

Mandate of the Special Rapporteur on the independence of judges and lawyers

Ref.: AL KIR 1/2023
(Please use this reference in your reply)

14 September 2023

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 53/12.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning actions taken by the Executive to reportedly **dismiss three Court of Appeal judges as well as the Chief Justice of Kiribati**.

Justice William Hastings is a citizen of New Zealand, and until his resignation, he was Chief Justice in Kiribati.

Honourable **Paul Heath** KC, Honourable **Peter Blanchard** KNZM KC, and Honourable **Rodney Hansen** CNZM KC are Judges on the Kiribati Court of Appeal. They are all citizens of New Zealand.

I wish to recall that a communication on the situation of judges and the judiciary in Kiribati was previously addressed to your Excellency's government, on 17 August 2022 (AL KIR 1/2022). However, concerns persist. This letter focuses on events that ensued after this mandate brought to your attention the case of Judge **David Lambourne**. In AL KIR 1/2022, this mandate expressed concerns about actions taken by the Executive to reportedly shorten Judge Lambourne's appointment as High Court judge and the ensuing judicial crisis in Kiribati.

According to the information received:

Case of chief justice William Hastings

On 11 November 2021, then-Chief Justice of Kiribati Honourable William K. Hastings ruled that Judge Lambourne continued to 'hold office as a judge of the High Court of Kiribati for an indefinite period' and that the legislation purporting to retrospectively vary and limit judicial terms of office was 'inconsistent with the Constitution and void to the extent of the inconsistency'.

After issuing this High Court ruling, in December 2021, Chief Justice Hastings went home to New Zealand for the Christmas period. He was unable to return to Kiribati allegedly due to the COVID 19 pandemic, although he continued to hear cases remotely and to fulfil his duties as Chief Justice during that time.

On 30 June 2022, as the Chief Justice was about to begin hearing the constitutional challenge raised by Judge David Lambourne to his suspension, the government suspended Chief Justice Hastings from office.

It is reported that the day before, on 29 June 2022, an Independent Tribunal had been established by the Beretitenti (President of Kiribati) pursuant to his power under section 83(4) of the Constitution, to investigate allegations

submitted by the Kiribati government against Chief Justice Hastings.

On 18 July 2022, the investigative tribunal concerning the Chief Justice informed Chief Justice Hastings about the allegations submitted against him and revealed that three allegations had been submitted by the Secretary to the Cabinet, on behalf of the Executive, against Chief Justice Hastings during the time he held office from August 2021 to June 2022 when he was suspended.

The allegations submitted against the judge reportedly include:

1. The Chief Justice took annual leave in breach of the conditions and requirements set out in his letter of appointment and also stipulated in the Judicial Salaries and Allowances Regulations of 2018: he took this leave without mutual agreement between him and the Minister of Justice nor with the Berenitenti as required in the Regulations and that the number of days taken as leave were more than the due entitlement for the period of time served as Chief Justice.
2. The Chief Justice ordered the release of financial benefits for Judge Lambourne through a signed MOU to the Judiciary and the Ministry of Finance on 13 August 2021, a duty that belongs to the Chief Registrar. It was further added that since he had been administratively involved in the matter concerning Judge Lambourne, he had the ethical obligation to recuse himself from hearing the case against him.
3. The Chief Justice published an article entitled ‘A personal journey through the rule of law in the South Pacific’ in *Judicature International* in October 2021. This article was perceived to reflect the views of the Chief Justice on the tenure of Kiribati High Court judges, the standard practice for judges in Kiribati to be on contract appointment, and the amendment of the High Court Judges’ salaries and allowances in 2021. The content of this article was considered to be closely associated to the case concerning Judge Lambourne which was pending before the High Court at that moment and awaiting to be heard by the Chief Justice. It was therefore alleged that the publication of the article while the case was still pending was unethical and called into question the behaviour of Chief Justice Hastings as the Chief Justice in the country.

On 11 November 2022, the investigative tribunal concerning the Chief Justice submitted a report of their findings to the Maneaba ni Maungatabu (Parliament of Kiribati). Chief Justice Hastings was reportedly not provided the opportunity to read or comment on the report before it was submitted.

