



FAI:51/7/109

The Ministry of Foreign Affairs and Immigration of the Republic of Kiribati presents its compliments to the Office of the High Commissioner for Human Rights (OHCHR) in Geneva and has the honour to attach herewith a letter from the Government of the Republic of Kiribati pertaining to the response of the Government of the Republic of Kiribati regarding the Mandate of the Special Rapporteur on the Independence of Judges and Lawyers.

The Ministry kindly seeks the latter's assistance in forwarding the attached letter and the accompanying annexes to their highest destination at the earliest possible opportunity.

The Ministry of Foreign Affairs and Immigration of the Republic of Kiribati avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights (OHCHR) the assurances of its highest consideration.

Bairiki
Tarawa

15 March 2024

Office of the High Commissioner for Human Rights
Geneva, SWITZERLAND





GOVERNMENT OF KIRIBATI

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File ref: SC 21/1

Date: 14th March, 2024

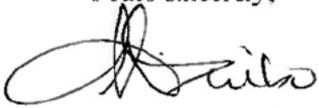
Margret Satterthwaite,
Special Rapporteur on the independence of judges and lawyers,
United Nations Human Rights Procedures
Office of the High Commissioner
Geneva 10
Switzerland

Dear Madam,

Re: Communications from Special Procedures

1. I refer to correspondences from Mr Stefano Sensi in response to my letter dated 14th November, 2023.
2. First of all, I thank you for acknowledging receipt of Government's submission before the 60-day deadline. Secondly for agreeing not to disclose Government's original response as it may compromise the High Court Civil case 18 of 2022 between David Lambourne and the Beretitenti (President) and the Tribunal members. Lastly, for recommending that Government considers a redacted response and allowing time to complete it.
3. After careful review and consideration of your Office's recommendation and noting that the response will not be analysed by the Special Rapporteur but simply uploaded on the website, attached is the Government of Kiribati's revised version. It is important to draw to your attention that this version does not include the response to the clarifications sought on two questions. These two questions have direct links to the High Court case mentioned above on the *Tribunal Member* and reasons for the *resumption of the Tribunal* on page 5 of your letter AL KIR 1/2023. The High Court Civil case hearing is scheduled to take place on the 26th of March, 2024. As you would agree, releasing the response early before the court hearing will compromise this court case, so to avoid any risks, I request your due consideration to allow the submission of the remaining question once the court case is completed.
4. Last but not least, I would be most grateful if you could acknowledge receipt of this TPN and attachments. Should you need further information or information pertaining to these matters, please do not hesitate to contact me.

Yours sincerely,

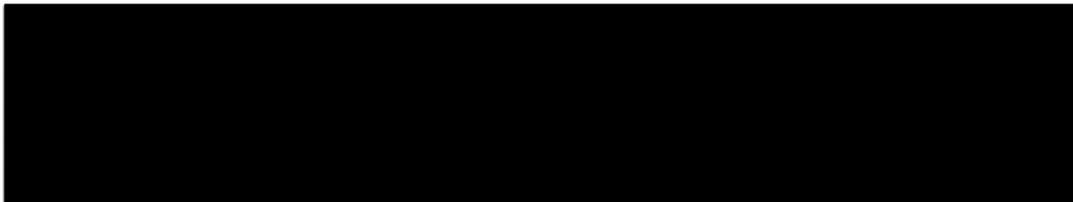


Naomi Biribo, Dr
Secretary for the Cabinet

Enclosed: pages:

- Responses to Questions raised 9 pages
- Annexes
 - 1a (2 pages)
 - 1b (4 pages)
 - 1c (1 page)
 - 1d (1 page)
 - 1e
 - 1f
 - 1g
 - 2a
 - 2b
 - 2c
 - 2d
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cc.



UNITED NATIONS HUMAN RIGHTS QUESTIONS

Kindly refer to the answers in response to the questions raised by UNHR.

