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Dire Straits: A report on the rule of law in Fiji

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An International Bar Association
Human Rights Institute Report

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Table of contents

Chapter 3: The independence of the judiciary

Chapter 4: The independence of the legal profession

Chapter 5: Alternative accountability mechanisms – other issues of concern

Chapter 6: Conclusion and recommendations

Executive summary

This report is the result of a fact-finding mission on the Republic of the Fiji Islands (Fiji) undertaken by the International Bar Association's Human Rights Institute (IBAHRI) between 8–13 December 2008. The IBAHRI is grateful for the financial support provided by the Foundation Open Society Institute.

The mission was prompted by concerns about the rule of law, particularly following the coup of December 2006, since when there have been threats to judicial independence and violent attacks on some lawyers made, apparently with the involvement of the military.

Through 2008 and during the course of the mission, various members of the delegation consulted a range of stakeholders involved directly in the events that have occurred in Fiji over the past two years and conducted numerous teleconferences with stakeholders who were based in Fiji and abroad. It should be noted that the delegation received a variety of views during its consultations, including both from stakeholders in favour of, and opposed to, the interim regime.

The IBAHRI has also conducted considerable desk research into the situation in Fiji, including the monitoring of media reports, assessment of other reports on similar topics, and reviews of the interim government's actions on justice issues. This desk research formed the basis for the IBAHRI's decision to visit Fiji to meet with relevant stakeholders to further its understanding of the situation.

The IBAHRI is grateful to the delegation members who accepted the invitation to take part in this mission. The delegation members were:

- The Hon Justice Roslyn Atkinson, Supreme Court of Queensland, Australia;
- Mr Roger Tan, Advocate and Solicitor, Malaysia;
- Dr Loretta de Plevitz, Senior Lecturer, Faculty of Law, Queensland University of Technology, Australia;
- Ms Felicia Johnston, IBAHRI Programme Lawyer, United Kingdom; and
- Mr Daniel Woods, Rapporteur

Summary of conclusions

Since the December 2006 coup, the interim military regime has taken steps to influence, control or intimidate the judiciary and the legal profession. Its attempts to stifle this review are of great concern, and the information uncovered by the delegation suggests that the rule of law in Fiji is in dire straits.

The cancellation of the IBAHRI's visits

A substantial amount of misinformation was publicised about the two proposed visits of the IBAHRI to Fiji. The IBAHRI has a long history of monitoring the rule of law in Fiji. In 2001 it conducted a trial observation of a significant Constitutional case, and in 2006, it released a

report criticising the proposed Promotion, Reconciliation, Tolerance and Unity Bill. Following the coup in December 2006, the IBAHRI increased its monitoring of the situation in Fiji, and was deeply concerned by events during early 2007, including reports of threats and physical attacks against lawyers and judges and the suspension of Chief Justice Daniel Fatiaki. Consequently, it decided to visit the country.

Chapter 2 of the report outlines the history of the IBAHRI's attempts to request the interim Attorney-General to meet with the delegation, and his responses that resulted in both attempts to visit Fiji being cancelled. All communications between the IBA and the interim Attorney-General are at Attachments B–J. The claims of the interim Attorney-General that the IBAHRI was biased, controlled by partisan lawyers within Fiji or restrictive in its meeting arrangements are baseless, and the IBAHRI remains unable to understand where such claims originated. The IBAHRI recognises the substantial support it received for both attempts to visit Fiji from the Fijian non-governmental community and legal fraternity, from the international legal fraternity and from key governments in the region. Despite the behaviour of the interim regime in cancelling the IBAHRI's missions, the IBAHRI does not consider itself to be biased.

The IBAHRI is concerned by statements made by the interim Attorney-General, and repeated by then Acting Chief Justice Gates and Justice Hickie, intended to justify the rejection of the IBAHRI delegation, that three independent review teams have previously found the Fijian judiciary to be independent. A review of each of these visits in Chapter 2 evidences that this is not in fact the case, and that such claims are fallacious and misleading.

The independence of the judiciary

The IBAHRI received numerous reports that the Fiji judiciary was deeply divided following the 2000 coup, consisting of a marginalised group that supported strict upholding of the Constitution following the coup and another group that included Chief Justice Fatiaki. The IBAHRI found that there is a view in Fiji that the 2006 coup gave the marginalised group within the judiciary an opportunity to assert dominance over the bench.

The circumstances surrounding the removal of Chief Justice Fatiaki raise a number of serious concerns about the independence of the judiciary. Chief Justice Fatiaki was removed from his office by representatives of the current interim regime and forced to take leave under duress. When attempting to return, Chief Justice Fatiaki was charged with a range of misconduct offences, including charges that he was involved in the 2000 coup, and subjected over time to a questionable, delayed disciplinary process which was finally dissolved as part of a 'settlement' negotiation between him and the regime reached in December 2008. As part of the settlement, Chief Justice Fatiaki resigned as Chief Justice from December 2008, almost a year after his removal. It is of significant concern to the IBAHRI that the suspension of the former Chief Justice has been concluded in this way. If the allegations were true, they were extremely serious and warranted investigation and consideration by an independent tribunal. In such circumstances, it is highly inappropriate for the interim regime to have dropped the charges and made a large payment to the former Chief Justice to facilitate his resignation. Alternatively, if the allegations were false, the fact that the interim regime suspended the Chief Justice and prevented him from returning to office was entirely without foundation, constituting a serious and unwarranted

violation by the interim regime of the independence of the judiciary. There is no conclusion that can be drawn from the resolution of the suspension of the Chief Justice that does not have serious negative implications for the rule of law in Fiji.

The IBAHRI was also seriously concerned by reports received as to physical threats and attacks against judges in 2007. Threats and attacks against the judiciary are never acceptable in any circumstances, and these attacks are extremely concerning to the IBAHRI. The IBAHRI was not in a position to investigate these attacks in further detail during its mission, due to its inability to enter the country.

Due to ongoing judicial processes, the IBAHRI has refrained from commenting on the validity of the Judicial Services Commission (JSC) meeting that resulted in the appointment of Justice Gates as Acting Chief Justice. However, this report presents the known facts and many of the views that have been made regarding this appointment.

The IBAHRI considers that there is a perception that the judiciary in Fiji has been compromised, and that there may be constitutional questions regarding the validity of appointments. Following the exodus of numerous expatriate judges throughout 2007 and early 2008 and a number of new appointments to replace these positions, the High Court and Court of Appeal has been reshaped. The IBAHRI understands that a number of appointments to the Supreme Court are also due to expire, and is concerned about what this will mean for the future independence of that court. At this stage, it appears that there is no way to make unquestioningly legitimate appointments to these roles or vacancies as any person who accepts a nomination will be perceived as compromised by the method of appointment.

After the conclusion of its mission, Acting Chief Justice Gates was appointed as permanent Chief Justice. Consequently, the IBAHRI was not able to investigate this during its mission. However, this appointment requires further review as to its constitutionality. If the appointments of Chief Justice Gates – as both acting and permanent Chief Justice – are unlawful, those judges appointed recently and in the future may also be compromised by the process of their appointment.

The IBAHRI has serious concerns regarding judicial conduct in Fiji. For example, a number of judges who have been appointed or promoted following the December 2006 coup have heard cases that relate to the constitutionality of their own appointments. This breaches the law of recusal, which prohibits judges from presiding over a matter in which he or she holds an interest.

Of particular concern to the IBAHRI was the apparent practice of a particular judge granting urgent ex parte stays where a decision is not favourable to the interim government. The view expressed to the delegation was that the stays are inappropriate and without legal basis, as well as being granted in questionable circumstances.