On 6 December 2022, Chief Justice Hastings submitted his resignation. He stated that as a consequence of his suspension as Chief Justice on 30 June 2022 and the creation of a tribunal to investigate his alleged misbehaviour, he had been unable to perform judicial functions in Kiribati. He added that he had nevertheless continued to honour the terms of his appointment as Chief Justice of Kiribati by not performing judicial functions in New Zealand.

He expressed regret at having been suspended less than a year after being appointed, on the morning he was scheduled to hear Justice Lambourne’s

challenge to his suspension. Further, he regretted that the investigative tribunal concerning him submitted its report to the Maneaba ni Maungatabu without notice, and without giving him the opportunity to comment on it.

He concluded that, in light of his suspension and the breaches of natural justice by the investigative tribunal concerning him, he was compelled and left with no choice but to resign. He however clarified that his resignation did not constitute acceptance of any of the allegations as he continued to deny any misbehaviour on his part.

Case of judges Paul Heath, Peter Blanchard and Rodney Hansen

The government lodged an appeal to the 11 November decision that Chief Justice Hastings had made in the High Court in the case concerning Judge Lambourne. Through this appeal, the government sought to challenge the previous declaration by Chief Justice Hastings that Judge David Lambourne held office as a judge of the High Court of Kiribati until death, resignation or removal from office in accordance with section 83 of the Constitution of Kiribati.

On 26 August 2022, the Court of Appeal issued its judgement in the appeal. In their judgement, the three judges upheld the declarations of Chief Justice Hastings of 11 November 2021 and affirmed that Judge David Lambourne holds office as a judge of the High Court of Kiribati until death, resignation or removal from office in accordance with section 83 of the Constitution of Kiribati. They also confirmed Chief Justice Hastings' order of 7 December 2021, which precluded the deportation of Mr. Lambourne while he was still a judge.

In addition, the Court of Appeal set aside and dismissed the section 138 appointment warrant through which the Beretitenti purported to "recall, vacate and nullify" Judge David Lambourne's appointment of 10 May 2018 as a Judge of the High Court and reappointed him for a term that expired on 30 June 2021.

Lastly, the three judges issued orders that the two other deportation orders that had been previously issued against Mr. Lambourne be set aside and that his passport be returned to him. They also ordered that Mr. Lambourne be freed from his bail terms.

On 2 September 2022, following the issuing of judgement of the Court of Appeal, the President of Kiribati, pursuant to his power under section 93(5) of the Constitution, announced the suspension of the three Court of Appeal judges who had rendered the judgement: Honourable Paul Heath KC, Honourable Peter Blanchard KNZM KC, Honourable Rodney Hansen CNZM KC.

On the same day, the Beretitenti announced the creation of an Independent Tribunal to investigate the suspension of the 3 judges, by his powers under section 93(4) of the Constitution. The Independent Tribunal was composed of three members authorized to inquire into and investigate allegations against the three judges of the Court of Appeal and the question for their removal and

to thereafter report the facts and outcome of their investigation to the Maneaba ni Maungatabu. The President further announced that the question of the removal of the 3 judges had been referred to this Tribunal.

The Beretitenti stated that these judges would be immediately suspended from performing the function of their office, and that any such suspensions may be revoked at any time by the Beretitenti and shall in any case cease to have effect if the investigative tribunal concerning the Court of Appeal Judges he appointed advised the Maneaba ni Maungatabu that the judges should not be removed from office.

It was clarified that the issues of misbehaviour to be analysed related to the breach of oath, that is, the allegation that the three judges acted on 26 August 2022 (through their judgement) and continue to act in violation of their oath and legally binding customs and traditions by awarding Judge Lambourne a life-time judgeship when they knew or ought to have known that David Lambourne in his affidavit acknowledged that every single judge in Kiribati had been appointed on a 3 year-term and that such life-term appointment was never the practices and usages of Kiribati.

No further information has been received about the investigative tribunal concerning the Court of Appeal Judges or its investigation since its creation on 2 September 2022. Reports further suggest that it has not taken any action in the 12 months since it was established, and that the Court of Appeal Judges have not even been provided with its terms of reference, nor have they had any contact from anyone in Kiribati since they were suspended on 2 September 2022.