1. Question 1

Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

Allegations by the Chief Justice

2. CJ argued that he was not given an opportunity to read the report before it was submitted to Parliament.

- (i) We submit that CJ has been given an opportunity during the course of investigations (refer to the tribunal's response). Based on the information provided by the tribunal indicates that CJ was given an opportunity as stated above. There was a series of communications online between the tribunal and the legal representatives as indicated in the email of the tribunal Chair (refer to attachments below).
- (ii) Series of Communications are as follows-
 - (a) Letter to CJ Hastings sent on 18/07/22 (Annex 1a)
 - (b) Response from Hastings through Judge Finlayson on 03/08/22 (Annex 1b)
 - (c) Response to Judge Finlayson on 3/08/22 (Annex 1c)
 - (d) Response to Judge Finlayson on 15/08/22 (Annex 1d)
 - (e) Letter from Finlayson on 17/08/22 (Annex 1e)
 - (f) Virtual interview with CJ through Finlayson on 26/08/22 (Annex 1f)
 - (g) Transcript of interview with Finlayson submitted to him with opportunity to respond on 08/09/22.
 - (h) Response received on 5/10/23(Annex 1g).
- (iii) At the stage when the report was completed, it is our view with all due respect that there is no need for CJ to be given this report. He had been given the chance to respond and he had done as that as explained above. At this stage when the report was completed, the tribunal submitted it to Parliament, a duty imposed on it by section 83(4)(b) of the Constitution.
- (iv) At the stage when the report was completed, it is for the tribunal to submit it to Parliament as required by law. If the report is given back to CJ for comments, the report will go in cycle and perhaps will unable the tribunal to complete its task.
- (v) The tribunal in its email indicated that when Mr Finalayson requested a draft copy of the report, the tribunal explained that the report was with Speaker of Parliament due to the provisions of the Constitution and had no authority to provide it. This was also the same response given by the tribunal to the request for a copy of such report by the Secretary of the Cabinet

3. CJ resigned because he did not have a choice due to him being suspended and the establishment of the tribunal.

- (i) We agree that CJ resigned before the finding of the tribunal was resolved in Parliament.
- (ii) Our comment to this is that the appointment of the tribunal and CJ's suspension did not force CJ to resign. The Beretitenti (President) has the power to suspend CJ when there was an allegation against him and that suspension can be revoked at anytime (section 83(5) of the Constitution). With all due respect, it is our argument that CJ was not forced to resign when the Beretitenti executed his power to appoint a tribunal and when he suspended CJ because the Beretitenti has a duty to do such due to the allegations he received. Section 83(5) Constitution empowered the Beretitenti to suspend the CJ as there was an allegation against him and also for the Beretitenti to establish a tribunal to assess the correctness of those allegations. The Beretitenti suspended him so that he will not interfere with the investigations.
- (iii) Constitution of Kiribati, Section 83

(4) If the Beretitenti considers, or the Maneaba resolves, that the question of removing a judge of the High Court from office for inability as aforesaid or for misbehaviour ought to be investigated, then—

- (a) *the Beretitenti shall appoint a Tribunal which shall consist of a Chairman and not less than 2 other members, 1 of whom holds or has held judicial office; and*
- (b) *the Tribunal shall inquire into the matter and report on the facts thereof to the Maneaba and advise the Maneaba whether that judge should be removed under this section.*

(5) If the question of removing a judge of the High Court from office has been referred to a Tribunal under the preceding subsection, the Beretitenti may suspend that judge from performing the functions of his office, and any such suspension may at any time be revoked by the Beretitenti and shall in any case cease to have effect if the Tribunal advises the Maneaba that that judge should not be removed from office.

- (iv) Since there was an allegation which ought to be investigated, it is lawful for the Beretitenti to suspend and appoint a tribunal. The question of whether the allegation does not amount to malfunction as required by law for a judge, we wish to comment here that this should be determined during the investigation. It was premature to decide that the allegations alleged did not satisfy the requirement of malfunction; the allegations ought to be investigated and this was the reason for the Beretitenti to exercise his power under section 83 of the Constitution.