Other concerns, including the occurrence of 'beratement' proceedings to intimidate critics of the judiciary; judge shopping; judicial perjury; the occurrence of Court Registry staff writing direct letters to clients with solicitors on the record; the apparent use of contempt powers to stifle criticism and legal challenges; a report of a judge attempting to intervene in an appeal hearing from her own decision; and an apparently inappropriate close relationship between some members of the judiciary and the interim regime, have been investigated in depth in this report.

As a result of all these concerns, in addition to an assessment of the Fijian media and other commentary, the IBAHRI found that there is an apparent lack of independence and public confidence in the Fiji judiciary at the current time.

The independence of the legal profession

The IBAHRI has found that the Fiji Law Society (FLS) has had a difficult relationship with the interim regime since the coup in December 2006. Similar to the judiciary, it appears that the FLS had been polarised through opposition to the previous government, which has translated into support for the military regime.

A number of military lawyers were reportedly struck off the roll following the coup, due to their reported involvement in it. Conversely, the IBAHRI received reports that law firms with expatriate lawyers were threatened with having their work permits cancelled should they criticise the coup.

The IBAHRI has received reports that the divide within the FLS effectively prevented it from taking strong action against the interim regime and the events that followed.

The IBAHRI was very concerned by reports of numerous incidents where agents of the military government used physical and psychological violence against people who made public comments that were critical of the regime's actions, including against lawyers. The delegation was informed that the majority of these incidents took place shortly after the coup. The delegation was also told that lawyers have been taken from their homes late at night and detained in military barracks for a number of hours. During this time, they were subject to physical and mental violence and threats were made that unless they desisted from speaking out against the military government, their families would also be subject to detention and torture.

Contempt proceedings and travel bans have also apparently been used in an attempt to stifle criticism of the judiciary and the interim regime.

The FLS has been seriously criticised by the interim government for failing to adequately discipline lawyers. These criticisms and concerns were corroborated by the delegation's discussions with stakeholders throughout Fiji. Reports confirmed that there is a significant backlog in discipline cases, and that public confidence in the legal profession is low due to non-responsiveness to complaints. The interim regime has announced its intention to establish a Legal Services Commission to hear complaints against lawyers, which has caused significant consternation throughout the legal community. This is due to fears that the Commission will not operate fairly or act independently of the interim regime.

Regardless of the current level of effectiveness of the FLS's disciplinary processes, the IBAHRI considers that it is inappropriate for a debate on alternative proposals to take place until democracy is restored. Further, the IBAHRI considers that primary responsibility for such discipline must remain with the legal profession, in association with the judiciary.

Alternative accountability mechanisms

The IBAHRI recognises the importance of both the Fiji Human Rights Commission and Fiji's media to ensure accountability of the government. The Commission and the media have, in the past, had reputations for making independent, robust and balanced contributions to Fiji's political discourse. However, this has changed since the 2006 coup.

The IBAHRI found that the leadership of the Human Rights Commission has been taken over

by a military appointee who is strongly sympathetic to the military government and no longer fulfils its mandate. Further, it found that the media has been silenced by the deportation of key media figures and the misuse of contempt proceedings to shut down debate.

RECOMMENDATIONS

The IBAHRI recommends:

(1) That elections are held at the earliest opportunity in order to restore democracy to Fiji and legitimacy to all government actions.

(2) That the interim regime refrains from any interference with the independence of the judiciary and the legal profession.

(3) That the interim regime refrains from attempting to make any changes to the Fiji Constitution or the structure of the Fiji legal and justice system more generally.

(4) That the interim regime be transparent and accountable, and refrains from inhibiting access to Fiji of independent international delegations such as the IBAHRI delegation and the UN Special Rapporteur on the Independence of Judges and Lawyers.

(5) That the interim regime and the current members of the judiciary in Fiji refrain from misleading the public as to the nature of previous international reviews of the situation in Fiji.

(6) That the interim Attorney-General and the interim military government respect the principle of the separation of powers and support the development of an independent judiciary.

(7) That all members of Fiji's judiciary work together to overcome personal conflict and restore collegiality across the judiciary.

(8) That until elections are held, no further appointments to the judicial bench are made in order to avoid further doubt being shed on the legitimacy of the current appointments to the judiciary in Fiji.

(9) That all members of Fiji's judiciary adhere to their oath of service by upholding the Constitution and doing right to all people in accordance with the laws of Fiji without fear or favour, affection or ill will and to conduct themselves with the utmost integrity at all times.

(10) That all judges must recuse themselves from cases where the validity of their position as judge or other appointment depends on the answer to the question they are asked to consider.

(11) That all appointments to and suspensions from the bench follow the procedures outlined in the Constitution.

(12) That the Chief Justice and all those responsible for case management ensure that cases are listed for hearing in a transparent, fair and equitable manner.

(13) That the interim government deals with all allegations of judicial misconduct through independent tribunals set up and governed by constitutional processes free from executive interference or influence.

(14) That the FLS should take steps to further its legal challenge to the JSC as soon as possible

and avoid any further delays.

(15) That the interim government desists from making political and military appointments to public service and police roles.

(16) That the Fiji judiciary respect freedom of expression amongst the media and the legal profession.

(17) That the interim regime respects the independence of the legal profession in Fiji, and refrains from making inappropriate criticisms of the legal profession or individual lawyers.

(18) That the interim regime investigates the allegations of physical abuses of lawyers in the aftermath of the coup, and takes action against those responsible.

(19) That the interim regime respects the independence of the FLS.

(20) That the interim regime abandons its proposals to establish a Legal Services Commission for disciplining lawyers.

(21) That the FLS reviews its existing disciplinary procedures and establishes more efficient procedures to ensure that complaints against lawyers are dealt with fairly and expeditiously. Further, the FLS is urged to investigate avenues for fundraising to enable it to implement these procedures as soon as possible.

(22) That the interim regime withdraws its direction that government work must not be provided to specific law firms.

(23) That the interim regime ceases attempting to use contempt proceedings and travel bans to influence the responsible conduct of lawyers.

(24) That members of the Fiji judiciary ensures that contempt proceedings are not used to silence legitimate political debate or to influence the responsible conduct of lawyers.

(25) That the interim regime facilitates the independent and free operation of the Fiji Human Rights Commission and Fiji's media.

(26) That the Chair of the Fiji Human Rights Commission ensures that the Commission complies with the standards for human rights commissions set out in the Paris Principles.

(27) That the Fiji Human Rights Commission acts independently and in compliance with its powers and mandates under the Fiji Constitution and law.

(28) That the Fiji Human Rights Commission desists from making inappropriate and misleading statements regarding any legitimate criticism by other countries or international agencies of Fiji's compliance with human rights standards and democratic principles.

(29) That independent and fair-minded Commissioners are appointed to the Fiji Human Rights Commission in accordance with Constitutional principles and processes.

(30) That the Fiji Human Rights Commission abides by and carries out its mandate, and avoids establishing commissions of inquiry regarding extraneous matters.

(31) That the interim government desists from using contempt or deportation proceedings to attempt to control information provided to the community by the media.

Chapter 1: Background

Introduction

1.1 This report is the result of a fact-finding mission on the Republic of the Fiji Islands (Fiji) undertaken by the International Bar Association's Human Rights Institute (IBAHRI) between 8–13 December 2008. The mission was prompted by concerns raised about the rule of law, particularly following the coup of December 2006, since when there have been threats to judicial independence and violent attacks on some lawyers made, apparently with the involvement of the military.