Appointment of Acting High Justice

It is reported that from early September 2022, only the Chief Registrar was able to act as Judicial Commissioner to hear cases in the High Court.

On 28 October 2022, the former Chief Registrar and Attorney-General was appointed to the position of Acting Chief Justice of Kiribati, and continues to hold office only in an acting capacity. As acting Chief Justice, the incumbent does not have security of tenure and could be easily removed.

The President has not appointed a new Attorney-General either. Under the Constitution the Chief Justice oversees the presidential elections, so reports indicate a lack of appointment of a Chief Justice may have implications for those elections, due to be held in mid-2024.

Follow up to the case of judge David Lambourne

The information indicates that the tribunal set up in May 2022 to investigate Judge David Lambourne suspended its hearings pending the outcome of the tribunal set up in June 2022 to investigate the allegations against Chief Justice Hastings, the judge who was set to hear the constitutional challenge brought by Judge Lambourne.

The appointment of a judge who will be able to hear the constitutional challenge to the President's actions is still pending, as the Acting Chief Justice was a party to the previous case in her capacity as Attorney General and therefore is unable to hear the case due to the manifest conflict of interest that would cause.

Reports suggest that during the May 2023 Parliament sitting, the Minister for Justice advised that a judge was ready to hear the case. However, he refused to say who the judge was or when the case would commence. The court has not made public any information about the case.

On 24 August 2023, the two constitutional actions introduced by Judge Lambourne, which have been pending in the High Court, were assigned to the Commissioner of the Court. On 24 August these preliminary applications were adjourned until 10 November when it is expected that Commissioner will list the substantive matters for trial at a later date.

The information suggests that neither case is ready for trial yet as there remain several preliminary matters that need to be resolved. One of the preliminary matters that is awaiting the Commissioner's consideration is Judge Lambourne's application that the Tribunal set up to investigate Judge Lambourne be restrained from proceeding with its investigation pending the outcome of his challenge to its legitimacy. The information suggests that the Commissioner's adjournment to 10 November occurred without dealing with that application. This would potentially give the Tribunal set up to investigate Judge Lambourne sufficient time to complete its activities and submit its report to Parliament before parties get back to Court. Judge Lambourne's lawyer has sought an urgent hearing before the Commissioner to press his application for an interim restraining order, and not wait until 10 November.

On 6 September 2023, Judge Lambourne's lawyer received a letter from the secretary to the Tribunal established to investigate the allegations against Judge Lambourne. The letter advised that (without any prior notice to Judge) the Tribunal had resumed its activities on 30 August. This resumption occurred despite the advice received from the former Tribunal secretary in July 2022 that the Tribunal would cease its work until the outcome of Judge Lambourne's constitutional challenges were known. No basis for the reversal of this decision was provided.

The letter also advises that the President has purported to revoke the appointment of one of the members of the Tribunal set up to investigate Judge Lambourne and appoint a new member. The member whose appointment has been revoked is a lay magistrate. The new member is also a lay magistrate (from a different island). He was a member of the investigative tribunal concerning the Chief Justice and is also a member of the investigative tribunal concerning the Court of Appeal Judges. The information suggests that he has no formal qualifications.

Without prejudging the accuracy of these allegations, I would like to express my serious concern at the information received regarding the actions taken by Your Excellency's government to suspend Chief Justice Hastings, as well as the three Court of Appeal judges. If confirmed, these actions would constitute a serious breach of

international human rights standards, as well as the Basic Principles on the Independence of the Judiciary. The reported measures taken against Chief Justice Hastings and the three Court of Appeal judges appear to violate the principle that judges can only be dismissed for serious reasons of misconduct or incompetence, and in accordance with fair procedures guaranteeing objectivity and impartiality provided for by the constitution or law.