- (v) The CJ resigned before Parliament resolved these findings. The resignation took place on the 6th of December, one day immediately after the report had been presented to Parliament for notice (5th of December, Annex 2a) and before the report was debated in Parliament (Annex 2b). We do respect the decision of CJ to resign however if it is true that he resigned due to his suspension and the appointment of the tribunal, this resignation should have taken place way back and would allow the government to reconsider its way forward for the tribunal to cease its function. The CJ was offered opportunities to resolve this matter, however he did not accord this priority as he neither acknowledged the letter or responded to the matter, until after the Tribunal was established to resolve these grave concerns (Annexes 2c and 2d).
- (vi) The government moves to this investigation, why would CJ argue about this when he did not let the government know about his position immediately after being suspended? The government had been waiting to consider his position and the need to discuss on the way forward. Nothing came up so the government assumed this was the best way forward to handle the complaint which needs investigations. When he resigned, the report was completed and had been submitted to Parliament; this was a very late resignation without having the government aware of his position and grievance for such HE's powers.
- (vii) Our argument is that CJ's actions, with all due respect, was too late to settle matters. The government has been expecting his feedback when he was advised about the concerns government had on his article titled "A personal journey through the rule of law in the South Pacific". He did nothing until the tribunal was set up. Since the tribunal was established, it will be difficult to revoke its existence. This would be unfair to the public and would undermine the decision of the government. Had CJ approached the government beforehand, other decisions may come up to settle this issue, but there was nothing the government received from CJ.

4. Court of Appeal Judges

(a) Allegation

- (i) The allegation was about the appointment of the tribunal which was inactive for almost or more than a year now after being established. Also there is a need for a term of reference to be provided to the UN.

(b) Response

- (i) The Court of Appeal tribunal was inactive because most members of the Judge's tribunal are the same as CA tribunal (Annex 3). There are limited resources in Kiribati. Members of the judge's tribunal are now in the process

of investigating the case of the judge and would not be able to execute their functions for the CA judges.

5. Judge David Lambourne

(a) Allegations

- i. There was **a change of advice** by Secretariat to the tribunal. The initial advice to DL was that the function of the tribunal would be ceased until the case of DL was disposed of in Court. Why the change of advice.
- ii. Our comment to this first allegation was that there was **a great misunderstanding** by the tribunal. Their understanding was that when they became aware of DL's court case, they assumed that their operation cannot proceed on this basis. After receiving OAG's advice that they can still proceed given that there is no court order in place to cease their operation, the tribunal resent a notification to the judge with a different advice.
- iii. The second allegation was that there was **a change of member** in the tribunal although the new member has the same qualification/criteria with the first one. The new member was also a member for the tribunal hearing the case of the Chief Justice.
- iv. The government is of the view that the new member appointed has more experience and eligibility than the old member. He has been sitting and hearing court cases dealing with civil, criminal and land cases on his own as a Single Magistrate both on the capital Tarawa and outer islands since 1994. He resigned in 2011 to become the Presiding Magistrate and Single Magistrate for one of the outer islands in Kiribati. The former member merely heard cases on the outer islands and during the hearing cases, this magistrate always sits with other panels of the court. Based on the skill and 29 years of experience by this new member, the government considers him to be a more appropriate person to be appointed to the tribunal to investigate the allegations against the judge (Annex 4).
- v. Also, part of the claim lodged by David Lambourne is that the former member of the tribunal was not eligible to sit as one of the tribunal's member. It is for this claim which caused the government to reconsider the eligibility of those who have been appointed and decided to change a member to a more knowledgeable and experienced one.

6. Answer to Question 2

The establishment of a tribunal and the suspension of the judges are main actions taken the government in both the cases of Puisne Judge David Lambourne, CJ Hastings and the three Court of Appeal Judges. These actions are taken in accordance with the provisions of the Constitution.

Section 83 of the Constitution provides that if the Beretitenti considers that the question of removing a judge ought to be investigated, the Beretitenti shall appoint a tribunal to investigate

the matter and the tribunal shall inquire into the matter and report to the Maneaba ni Maungatabu whether that judge should be removed. This section further provides that if the question of removing a judge from office has been referred to a tribunal, the Beretitenti may suspend that judge from performing the function of his office. Any such suspension may at any time be revoked by the Beretitenti.

These actions are compatible with the international human rights standards and the Basic Principles on the Independent of the Judiciary as the judges are accorded full equality to a fair hearing by the established tribunal.