1.2 The delegation's terms of reference were:

(1) to examine the current status of the judiciary in Fiji and whether there is executive or other interference in their independence;

(2) to examine reports of inappropriate appointments to the judiciary since December 2006 and whether these have impacted on public confidence in the independence of the judiciary;

(3) to examine the situation involving the removal of the former Chief Justice;

(4) to examine the current status of the legal profession, and the independent bodies that represent the legal profession, to examine whether there are unacceptable constraints on their independence or whether they have been subject to harassment or inappropriate interference by the government;

(5) to determine whether there is any other impediment, either in law or in practice, which jeopardises the administration of justice;

(6) to prepare a report for dissemination as appropriate; and

(7) to make recommendations for future activities and projects to address any concerns reported by the delegation.

Organisation of the mission

1.3 The International Bar Association (IBA) is the world's largest lawyers' representative organisation comprising 30,000 individual lawyers and over 195 bar associations and law societies. In 1995, the IBA established the IBAHRI under the Honorary Presidency of Nelson Mandela. The IBAHRI is non-political and works across the IBA, helping to promote, protect and enforce human rights under a just rule of law and to preserve the independence of the judiciary and the profession worldwide.

Delegation members

1.4 The IBAHRI is grateful to the delegation members who accepted the invitation to take part in

this mission. The delegation members were:

- The Hon Justice Roslyn Atkinson, Supreme Court of Queensland, Australia;
- Mr Roger Tan, Advocate and Solicitor, Malaysia;
- Dr Loretta de Plevitz, Senior Lecturer, Faculty of Law, Queensland University of Technology, Australia;
- Ms Felicia Johnston, IBAHRI Programme Lawyer, United Kingdom; and
- Mr Daniel Woods, Rapporteur

Interviews and consultation

1.5 Through 2008 and during the course of the mission, various members of the delegation consulted a range of stakeholders involved directly in the events that have occurred in Fiji over the past two years and conducted numerous teleconferences with those stakeholders who were based in Fiji and abroad. Due to concerns about the safety of Fijian based stakeholders following previous attacks and criticisms against those who have spoken out about their experiences and views, the IBAHRI has decided that those consulted will not be listed in this report. However, it should be noted that the delegation received a variety of views during its consultations, including both from stakeholders in favour of, and opposed to, the interim regime. The IBAHRI would like to take this opportunity to thank all those who spoke with the delegation and who provided additional resources to facilitate this review.

Methodology

1.6 The IBAHRI has been monitoring and reviewing the situation in Fiji for a number of years. Throughout 2007 it particularly monitored events following the December 2006 coup, including the suspension of the Chief Justice and ensuing departure of a number of High Court and Court of Appeal judges. It was also extremely concerned by reports of abuses against lawyers during the immediate aftermath of the coup.

1.7 As a result of this interest, the IBAHRI has conducted significant desk research into the situation in Fiji, including monitoring of media reports, assessment of other reports on similar topics, and reviews of the interim Government's actions on justice issues. This desk research formed the basis for the IBAHRI's decision to visit Fiji to meet with relevant stakeholders to further its understanding of the situation.

1.8 As discussed further in Chapter two, the interim regime actively prevented the IBAHRI delegation from visiting Fiji to carry out this review on two occasions. Following the cancellation of the second proposed visit, the IBAHRI considered it highly unlikely that the interim regime would ever allow the delegation free and full access to Fiji to conduct its review. Therefore, the IBAHRI decided to conduct the review remotely, and invited all participants who had previously agreed to meet with the IBAHRI delegation to speak with it over the telephone. Most stakeholders agreed to this amendment, and the teleconferences were carried out from Brisbane during the week of 8–12 December 2008. The delegation found that the telephone interviews were extremely

effective, and almost all those interviewed were frank and open. A number of interviews were also carried out in person and via telephone with stakeholders who were outside Fiji.

1.9 However, as is evident from this report, the majority of the evidence relied on in this review has been primary source material such as cases, public statements, court documents and other inherently reliable documents. This has been supplemented by published papers, newspaper reports and other analyses by those who are in a position to comment on the situation in Fiji. The report is fully referenced throughout when such documents have been used.

Political background

1.10 Fiji gained independence from the United Kingdom in 1970, after 96 years of colonial rule.[1] Fiji has been subject to four coups, each of which has been related to ethnic divisions within Fiji. The first coup took place in 1987, following the formation of Fiji's first Indo-Fijian majority government, led by Dr Timoci Bavadra's Labour Coalition Party. In May 1987, a coup led by Lieutenant Colonel Sitiveni Rabuka unsuccessfully attempted to overthrow Bavadra's Government. Lieutenant Colonel Rabuka staged a second coup in September 1987, this time deposing the elected government, revoking the 1970 Constitution and declaring Fiji a republic.[2] Following an interim period of military rule, Lieutenant Colonel Rabuka stepped down in December 1987, appointing the previous Governor General, Kanatabatu Ganilau, as President, Ratu Sir Kamisese Mara as Prime Minister and himself as Minister of Home Affairs.[3] A new constitution was put in place in 1990 that reserved majorities for indigenous Fijians in both houses of parliament.[4]

1.11 In 1993, an election was held under the 1990 Constitution and Lieutenant Colonel Rabuka was elected Prime Minister. In 1997, a planned review of the Constitution led to the drafting of a new Constitution, which guaranteed indigenous Fijian dominance in most senior government and administrative positions. Constitutional amendments in 1988 attempted to introduce some ethnic balance in government, including providing for a multi-ethnic Cabinet.

1.12 Elections were held in 1999 under the amended 1997 Constitution and an Indo-Fijian, Mahendra Chaudhry, was elected Prime Minister, leading a coalition government formed by his Indo-Fijian-dominated Labour Party.[5]

1.13 Prime Minister Chaudhry's government was dissolved in 2000, following a coup attempt led by indigenous Fijian nationalist George Speight, who occupied Parliament on 19 May 2000, holding Prime Minister Chaudhry, members of his Cabinet and other members of his coalition government hostage for 56 days.[6] On 27 May 2000, President Mara prorogued Parliament for six months and two days later Commodore Bainimarama purported to abrogate the 1997 Constitution, appointing himself as head of an interim military government.[7] President Mara

1 US Department of State, 'Background Note: Fiji', at www.state.gov/r/pa/ei/bgn/1834.htm (last accessed 23 October 2008).

2 Foreign and Commonwealth Office, 'Fiji', at www.fco.gov.uk/en/about-the-fco/country-profiles/asia-oceania/asia-fiji?profile=all,(last accessed 21 October 2008).

3 *Ibid.*

4 This owed in part to the fact that during the coups of 1987, some 12,000 Indians left the islands, see: ibid.

5 Sanjay Ramesh, 'Viewpoint – Destruction of Democracy in Fiji', September 2002, at www.worldpress.org/images/freelancersPDF/58_1.pdf (last accessed 23 October 2008).

6 *Republic of Fiji Islands v Prasad* [2001] FJCA 2; Abu0078.2000s (1 March 2001).

7 'Report of visit to Fiji by LAWASIA Observer Mission', LAWASIA, p 5, at http://lawasia.asn.au/objectlibrary/150?filename=Lawasia%20visits%20Fiji.pdf (last accessed 11 January 2009).

considered that an abrogation of the Constitution meant that his term as President lapsed. Over June and July 2000 a number of decrees were published by the military government, appointing Mr Laisenia Qarase as Prime Minister and empowering the Great Council of Chiefs (*Bose Levu Vakaturaga*) to appoint an interim President.[8]

1.14 On 14 July 2000, the Great Council of Chiefs appointed Ratu Josefa Iloilo as President.[9] Mr Speight was arrested on 26 July 2000 and charged with treason.

