that is established by law and is competent, independent and impartial. This rule of law principle is well established under general international law, affirmed in such instruments as the Universal Declaration of Human Rights (article 10), the International Covenant on Civil and Political Rights (article 14) and the UN Basic Principles on the Independence of the Judiciary. Adherence to the principle has been severely eroded in Lesotho, particularly in the time since the first periodic review of Lesotho.
3. The judicial structure in Lesotho comprises the Court of Appeal, the High Court and subordinate courts. The Court of Appeal is the apex court presided over by a President and hears appeals from the High Court presided over by a Chief Justice. The High Court has unlimited inherent common law jurisdiction as well as appellate jurisdiction and hears appeals from the subordinate courts. It also hears constitutional matters referred to it by subordinate courts, subject to confirmation by the Court of Appeal. The Court of Appeal is in session twice per year in April and October and is generally regarded as an ad hoc court. In this capacity, judges of the Court of Appeal do not receive a salary but instead are paid "sitting allowances". Section 123(1) of the Lesotho Constitution provides that the judges of the Court of Appeal include the Chief Justice and *puisne* judges of the High Court ex officio.
4. The Constitution does not explicitly identify either the President of the Court of Appeal or the Chief Justice as head of the judiciary. However, under the Constitution the President of the Court of Appeal does not have any administrative powers or other functions beyond those associated with the functioning of the appeal court, while the Chief Justice, who presides over a lower court (the High Court), does have a number of administrative powers and functions beyond those associated with the functioning of the High Court.
5. The lack of clarity in the Lesotho Constitution as to whom between the President of the Court of Appeal and the Chief Justice holds authority as the head of the judiciary has led to a crisis that has paralysed the proper administration of justice and affected judicial independence from 2009 until now. During this period, there has been a breakdown in the relationship between the Chief Justice and the President of the Court of Appeal, which had a negative impact on the administration of justice, and the independence of the judiciary, both actual and perceived. Due to the impasse, the Law Society of Lesotho felt compelled to call upon the executive in 2012 to intervene in the conflict over judicial leadership. In an attempt to resolve the judicial leadership crisis, the executive ruled, through executive fiat, that the president of the Court of Appeal was the leader of the judiciary.
6. The executive therefore intervened in matters falling within the purview of the judiciary, in contravention of the principle of separation of powers, thereby undermining the independence of the judiciary.

7. In response to this crisis, the ICJ undertook a fact-finding mission to Lesotho led by three former chief justices from South Africa, Tanzania and Botswana to investigate the organization's concern that the executive's attempts to guide and direct the affairs of the judiciary was not compatible with the principle of judicial independence. The ICJ compiled a report,¹ which was transmitted to the government of Lesotho. The report's main findings were that: lawyers in Lesotho have complained about the delays in the delivery of judgments and sentences. Some cases have taken over 10 years before hearing. This is a violation of essential fair trial rights. Delays in the administration of justice deny litigants access to justice and undermine public confidence in the judiciary. Judges attributed the backlog to inadequate resources and facilities and high volumes of cases filed. The proper administration of justice entails the prompt delivery of judgments by a competent and diligent judiciary with adequate resources to operate.
8. The report recommended, inter alia, that the Prime Minister request the King to set up a tribunal to investigate any alleged misconduct by the Chief Justice or the President of the Court of Appeal. The Chief Justice resigned in April 2013 before his term of office ended in August 2013. The President of the Court of Appeal only resigned in May 2013 before a duly constituted tribunal could commence investigations of misconduct against him. He had been suspended in September 2013 after being accused of various acts of misconduct, including having ordered his driver to submit a false accident report to an insurance company when his son was allegedly involved in an accident with his official vehicle. He was also accused of having claimed travel allowances to which he was not entitled. While the resignations of the Chief Justice and the President of the Court Appeal were welcome because of the irretrievable breakdown in their relationship and their untenable power struggle, it is regrettable that there was no scrutiny through the legal process of impeachment. In addition, there are still no clear provisions in law as to whom between the Chief Justice and President of the Court of Appeal is the leader of the judiciary.
9. Judicial independence in Lesotho is further eroded by the ad hoc nature of the Court of Appeal. Judges appointed to the Court of Appeal are drawn from outside the country and hence are foreign nationals. Their appointment process is not transparent. The immediate past President of the Court of Appeal was the first citizen of Lesotho to occupy that position.
10. In 2013, the Law Society of Lesotho called for the transformation of the Court of Appeal into a permanent unit, arguing that this would expedite the justice delivery process and enhance judicial independence. This proposal is yet to be implemented and the government has not indicated whether it intends to do so.
11. There have been numerous allegations of ill discipline within the judiciary. Although Lesotho has a judicial code of conduct there is no evidence to show that the code of ethics has been disseminated to judges and implemented. Judges must have high standards of integrity and conduct themselves in an ethical manner. Ultimately, judicial independence is enhanced when members of the public have confidence and trust in the judiciary. A disciplined judiciary that upholds ethical standards will lead to the proper administration of justice. It means that judges will do their work on time and deliver judgments without delays.