Though the proceeding of the tribunal for the three Court of Appeal judges has yet to commence, it is clear from the investigation on the CJ Hasting case that the judge was given a fair opportunity to be heard during the investigation and that his rights are respected throughout the process. Communications were made to him concerning the allegations and his responses were well received and recorded. CJ Hastings was also given every opportunity to present and participate in a virtual hearing and this was happened when he engaged a lawyer to represent him throughout the process. Even a transcript of the interview was also provided and his comments and responses were recorded and considered before the tribunal made a conclusion.

There is no doubt that this same fair treatment to CJ Hastings will also be applied to the three Court of Appeal judges once their tribunal proceeds as the members of the tribunal are same with the tribunal established for CJ Hasting. The bottom line is that the principle of natural justice will always be a guiding principle to all the tribunals.

Constitution.

Section 83 provides with the tenure of office of Judges of High Court which shall become vacant upon the expiration of the period of the appointment to that office. It also provides for the removal of the judge and the establishment of a tribunal to conduct the investigation for the removal which shall be reported to Parliament for a resolution.

In terms of suspension of the judge, the suspensions are carried out in accordance with the established requirement under section 83(5) which states that where a question of removing a judge has been referred to a Tribunal, the Beretitenti may suspend that judge from performing the functions of office, and any such suspension may at any time be revoked by the Beretitenti and shall in any case cease to have effect if the Tribunal advises the parliament that the judge should not be removed from office.

High Court Judges (Salaries and Allowances) Act 2017

Part III of the Act provide provisions relating to the tenure and removal of the Judge from office. Under section 5 the Act states that pursuant to section 83(1) of the Constitution, the tenure of office for the judge of the High Court shall be subject to the appointment. Where the appointment was made for a fixed period, the appointment may be further extended provided the appointee's age during the period of appointment does not exceed 65 years. Section 6

further provides that pursuant to section 83(2) of the Constitution, a judge may be removed from office for inability to discharge the functions of the office and misbehavior, provided that a judge shall only be removed or suspended by the Beretitenti following the requirement of section 83(3), 83(4) and 83(5) of the Constitution.

The salaries and allowances of the judge are covered under section 7 of the Act which may by regulation prescribed the:

- a) Annual salary;
- b) An appointment grant;
- c) Entertainment allowance;
- d) Judiciary special security allowance and;
- e) Judiciary extra allowance.

The regulation shall be reviewed once every three years, provide that the salaries and allowance shall not be reviewed to the disadvantage of the holder of the office.

Security allowances are governed by section 11 of the Act where the Government shall be responsible for providing adequate security to the office holders specified in the Schedule at the resident and office compound.

7. Answer to Question 3

Please provide the terms and reference of, and an update on, the tribunal established to investigate the allegations raised against the three Court of Appeal judges, and in particular, how the proceedings of the tribunal are in line with the judge's rights to a fair and impartial trial.

TOR

With all due respect, the TOR for the Court of Appeal tribunal is not possible to be submitted as required. This is because the tribunal is the one to formulate its own rules and procedures. Since it is not yet functional for reasons stated earlier, the tribunal cannot provide a TOR now.

Another thing which is worth to note is the composition of the tribunal. The government sees the need to change the current members of the tribunal per sections of the Constitution hence the delay in the function of the tribunal.

Finding appropriate people to be members of the tribunal is not an easy task for the government to do. Kiribati has very limited human resources and unfortunately for those who have been appointed also need to fulfill their roles as members of the judge's tribunal. They cannot do both tasks at one time therefore the tribunal for the Court of Appeal has to wait until they completed their duties as members for the judge's tribunal.

INACTIVENESS OF TRIBUNAL

The reasons for the tribunal being inactive, please refer to our explanations above.

FAIR TRIAL

It is clear from the information gathered from the tribunal that the judge (CJ) was given fair opportunity to be heard during the investigation and that his rights are respected throughout the process. Communications was made to him concerning the allegations and his responses were well received and recorded. He was also given every opportunity to present and participate in a virtual hearing with the tribunal where he has chosen to be represented through a legal counsel of his choice. Transcript of the interview were also given to the judge and his responses were recorded and considered before the tribunal made a conclusion. It is without doubt that the same process and a fair trial will be accorded to the other judges as the Tribunal comprises of the same members,

8. Answer to Question 4

The latest update on the case was dated the 10 November where the matter was called again before Judicial Commissioner of the High Court.

During the mention, the Court noted the change in advocate with a formal submission of the Notice to Change of Advocate by David.