1.15 In November 2000, Justice Gates of the High Court ruled in *Republic of Fiji Islands v Prasad*[10] that the 1997 Constitution had not been abrogated following the coup. It had been successfully argued that the doctrine of necessity did not apply. This decision was upheld by the Court of Appeal in March 2001 on different grounds. The Court of Appeal found that the 1997 Constitution had not been abrogated, that it remained the supreme law in Fiji and that the presidency had not become vacant until President Mara resigned, effective 15 December 2000.[11] Elections were held in 2001 to overcome perceived constitutional irregularities, which Prime Minister Qarase's *Soqosoqo Duavata ni Lewenivanua* (SDL) party won.

1.16 Tensions between the government and Commodore Bainimarama's military increased in 2005, against a background of controversial legislative proposals to grant amnesty to certain categories of participants in the 2000 coup. Commodore Bainimarama opposed the proposals on the basis that they represented an unnecessary concession to objectionable Fijian-nationalist sentiment. Prime Minister Qarase won the next elections, which were held on 6–13 May 2006 and in September 2006 Qarase was sworn in as Prime Minister for a second term, leading the SDL party back to government.[12]

1.17 The result of the elections escalated tensions between Prime Minister Qarase's government and the military. The Fiji High Court later described the situation as descending 'into a relationship of increasing ill will and conflict' while 'public and private exchanges between the Commander of the RFMF [the military] on the one hand and the Prime Minister on the other were both hostile and acrimonious'.[13] In late October 2006, the military issued Prime Minister Qarase with a series of requests, including that the government declare the 2000 coup illegal, withdraw three bills, stop an investigation into Commodore Bainimarama's conduct during the coup, terminate the Commissioner of Police's tenure and remove the commercial arm of the Native Land Trust Board. Subsequently, the Commissioner of Police announced that Commodore Bainimarama would be investigated for sedition.[14]

1.18 On 5 December 2006, the military took control of the streets of Suva and Commodore Bainimarama assumed executive authority, proclaiming himself President, dismissing the Prime Minister and publishing an extraordinary gazette notice proclaiming a state of emergency. He also appointed an interim Prime Minister, Dr Jona Baravilala Senilagakali.

1.19 On 4 January 2007, Commodore Bainimarama restored Mr Iloilo to the presidency and the

8 *Ibid.*
9 *Ibid*, p 8.
10 *Prasad, supra* n 6.
11 *Ibid.*
12 The results of the election can be found at the Fiji Electoral Commission website, at www.elections.gov.fj/results2006.html (last accessed 22 January 2009).
13 *Qarase and Others v Bainimarama and Others*, Fiji High Court, 9 October 2008 per Gates A/CJ, Byrne and Pathik JJ at [34].
14 *Ibid*, at [47] to [49].

interim Prime Minister resigned.[15] The following day, President Iloilo appointed Commodore Bainimarama as interim Prime Minister. On 18 January 2007, President Iloilo announced the Immunity (Fiji Military Government Intervention) Promulgation 2007, which granted 'full and unconditional immunity from all criminal or civil or legal or military disciplinary or professional proceedings or consequences' to the armed forces in the country who were involved in the coup, and all other persons who acted under their command in the lead up to the coup and until 5 January 2007.

1.20 On 31 May 2007 the state of emergency was lifted. Commodore Bainimarama had stated that the state of emergency 'was to provide safety for the citizens of our country and safeguard private property and basically to move the country forward peacefully with minimum civil unrest and disruption'.[16] The state of emergency was re-imposed in September 2007 when the deposed Prime Minister, Mr Qarase, returned to Suva from exile on Vanuabalavu Island.[17] The second state of emergency was lifted on 6 October 2007.[18] Parliament has not sat since it was dissolved by President Iloilo during the December 2006 coup.

Fiji's governance arrangements

1.21 For a summary of Fiji's governance arrangements, please see Attachment A.

Fiji's court system

1.22 Apart from the lower courts such as the Magistrates courts, there are three main courts in Fiji – the High Court, the Court of Appeal and the Supreme Court.

The High Court

1.23 The High Court has unlimited jurisdiction to hear and determine civil and criminal proceedings, as well as constitutional matters. The High Court can also hear appeals from subordinate courts (or provide direction or supervision to subordinate courts). The High Court is headed by the Chief Justice.

The Court of Appeal

1.24 The Court of Appeal hears appeals on cases from the High Court. It is made up of a President (any judge except the Chief Justice), appointed Court of Appeal judges and the puisne judges of the High Court.

The Supreme Court

1.25 The Supreme Court is the apex court, dealing with appeals against judgments in the Court of

15 *Ibid*, at [68].

16 'Fiji lifts emergency imposed after December coup', Reuters, 31 May 2007, at www.reuters.com/article/latestCrisis/idUSSYD273137 (last accessed 11 January 2009).

17 Ricardo Morris, 'Fiji State of Emergency Re-Imposed', *Pacific Magazine*, at www.pacificmagazine.net/news/2007/09/06/fiji-state-of-emergency-re-imposed (last accessed 22 October 2008).

18 'State of Emergency lifted because Qarase posed no threat to the nation', BBC News, 3 October 2007, at: http://news.bbc.co.uk/1/hi/world/asia-pacific/7029352.stm (last accessed 6 January 2009).

Appeal. The Supreme Court can also advise the President on constitutional questions.[19]

Appointments to the courts – Judicial Service Commission

1.26 The Judicial Service Commission (JSC) is a body mandated by the Constitution to nominate judges for appointment to the bench.[20] It consists of the Chief Justice (who is its Chair), the Chair of the Public Service Commission and the President of the Fiji Law Society (FLS). It is also empowered to investigate complaints against judges and take appropriate disciplinary action.

1.27 All judges, bar the Chief Justice, are appointed by the President on the nomination of the JSC, following consultation with a relevant House of Representatives Committee. The Chief Justice is appointed by the President, on the advice of the Prime Minister, following consultation with the Leader of the Opposition.[21] Judges must have held high judicial office or have seven years practice as a barrister or solicitor in Fiji or other country approved by Parliament.[22]

1.28 The JSC also has the power to nominate judges to act as Chief Justice or a High Court judge if the substantive judge is absent or the position is vacant. In this case, the JSC makes a recommendation to the President after consulting with the relevant Minister, who then appoints that nominee into an acting position.[23]

The path to elections

1.29 The interim government's timeline for restoring democracy has extended beyond its original date. In October 2007, Commodore Bainimarama told Pacific leaders gathered for the Pacific Island Forum that democratic elections would be held by March 2009.[24] In August 2008, Commodore Bainimarama announced that the interim government planned to unilaterally amend Fiji's Constitution to incorporate a People's Charter.[25] In September 2008, he announced that elections would not be held until a new Constitution is in place.[26] As noted in the *Qarase v Bainimarama* case, Commodore Bainimarama has indicated:

> 'When the country is stable and the Electoral Rolls and other machineries of Elections have been properly reviewed and amended, elections will be held. We trust that the new government will lead us into peace and prosperity and mend the ever widening racial divide that currently besets our multicultural nation.'[27]

The People's Charter for Change, Peace and Progress (People's Charter) is the planned product of the interim government's electoral reform process, which is known as the National Council for Building a Better Fiji. A draft of the Charter was released on 6 August 2008 and