Prohibition of torture and other ill-treatment

12. The situation as reflected in a number of court cases referred to below shows that Lesotho is falling below its legal obligations and has thus failed to actually prevent and punish acts of torture through the adoption of appropriate

measures. The cases mentioned below demonstrate the prevalence of acts of torture by police officers and other security services officers. Those law enforcement officials alleged to be responsible for acts of torture have not been held criminally accountable, and prompt and impartial investigation and prosecutions into instances of torture have not taken place. While Lesotho has become party to relevant regional and UN human rights instruments, and notwithstanding the fact that its constitution provides the right to be free from torture, it has failed to adopt legislative and adequate judicial and administrative measures to give effect to its obligations in respect of the prohibition of torture.

13. In a number of instances, courts in Lesotho have upheld complaints in cases concerning allegations of unlawful arrest and detention, physical assaults, administering of harmful substances, etc. that disclose evidence of torture or other ill-treatment at the hands of law enforcement officials against people in their custody. The ill-treatment, as revealed in the court cases, is largely alleged to have been committed by police officers during interrogations, and, to a lesser extent, by members of the military and correctional services. In the case of *Commissioner of Police and the Attorney General v Neo Rantjanyana*,² the respondent, who was a police officer, was detained for three days during which time he was assaulted and eventually released without charge. The High Court of Lesotho awarded him damages for unlawful arrest, pain and suffering.
14. Similarly, in the case of *Taole v Sehlolo and others*,³ the complainant was unlawfully detained and suffered mental and physical pain inflicted by police officers. The plaintiff was arrested on suspicion of stealing a laptop at his workplace. The court found that the plaintiff had been ordered to take off his clothes and thereafter the defendant and a number of other police officers assaulted the plaintiff until he vomited blood, urinated on himself and fainted. Notwithstanding the fact that the plaintiff's civil claim for damages resulted in an award of damages for assault, unlawful arrest and detention, as well as for medical expenses, no police officer was ever criminally charged.
15. In the case of *Motiane v Officer Commanding Mabote Police Station and others*,⁴ the plaintiff was awarded damages for pain and suffering and medical expenses. He had been arrested on charges of murder. However, he was not taken to the police station in accordance with laid down procedures, but instead was led to a disused hotel building. While in the hotel building he was ordered to take off his clothes, handcuffed and tied with a rope. While he lay on the ground naked, he was suffocated with a tube and cold water was poured over him. He was then ordered to wear his wet clothes and to eat stale bread. He was eventually released without charge after three days of unlawful detention and physical abuse. Both mental and physical pain was inflicted on the complainant by investigating police officers. The police officers were not charged or prosecuted.
16. In July 2013, 13 prisoners were shot and injured by correctional officers at Maseru Central Prison as punishment for allegedly embarking on a hunger strike.
17. These cases and others reveal that acts of torture and cruel, inhuman or degrading treatment by members of the security services are widespread in Lesotho. From these cases it also appears that the police and prison officers who committed acts of torture have not even been discharged from service or subjected to disciplinary sanction. Although some victims are able to obtain some redress through the award of monetary damages, the government of Lesotho has failed to take the measures necessary to prevent torture and hold accountable the perpetrators.