It was also noted that a number of Miscellaneous Application, mostly by David Lambourne, are yet to be heard, including the amendment to his Originating Summons. The Court advice that these miscellaneous applications should be dealt first before hearing on the main cases. Parties are advised to sort out which application should go first. It was agreed that the case be adjourned to the 1st of December where the issue on miscellaneous application will be sorted out.

The Court also advised that the idea of having a virtual hearing might not be possible due to the possibility of having a poor connection with the internet as advised by High Court IT team. But the Court will confirm on this at the next mention on 1st December.

There is a possibility that the hearing date on the main substantive cases will be fixed after the 1st of December.

9. Answer to Question 5

Having consulted with the High Court, it is clear that the High Court is fully functioning. Unless lawyers and court daily users are complaining of the High Court not fully functioning. The Judiciary Complaint Center has never received such complaints on this matter from lawyers and daily court users (Annex 4).

The High Court have also advised that the Court of Appeal would sit next year February, 2024.

In addition, the High Court have provided the following supplementary information to assist in responding to the question showing that the High Court is fully functional:

1(a). Judicial Independence. Decisions of the Magistrates' Court can only be overridden by decision of the High Court. Decisions of the High Court can only be overridden by decision of the Court of Appeal. The decision of the Court of Appeal is final. For instance, Pusine Judge David Lambourne remains a judge receiving allowances even though under suspension.

1(b). Access to Justice. The outer island courts remain accessible. There is an increase in the number of magistrates to nine magistrates per island. The High Court maintains court circuits to the outer islands.

1(b)(i). Use of technology - Virtual court. Virtual session has been conducted for the island of Arorae.

1(b)(ii) Use of technology - Phone. There is a plan for those on remote islets and villages away from the Judiciary Center to use phones to file cases and for the court to visit and conduct hearings in maneaba of those of remote places.

1(b)(iii). Case Tracking System (CTS). For efficient and effective justice, the CTS is now installed in the Judiciary and will be live this November. An IT Expert from Australia is now working with the Judiciary in training court officers and judicial officers on the use of the CTS.

10. Answer to Question 6

Please provide information on the measures taken to ensure that the terms of office of judges in Kiribati, their independence, security and adequate remuneration, conditions of service, pensions, and the age of retirement are in line with international standards described in the Annex.

The annex is basically about the independence of the judiciary, impartiality, grounds of removal of the judge and the remuneration and conditions of the judge to not be a disadvantage to them.

In Kiribati there are two Laws which lay out measures to ensure that the terms, independence, security, remuneration, conditions of service, pensions and the age of retirement are in line with international standards. The relevant provisions in the Constitution and the High Court Judges (Salaries and Allowances) Act 2017 are all in line with the international principles for judges.

High Court Judges (Salaries and Allowances) Act.

Part IV – Salaries and Allowances

Section 7(1) & (2) state that the salaries is to be prescribed by Regulations and this regulation shall be reviewed once every three years, provided that the salaries and allowance shall not be reviewed to the disadvantage of the holder of the office.

The provisions of these laws are in line with international principles.

The terms

The tenure of the judges set out in the Constitution and the Act is upon the expiration of his appointment (s. 83(1) of the Constitution and s. 5(1) of the Judges Act). Both laws add to say about the removal on the grounds of inability to execute a judicial function or misbehaviour.

The word misbehaviour is not defined but upon a complaint this ought to be investigated by the tribunal (Constitutional). This is what was done in the country and what was done aligned with the Constitution of Kiribati hence principles.

Contract of Employment

In our views, there should be a contract of employment for a judge to work in Kiribati. It has been the case since Kiribati gained independence in 1979. It is so unusual for anyone to work in the country without any ending period. We do respect the decision of the Courts in respect of the judge in Kiribati however, we feel neglected as the State for having ignored our concern if we feel that we need to have the judge removed from the country.

For the judges, the terms will be stated in the appointment. The judge DL has no contract but was appointed merely with a warrant of appointment which did not set out the term of this appointment. According to the CJ supported by the Court of Appeal judgement the term is indefinite which means upon death, resignation or proof of misbehavior.

The above is our response to the queries raised and we are happy to provide more should there be a need to.