19 Section 123, Fiji Constitution, at www.servat.unibe.ch/law/icl/fj00000_.html#C007 (last accessed 11 January 2009).
20 Section 131, *ibid.*
21 Section 132, *ibid.*
22 Section 130, *ibid.*
23 Section 132, *ibid.*
24 Michael Perry, 'Fiji coup leader promises democracy by March 2009', Reuters, 17 October 2008, at www.reuters.com/article/worldNews/idUSSYD28653120071017 (last accessed 23 October 2008).
25 'Bainimarama says Constitution will be changed', Fiji Live, 25 August 2008, at www.fijilive.com/news_new/index.php/news/show_news/7968 (last accessed 11 January 2009).
26 'No elections until voting changes', New Zealand Herald, previously at www.nzherald.co.nz/fiji-coups/news/article.cfm?c_id=582&objectid=10534616.
27 *Qarase, supra* n 13, at [58].

includes recommendations to change the electoral process to a proportional system.[28]

1.30 The purpose of the IBAHRI's review of the rule of law in Fiji did not extend to a consideration of the proposed election, nor of the People's Charter. The IBAHRI acknowledges that there are significant flaws within Fiji's electoral system, including racial biases. However, the IBAHRI considers that it is inappropriate for an unelected, military regime to make significant changes to a constitution or to delay elections for any reason. Further, the IBAHRI considers that the continued actions of the military government are an obstacle to the progress of good governance and democracy in Fiji, and elections must be held at the earliest opportunity.

The case of Qarase v Bainimarama

1.31 The key challenge to the legality of the coup is still under the appeal processes of the Fiji courts. Therefore, the IBAHRI will not present its own views on the legality or otherwise of the coup, but will document the known facts and present various views that have been expressed. A full review of the case will be released once all judicial processes have been exhausted.

1.32 On 4 October 2007 the High Court commenced hearing the legal challenge brought by Qarase against Commodore Bainimarama and the interim regime for the December 2006 coup.[29] The primary question for consideration was 'whether the President could act in the crisis of December 2006 and January 2007 in the way that he did' and not whether the coup was warranted, excused or necessary.[30] Central to Qarase's case was the interpretation of the Constitutional powers inherent in the largely honorary role of the President of Fiji, which Commodore Bainimarama had assumed for a brief period of time during the coup in order to dismiss Qarase before returning them to President Iloilo. Qarase sought to establish that Commodore Bainimarama unlawfully assumed the position of Head of State through threats to Iloilo of a total military takeover; alternatively, even if this was not the case Commodore Bainimarama's capacity as acting or interim President did not permit him to unilaterally dismiss Qarase. At the hearing, Qarase's lawyer, Nye Perram, argued that according to the Constitution, Iloilo, as President, did not have the power to dismiss Prime Minister Qarase, who retained the confidence of the House of Representatives.[31] Mr Perram argued that the move to dismiss Qarase was null and void because Commodore Bainimarama had no power to do so. Perram argued therefore that regardless of what actions Commodore Bainimarama had taken, Iloilo remained in office as President.[32] Upon his 'reinstatement', the President fully endorsed all of Commodore Bainimarama's actions.[33] The case considered whether or not the President has power to validate Commodore Bainimarama's actions in this way.

1.33 It should be noted that there appears to be a widespread belief by supporters of the interim regime that although the coup was illegal, it was justified or necessary. The doctrine of necessity was developed originally in Pakistan, when it was used by a court to justify the dissolution of the

28 'NCBBF endorses draft People's Charter', *Fiji Times*, 4 August 2008, at www.fijitimes.com/story.aspx?ref=archive&id=96898 (last accessed 23 October 2008).

29 Gabriel Haboubi, 'Fiji Court Hears Ousted PM's Challenge to Legality of Coup', *Jurist*, 4 October 2007, at http://jurist.law.pitt.edu/paperchase/2007/10/fiji-court-hears-ousted-pms-challenge.php (last accessed 23 October 2008).

30 *Qarase, supra* n 13, at [3].

31 Verenaisi Raicola, 'President had the Power', *Fiji Times*, 5 October 2007, at www.fijitimes.com/story.aspx?id=71777 (last accessed 23 October 2008).

32 Raicola, **ibid**.

33 *Qarase, supra* n 13, at [69].

first constitutional assembly and the government of Prime Minister Khawia Nazim Uddin, on the basis that in the aftermath of a successful coup, 'the national legal order must for its validity depend upon the new law-creating organ'.[34] This doctrine has since been argued as justifying coups and other takeovers of government in Zimbabwe, Pakistan, Uganda, Ghana, Nigeria, Cyprus and others.

1.34 In response to the coup, New Zealand extended sanctions against Fiji, including the suspension of aid and the prohibition on all members of Fiji's military from visiting New Zealand.[35] At the time, then Prime Minister Helen Clark and Foreign Minister Winston Peters stated: 'They must cease their disgraceful acts and restore the legitimately elected government, or suffer the consequences of their grossly illegal acts'.[36] The US Ambassador to Fiji called on Commodore Bainimarama to return the democratically elected government to power and suspended aid.[37] The Australian Government also condemned the coup and suspended most aid to the country.[38]

1.35 On 12 December 2006, the European Parliament passed a resolution demanding the return of Prime Minister Qarase and his government to power, and called on penalties and pressures to be imposed on Fiji by Pacific Forum countries and other regional and international actors.[39]

1.36 The judgement in *Qarase v Bainimarma* was handed down on 9 October 2008, over a year after the Court first began to hear the matter and some months after the conclusion of the hearings. The High Court found in favour of the defendants. The Court found that the ratification by President Iloilo after returning to power on 4 January 2007 of the decisions and actions of Commodore Bainimarama in: dismissing the Prime Minister and Cabinet; the dissolution of Parliament; the appointment of new Ministers; and the absolution of the acts of Commodore Bainimarama and his men; were within the exercise of a President's prerogative powers.[40]

1.37 The court considered whether the President's prerogative powers enabled him to do this outside of the Constitution. The Court stated:

> 'We find that exceptional circumstances existed, not provided for by the Constitution, and that the stability of the State was endangered. We also find that no other course of action was reasonably available, and that such action as taken by the President was reasonably necessary in the interests of peace, order and good government. Rather than impairing the just rights of citizens we conclude that the President's actions were designed to protect a wide variety of competing rights from displacement by avoiding conflagration.'[41]

1.38 The Court ruled that the President had acted:

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34 *State v Dosso* (1958) S Ct 533.

35 'NZ extends sanctions against Fiji', *The Age*, 6 December 2006, at www.theage.com.au/news/World/Fijis-fate-in-hands-of-people-NZ-PM/2006/12/06/1165080980965.html (last accessed 14 January 2009).

36 *Ibid.*

37 *Ibid.*

38 'Fijian military chief declares coup', 5 December 2006, ABC News Online, at www.abc.net.au/news/newsitems/200612/s1804858.htm (last accessed 12 January 2009).

39 'Motion for a Resolution', 12 December 2006, at www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B6-2006-0649&language=EN (last accessed 12 January 2009).

40 *Qarase, supra* n 13, at [171].

41 *Ibid*, at [162].

> 'honestly, impartially, neutrally and in what he gauged was the best interests of the nation, that is, of all of the inhabitants of Fiji. It is not for this court to inquire into the details of his acts or to comment on whether one action would have been better done another way. But it is certainly open to conclude his intentions were to unify the people of Fiji'.[42]

1.39 The decision has since been appealed, and is due to be heard during the March 2009 sittings of the Court of Appeal. As stated, the IBAHRI does not intend to analyse the decision at this stage, given that there are still ongoing appeals in train. However, concerns about the judicial panel that heard the case should be noted. The judicial panel consisted of Acting Chief Justice Gates, Justice John Byrne and Justice Davendra Pathik. Of these, only Justice Pathik had been appointed in his position prior to the coup (the Acting Chief Justice was a judge, but not Chief Justice). Therefore, the IBAHRI has significant concerns about the impartiality of the bench hearing the case, as the validity of their appointments as Chief Justice and Judge, respectively, were potentially affected by their decision in this case. The IBAHRI is therefore of the opinion that Acting Chief Justice Gates and Justice Byrne should have recused themselves. This is considered in greater detail at paragraphs 3.52 to 3.62.