In this regard, I would like to recall the guarantee of the right to a fair and public hearing by an independent and impartial tribunal, provided in article 10 of the Universal Human Rights Declaration; highlights that a competent court is one of the guarantees of a fair trial. The rights to equality before the courts and tribunals, to a fair trial, and to effective remedies are key elements of human rights protection and serve as a procedural means to safeguard the rule of law. International standards on the independence of the judiciary make clear that judges may be suspended only for reasons of proven incapacity or behavior that renders them unfit to exercise their duties. Such suspensions may only be imposed by an independent body following appropriate procedures.

I am therefore concerned about the information received stating that Chief Justice Hastings was not given the chance to respond to the report of the Tribunal before it was submitted to Parliament, and further information that there has been no update from the Tribunal that was set up to investigate the allegations raised against the three Court of Appeal judges. I would like to recall that the guarantees provided in article 10 of the Universal Human Rights Declaration, require that in the determination of any charge against any individual, everyone is entitled to a number of minimum guarantees, including the right to defend himself/herself in person or through legal assistance of his/her own choosing.

Finally, I am seriously alarmed at the information provided that with the suspension of Chief Justice Hastings and the three Court of Appeal judges, Kiribati does not currently have a functioning High Court or Court of Appeal. This state of affairs is reportedly impeding the ability of ordinary citizens to access justice as they await decisions from the court system. The lack of a functioning High Court or Court of Appeal also undermines the ability of the judicial branch of the state to provide guidance, or—if required—to act as a check on the powers of the executive or parliamentary branches.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please explain how the actions taken in the case of Chief Justice Hastings and the three Court of Appeal judges are compatible with international human rights standards under article 10 of the UDHR and

the Basic Principles on the Independence of the Judiciary, and in particular principles 11, 12, 17, 18 and 19.

3. Please provide the Terms of 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 judges' right to a fair and impartial trial.
4. Please provide an update on the case of Judge Lambourne.
5. Please indicate the measures taken to ensure the independence of the judiciary in Kiribati, access to justice, and the right to a fair trial in the country. In particular, please describe the measures taken to address the lack of a functioning High Court and Court of Appeal in Kiribati.
6. Please provide information on the measures taken to ensure that the terms of office of judges in Kiribati, their independence, security, adequate remuneration, conditions of service, pensions, and the age of retirement are in line with international standards described in the Annex

I would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

I may publicly express my concerns in the near future as, in my view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. I also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that I have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of my highest consideration.

Margaret Satterthwaite
Special Rapporteur on the independence of judges and lawyers

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, I would like to draw the attention of your Excellency's Government to the Universal Declaration of Human Rights (UDHR) and refer to its article 10, which guarantees "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

As affirmed by the Human Rights Committee: "The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them". (General comment no. 32, para.19).

The Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, establish that all governmental and other institutions must respect and conform to the independence of the judiciary (principle 1) and that judges will decide cases impartially, on the basis of the facts and in accordance with the law, "without any restriction and without undue influence, incitement, pressure, threat or interference, direct or indirect, from any sector or for any reason" (principle 2).

The UN Basic Principles on the Independence of Judges also provide that: "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.....Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists (principles 11 and 12)."

The Basic Principles mentioned above also establish that "[n]o undue or unwarranted interference shall be made with the judicial process" (principle 3), and that everyone has the right to be tried by the ordinary courts of justice in accordance with the procedures legally established (principle 5).

In 2009 report to the United Nations Human Rights Council, the mandate on Independence of Judges and Lawyers recalled that "[t]he principle of the separation of powers, together with the rule of law, are key to the administration of justice with a guarantee of independence, impartiality and transparency" (A/HRC/11/41, para. 18). Furthermore, in the 2017 report to the Human Rights Council, the Special Rapporteur

on that mandate highlighted that “respecting the rule of law and fostering the separation of powers and the independence of justice are prerequisites for the protection of human rights and democracy” (A/HRC/35/31, para. 16).

According to the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region, adopted at the 6th Conference of Chief Justices, held in Beijing in August 1997, and signed by the Chief Justice of the Republic of Kiribati, the “(i)ndependence of the Judiciary requires that; a) The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and b) The judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature” (paragraph 3). The statement also notes that: “(j)udges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct that makes the judge unfit to be a judge” (paragraph 22); and “(t)he remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed” (paragraph 31). The statement also highlights that “Executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges” (paragraph 38).