18. Further, Lesotho has failed to enact specific legislation criminalizing torture and inhuman and degrading treatment. Section 8 of the Lesotho constitution provides for freedom from torture as a fundamental right. While, section 94 and 95 of the Penal Code 2010 identify torture as one of the elements of war crimes and crimes against humanity respectively, there is no provision in the penal code for acts of torture committed outside those contexts. There is no specific common law offence of torture prosecutable by domestic courts.
19. Lesotho does have an office of the Ombudsman and a Police Complaints Authority to allow victims to report cases of torture. However these administrative bodies lack full investigative powers. A national human rights institution is yet to be set up.

International instruments and mechanisms

20. Lesotho is a state party to a number of core human rights treaties,⁵ but has yet to become a party to the two optional protocols to the ICCPR; the Optional Protocol to ICESCR; the third Optional Protocol to the CRC; the Optional Protocol to CEDAW; the Optional Protocol to CAT; and the Optional Protocol to the CRPD. In addition, it has failed to submit periodic reports under the CAT, the ICCPR, the ICESCR, the CRPD and CRMW. Further, Lesotho has made impermissible reservations under article 2 of CEDAW.

Recommendations

21. The ICJ therefore calls upon the Working Group and the Council to recommend the Government of Lesotho:

concerning the independence of the judiciary and right to a fair trial

- a) Lesotho must clarify the question as to whom between the President of the Court of Appeal and the chief Justice is the head of the judiciary in order to ensure the independence of the judiciary and the fair and effective administration of justice in the country.
- b) The government of Lesotho should ensure that suitably qualified nationals of Lesotho are among those appointed to the Court of Appeal bench. The President of the Court of Appeal should be a member of the Judicial Services Commission. The Judicial Services Commission should have a broad representation, including members of academia, law society and civil society. This will enhance competence, independence and increase public confidence in the judiciary.
- c) Lesotho should ensure broad representation in the Judicial Services Commission. In particular, members must include the President of the Court of Appeal, and representatives from the law society, academia and civil society. This measure will help to ensure a transparent appointment process and ensure that suitably qualified lawyers are appointed to the High Court and Court of Appeal.
- d) Lesotho should take steps to ensure that the right to fair trial in accordance with international standards is fully respected in the country, including by preventing the extreme backlogs and delays in judicial procedures.
- e) Lesotho should disseminate widely its judicial code of conduct and ensure its enforcement as a measure of improving judicial conduct.

concerning the prohibition of torture and other ill-treatment

- f) Lesotho should criminalize acts of torture and ensure that perpetrators are held accountable not just through the award of damages but through criminal investigations, prosecution and imposition of criminal sanctions where evidence shows that a state official has committed acts of torture.

- g) Lesotho should include international human rights training as a module in the training of police and prison officers.
- h) Lesotho should establish a national preventive mechanism as recommended by the Committee against Torture.
- i) Lesotho should expedite the establishment of a national human rights commission to assist and strengthen the investigation of allegations of torture.

concerning international instruments and mechanisms

- j) Lesotho should become party to the Optional Protocol to the Convention against Torture.
- k) Lesotho should also consider ratifying the Optional Protocol to the Convention on the Rights of Persons with Disabilities; the Optional Protocol to the ICESCR; the two Optional Protocols to the ICCPR; the third Optional Protocol to the CRC; and the Optional Protocol to CEDAW.
- l) Lesotho should lift its reservation of article 2 of CEDAW without delay.
- m) Lesotho should comply with reporting obligations under CAT, ICCPR, ICESCR, CRPD and CRMW.

ENDNOTES

¹The Crisis of the Judicial Leadership in the Kingdom of Lesotho Report of the High-Level Mission of the International Commission of Jurists in the Kingdom of Lesotho, 1 September 2013.

² *Commissioner of Police and AG V Neo Rantjanyana* (2011) LSCA 42.

³ *Taole v Sehloho and Others* (2012) LSHC 68.

⁴ *Motiane v Officer Commanding Mabote Police Station and Others* (2010) LHSC.

⁵ Lesotho is a state party to the International Covenant on Civil and Political Rights (ICCPR); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW); the Convention on the Rights of the Child (CRC) and its first and second optional protocols; the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Rights of Persons with Disabilities (CRPD); and the International Convention for the Protection of all Persons from Enforced Disappearance. In addition, Lesotho is a party to the African Charter on Human and Peoples' Rights; the Protocol to the African Charter on the Rights of Women in Africa; and the African Charter on the Rights and Welfare of Children.