1.40 One newspaper noted that the decision provoked 'a wave of criticism'.[43] Following the decision, Mr Qarase commented:

> 'I think most people in Fiji are stunned, including myself. It is quite an unbelievable decision. I am extremely disappointed… It is a ridiculous situation. It will encourage future coups. I think the impartiality of our judiciary is completely gone.'[44]

1.40 George Williams, a professor in law at the University of New South Wales, who has appeared in constitutional cases before Fiji courts, wrote that the decision was a 'major disappointment'.[45] Professor Williams went on to describe the decision:

> 'The Court found that the President of Fiji, Ratu Josefa Iloilo Uluivuda, acted lawfully in ratifying the dismissal of Prime Minister Laisenia Qarase in dissolving Parliament and in granting immunity to the leaders of December 2006 coup. It also found that the President could rule Fiji directly by decree without the need for a timetable for the holding of elections.
>
> The Court held that all this could occur consistently with the 1997 Fiji Constitution. This was based on the giant legal fiction that the Constitution could accommodate such extraordinary undemocratic acts without itself being compromised.'[46]

1.41 Professor Williams went on to note that:

> 'This latest decision is at odds with the most important rule of law principles. It will not only provide encouragement to further coups in Fiji, and indeed elsewhere in the Pacific, but undermine the rule of law by providing unfettered power to the President that places

42 *Ibid*, at [157].

43 'Fiji accused of threats to judicial review', *TVNZ*, 26 November 2008, at http://tvnz.co.nz/world-news/fiji-accused-threats-judicial-review-2334356 (last accessed 11 January 2009).

44 'Laisenia Qarase attacks judiciary over dismissal of coup case', *The Australian*, 9 October 2008, at www.theaustralian.news.com.au/story/0,25197,24470761-2703,00.html (last accessed 11 January 2009).

45 George Williams, 'Qarase v Bainimarama: Fiji's Constitution under fire', East Asia Forum, 14 November 2008, at www.eastasiaforum.org/2008/11/14/qarase-v-bainimarama-fijis-constitution-under-fire (last accessed 11 January 2009).

46 *Ibid*.

him above the clear provisions of the Fiji Constitution.'[47]

1.43 Mick Beddoes, previously the leader of the opposition, stated that:

> '[the] judgment legitimised treason as a means of changing governments in Fiji which only served to encourage more coups in Fiji… [he is] grateful that the decision exposed the judiciary as no longer independent'.[48]

47 *Ibid.*

48 'Fiji High Court Dismisses Qarase Case, Legalises President's Actions in Coup', *Solomon Times Online*, 13 October 2008, at www.solomon-times.com/news.aspx?nwID=2802 (last accessed 11 January 2009).

Chapter 2: Background to this report and the cancellations of the IBAHRI missions

2.1 There has been a substantial amount of misinformation publicised about the two proposed visits of the IBAHRI to Fiji. This section aims to set out in detail the background to the IBAHRI's assessment of the rule of law in Fiji, the steps taken before both attempts were made by the IBAHRI to visit Fiji, and the reasoning behind its decision to carry out a full and detailed review remotely. In order to rectify the misinformation in the public domain, a series of letters and press statements have been attached to this report at Attachments B-K.

2.2 Further, this section will also illustrate that the claims made by the interim regime and some members of the judiciary that previous independent reviews had found the judiciary to be independent are inaccurate and misleading.

The IBAHRI's rapid response and fact-finding mechanism

2.3 When the IBAHRI considers the rule of law to be under threat in a specific country, it identifies whether a rapid response or fact-finding mission is warranted and possible. As a first step, the IBAHRI communicates with the local bar association or law society to investigate whether a high level IBAHRI delegation could be invited to visit the country to carry out an independent, impartial and non-political review of the rule of law. When such an invitation is forthcoming, the IBAHRI convenes a high-level delegation of respected jurists to visit the country and carry out extensive meetings. Shortly after these visits, a comprehensive report including recommendations to redress any identified problems is released. For example, in November 2007, the IBAHRI released a report detailing concerns of increasing executive influence over the judiciary, the legal profession and the prosecution in Poland, making 20 recommendations for action. In July 2007, the IBAHRI released a report concerning the suspension of the Chief Justice of Pakistan, following another high level visit.[49]

The IBAHRI's interest and background in Fiji

2.4 The IBAHRI has been involved in rule of law issues in Fiji for many years. For example, in 2001, Dr Peter Maynard, President of the Bahamas Bar Association, visited Fiji in 2001 on behalf of the IBAHRI to observe the case of *Republic of Fiji and the Attorney-General of Fiji v Chandrika Prasad*.[50] Dr Maynard concluded that the hearing was fair, and satisfied international standards. In February 2006, the IBAHRI released a report entitled 'Fiji: Comments on Fiji's Promotion of Reconciliation, Tolerance and Unity Bill', which examined a proposed piece of legislation that intended to establish a South Africa-style truth and reconciliation commission in respect of events surrounding the coup of May 2000. In its report, the IBAHRI criticised the legislation, noting concerns that the needs of the victims of the coup would not have been fully met under

49 See: 'Justice under Siege: A report on the rule of law in Poland', November 2007; and 'Pakistan: the struggle to maintain an independent judiciary: a report on the attempt to remove the Chief Justice', July 2007, both at www.ibanet.org/Human_Rights_Institute/HRI_Publications/Country_reports.aspx (last accessed 22 January 2009).

50 *Prasad, supra* n 6.

the terms of the Bill and that the provisions for restitution were insufficiently well drafted.

2.5 Following the coup in December 2006, the IBAHRI increased its monitoring of the situation in Fiji, and was very concerned by events during early 2007, including reports of threats and physical attacks against lawyers and judges and the suspension of Chief Justice Daniel Fatiaki. The IBAHRI located funding to enable it to visit Fiji, and indicated its interest in carrying out a visit to the FLS.

Proposed February 2008 visit to Fiji

2.6 On 28 November 2007, the IBAHRI received a letter from then-President of the FLS, Mr Isereli Fa, who welcomed the proposed visit by the IBAHRI to evaluate the situation and stated that the FLS would be able to receive the delegation any time after 15 January 2008.

2.7 Following its receipt of this letter, the IBAHRI consulted with its high level delegates and identified the week of 18–22 February 2008 as appropriate for the visit. The IBAHRI timed the mission purely on the basis of the earliest availability of all of its high level delegates. At the time this week was scheduled, the IBAHRI was entirely unaware of the court dates of various cases in Fiji.

2.8 As part of a series of letters to high level government officials, judges and lawyers, on 14 January 2008, Mark Ellis, the Executive Director of the IBA, wrote to the interim Attorney-General of Fiji, Aiyaz Sayed-Khaiyum, to invite him to meet with the IBAHRI delegation during its proposed visit. This letter is at Attachment B. As is evident from the attached letter, no mention was made of whom the IBAHRI delegation would meet, nor did it state any conclusions about the situation in Fiji.

2.9 On 14 January 2008, the President of Fiji wrote to Mr Ellis through his Official Secretary, stating that while he appreciated the initiative, conflicting commitments prevented him from meeting with the delegation. On 24 January 2008, Acting Chief Justice Gates wrote to Mr Ellis agreeing to meet with the delegation.

2.10 On 30 January 2008, the interim Attorney-General faxed a reply to the IBA, stating that 'I have no objection to any delegation to Fiji to examine our judiciary'. However, he noted that a number of significant cases were before the courts in Fiji, including the *Qarase v Bainimarama* case, the hearing by the Tribunal for the suspended Chief Justice[51] and 'the hearing of a number of Constitutional cases' (this was not specified further) as well as 'the Inquiry into the Magistracy'. Despite being aware that the IBAHRI was completely independent and apolitical and that the delegation included very high level participants including a Supreme Court judge, the interim Attorney-General alleged that the IBAHRI was being used by partisan lawyers to 'fulfil a particular lobby and political agenda'. Further, he stated that:

> 'I understand that the only past President of the Fiji Law Society that IBA intends to meet up with during the proposed visit is Graham Leung. You have not proposed to meet Devanesh Sharma (immediate past President), or Chen Young who was the President during the 2000 crisis'.[52]

2.11 This claim was perplexing, given that the IBA was still in the process of seeking meetings and had

51 The Tribunal is formally titled: 'Tribunal appointed pursuant to section 138(3) (i) of the Constitution of the Republic of the Fiji Islands'.
52 Facsimile from Aiyaz Sayed-Khaiyum, interim Attorney-General of Fiji, to Mark Ellis, Executive Director of the IBA, 30 January 2008.

not even requested a meeting with Mr Leung at that stage. At the time this claim was made, the IBAHRI was still determining the full list of people with whom it intended to meet and in no way had the IBAHRI expressed any intention publicly or otherwise that it would only meet with one former FLS President. Rather, the IBAHRI's letter to the Attorney-General was specifically timed so that the schedule remained relatively open to increase the likelihood of the delegation being able to find a mutually agreeable time to meet with the interim Attorney-General. The IBAHRI is not aware of why or on what basis the interim Attorney-General made this allegation, but it is of considerable concern that such a claim was made when it could not have been based on reliable information. The interim Attorney-General then went on to make the claim that:

> 'I believe the IBA is being manipulated by powerful elite and political groups in Fiji to undermine the independence of our Courts, to pressurize our judges to find in their favour and manipulate the media'.[53]

2.12 The interim Attorney-General then stated that the IBAHRI must delay its proposed visit based on these mistaken claims. The full text of this letter is at Attachment C. It is assumed that the interim Attorney-General is referring to the fact that Graham Leung is a member of the IBA. However, membership of the IBA does not confer any influence or power over the activities of the IBAHRI, which is an independent arm of the IBA. The IBAHRI, which throughout 2008 was chaired by Justice Richard Goldstone and Ambassador Emilio Cardenas, is not susceptible to the influence of individuals or their personal motivations, and is concerned only with maintaining, promoting and restoring the rule of law.

2.13 Attached to the interim Attorney-General's letter was a press statement, which repeated many of his alleged reasons for rejecting the visit, including both the baseless allegations that the IBAHRI was being controlled by partisan lawyers and that the delegation would not be meeting with any FLS Presidents other than Graham Leung. As with the letter, the press statement does not reference from whom he has received this inaccurate information. This statement can be found at Attachment D.

2.14 On the same day, Mr Ellis wrote again to the interim Attorney-General to respond to these allegations and to attempt to rectify the misinformation being expressed. Mr Ellis wrote that:

> 'The purpose of our visit is to assess the independence of the judiciary, not to impinge on that independence in any way through influence or pressure. In addition, in order to preserve judicial independence, the IBA has a strict policy of not commenting on cases that are before the courts'.[54]

2.15 Further, Mr Ellis stated:

> 'I emphasise that the IBA seeks to present a balanced view of the situations in-country and does not limit its recommendations to governments, but extends them to bar associations and other stakeholders as appropriate. The high-level delegates involved in the mission are experts in their field, and are not susceptible to manipulation or influence by any groups or individuals in Fiji'.[55]

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53 *Ibid.*

54 Letter from Mark Ellis, Executive Director of the IBA, to Aiyaz Sayed-Khaiyum, interim Attorney-General of Fiji, 30 January 2008.

55 *Ibid.*

2.16 Mr Ellis indicated that meetings were still being arranged, but that any suggestions were still welcome for other meetings. He also confirmed that the 'the timing for our visit was determined solely on the basis of the earliest date we could arrange the visit to Fiji, and not deliberately timed to coincide with any particular hearing'. However, in response to the interim Attorney-General's instruction to delay the visit, Mr Ellis stated:

> 'As an independent organisation, the IBA does not consult with governments as to the timing of its visits, although we strongly urge governments to meet with our delegations so a fulsome understanding of the situation can be attained.'[56]

The full text of this letter is at Attachment E.

2.17 A return reply was received on 3 February 2008, which is at Attachment F. Despite the assurances and explanations provided by Mr Ellis, this letter repeated the interim Attorney-General's misunderstanding that the IBAHRI was only intending to meet with Graham Leung, and alleged that this information had come from the IBAHRI itself. As the information was untrue, it has proved impossible for the IBAHRI to identify why the interim Attorney-General appeared to be so convinced of its veracity. Given that the letter to the interim Attorney-General was specifically requesting a meeting with him, it is not possible to understand his rationale for claiming that the IBAHRI was being biased in its selection of stakeholders.

2.18 In this letter, the interim Attorney-General also asked, 'Who are the complainants who have prompted your inquiry? Who are the accusers and what is the charge?' The IBAHRI considers it unfortunate that the interim Attorney-General appeared to be unaware of the widespread international concern about the rule of law and the justice system in Fiji since the coup in December 2006 and the suspension of the Chief Justice in January 2007. The interim Attorney-General concluded by stating 'My position is unchanged and you are not welcome in Fiji at this time'.

2.19 On 4 February 2008, Mr Ellis wrote back to the interim Attorney-General, emphasising again that:

> 'the IBA is meeting with a wide range of stakeholders from the judiciary, the legal profession and the non-government community, and has sent numerous requests to government officials… the IBA delegation's willingness to meet with all interested persons ensures that all diverse views are heard. The IBA does not limit its enquiries to government and judicial officials; it believes that all interested stakeholders should express their opinions'.

2.20 Further, Mr Ellis stated that:

> 'your allegations about Graeme [sic] Leung's purported influence over the IBA are entirely unfounded. Whilst the IBA delegation will meet with Mr Leung, he was not involved in any way with the decision of the IBA to send a delegation, nor had he any influence over its timing. Mr Leung, as any interested party in Fiji, is welcome to meet with the IBA delegation to share his views. We also have meetings with other members of the legal community'.

2.21 In response to the interim Attorney-General's continued questioning as to who the IBAHRI delegation intended to meet with, Mr Ellis stated:

> 'In the interest of frank and open discussions and the right to privacy, I am not at liberty

56 *Ibid.*

> to provide you with a full list of those the delegation will meet, nor am I able to respond to your queries about which parties in Fiji may have concerns about the status of the rule of law. The IBA delegation will hear from all perspectives and will make its own objective analysis of the situation'.

The full text of this letter is at Attachment G..

2.22 Throughout this period, there were a significant number of reports in the Fiji media debating whether the IBAHRI delegation should be allowed access. For example, the Citizens Constitutional Forum (CCF) expressed its support for the IBAHRI visit in advance of the cancellation, stating that it did not believe that the delegation would interfere with the Constitution or the independence of the judiciary. CCF chief executive officer, the Reverend Akuila Yabaki stated:

> 'These judges are expected to provide judgements under difficult circumstances, and the IBA visit should not really have any impact on the quality or objectivity of their judgements…We encourage IBA to visit civil society organisations as well, such as our organisation CCF.'[57]

2.23 The FLS also came out in support of the visit, stating that if the government had nothing to hide, it would welcome the organisation.[58]

2.24 Graham Leung, the lawyer at the centre of the interim Attorney-General's mistaken claims, also came out in support of the visit, stating that 'it would be a good opportunity for [the interim Attorney-General] to show the international community that freedom of expression and assembly is alive… [the IBA's] principal loyalty is to the rule of law. I have no problems with that'.[59]

2.25 The Fiji Women's Crisis Centre and then Human Rights Commissioner Shamima Ali stated that 'the judiciary should be free and fair and for me, if they [interim government] feel that they've got nothing to hide, then they should have welcomed the visit'.[60]

2.26 The Fiji Indigenous Lawyers Association President Samuela Matawalu also expressed support of the IBA's proposed visit to Fiji. In response to the government's decision to reject the visit, he stated 'the country has everything to lose and nothing to gain from preventing the IBA from visiting and helping restore public confidence in the administration of justice'.[61]

2.27 Ousted Prime Minister Laisenia Qarase also criticised the government for rejecting the IBA's request to visit Fiji, stating that:

> 'If he (Sayed-Khaiyum) has nothing to hide, there is no harm in allowing them to come now. His claim of independence of the judiciary is a big joke. How can they interfere with the judiciary when they are on a fact-finding mission to Fiji? He should swallow his pride and allow the team to come.'[62]

2.28 The SDL Party Director, Peceli Kinivuwai also supported the visit, stating:

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57 'NGO hopes envoy won't meddle with judges', FijiDailyPost.com, 4 February 2008, at www.fijidailypost.com/news.php?section=1&fijidailynews=14110 (last accessed 19 January 2009).

58 'IBA visit should go ahead – FLS', Fijitv.com, 7 February 2008.

59 'State under fire over IBA visit', *Fiji Times Online*, 9 Feburary 2008, no longer available online.

60 'Time right for IBA visit: Ali', *Fiji Times Online*, 8 February 2008, no longer available online.

61 'Legal Groups back stand', *Legal Times Online*, 11 February 2008, no longer available online.

62 'Qarase says A-G a mockery', *Fiji Times Online*, 9 February 2008, no longer available online.

> 'I think if they [have] nothing to hide, if they will conduct activities in a very diligent and very professional manner…they need not to worry about interference because in no way will anyone interfere if the justice system in Fiji is upholding the rule of law. [N]o way will any third party be a hindrance to them carrying out their duties to the expectations of the people of this country and as stipulated very closely under the constitution of this country.' [sic][63]

2.29 The Young People's Concerned Network criticised the interim Attorney-General's attitude to the visit. The group stated that the claims of the interim Attorney-General were unfounded, and that the government's decision to deny the IBAHRI the right to visit was 'double standards'.[64]

2.30 Throughout this debate, the interim Attorney-General continued to make various allegations against the IBAHRI, including:

> 'The reason we have taken this position is because there are number of matters before various tribunals, including constitutional cases in the High Court and the Court of Appeal, the suspended Chief Justice's Tribunal, the litigation filed by the suspended Chief Justice in relation to the Tribunal, the Fiji Law Society challenge of the Judicial Services Commission and the Magistrate's inquiry which will all be prejudiced by an outside visit. There is a danger that the examination of IBA or any other body at this point in time will trespass into areas which are specifically before the courts and which directly interfere with the independence of those courts.'[65]

and:

> '(I)n blatant terms the presence of the IBA connected as it is to partisan lawyers will unfairly prejudice those judges hearing the cases and will undermine their independence.'[66]

However, the interim Attorney-General did indicate that the IBAHRI may be welcome after the conclusion of those cases:

> 'The point is for them to have people talk to them freely and openly and give them their views, they cannot come when there's litigation before the courts, in particular when the persons that they'll be talking to are protagonists in the litigation, so what we've said to them is in order for them to be able carry out a thorough and independent investigation, they need to come when all this litigation is over and done with.'[67]

2.31 The Human Rights Commissioner, Dr Shaista Shameem, commented to the press about the visit, although did not respond to a number of IBAHRI requests to her office for a meeting. These comments echoed those of the interim Attorney-General:

> 'As I believe a number of the leading advocates are against the interim Government's law

63 'SDL criticises Attorney General on IBA visit', RadioFiji.com, 4 February 2008, no longer available online.

64 'YPCN questions interim Attorney-General', Fiji.village.com, 31 January 2008, at www.fijivillage.com/?mod=archivedstory&id=310108a4e7d30e3e9eb651430f96d2 (last accessed 19 January 2009).

65 'Fiji Government condemns "outside" visit', *Fiji Democracy Now*, 30 January 2008, no longer available online.

66 'Press Statement by Attorney-General, Aiyaz Sayed-Khaiyum', Fiji Government Online, 31 January 2008, at www.fiji.gov.fj/publish/page_11097.shtml (last accessed 19 January 2009).

67 'Fiji seeks to delay bar association visit', ABC Radio Australia, 4 February 2008, at www.abc.net.au/ra/temp/2154124.htm (last accessed 19 January 2009).

and order and human rights agenda as well as against the President's mandate for building a non-racially divided nation are members of certain committees of the IBA. This makes me reflect on the purported independence of the IBA as an organisation and ask whether the IBA is making this visit for purely political rather than genuine human rights reasons.'[68]

2.32 A few days later, Dr Shameem announced that 'we have faced rather too many visits by organisations purporting to be independent and I really have limited time at my disposal for yet another ill-informed talk-fest'.[69]

2.33 Following newspaper reports that the delegation might be barred, the Human Rights Commissioner stated that the IBAHRI would be allowed into Fiji, but that the government would not grant them an audience. Despite her former comments, she stated:

> 'I also received a letter from the IBA but I have told them that I will consider their request, as I don't think that there is much that they will be able to receive from our side but I haven't said no to them – I will consider it though.'[70]

2.34 Despite the interim Attorney-General's refusal to acknowledge the IBAHRI's intentions and independence, the IBAHRI moved forward with its arrangements as planned, expecting that the interim Attorney-General would not meet with the delegation, but confident of not being denied entry into the country. On 16 February, Felicia Johnston, the IBAHRI Programme Lawyer who was managing the mission, arrived in Fiji. Whilst on the plane, the IBA office discovered a stop-order[71] had been issued against the delegation from the scheduled start of the mission on 18 February and decided to cancel the mission before the other delegation members left their home countries. When Ms Johnston landed in Fiji, Immigration officials did allow her entry but she flew out to Brisbane later that day.[72]

2.35 Fiji's decision to ban the delegation from Fiji prompted international condemnation. Unfortunately, however, immediately following the cancellation of the visit, news stories were run in Fiji and throughout the world that Ms Johnston had been detained and deported, whereas she had chosen to travel onto Brisbane before the stop order came into effect.[73] The IBAHRI is unaware of the source of this misinformation. However, in response to criticisms of the inaccurate reports, the interim Attorney-General is reported to have confirmed the detention and deportation, and to have stated that entry is a privilege and not a right.[74] The IBAHRI has no knowledge as to why the interim Attorney-General confirmed detention and deportation, when neither in fact took place.

2.36 In response to the decision to ban the IBAHRI, the FLS sought an audience with the interim Prime Minister and called for the government to rethink its decision.[75]

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68 'Shameem concerned about IBA visit', *Fiji Times Online*, 1 February 2008, at www.fijitimes.com.fj/story.aspx?id=80174 (last accessed 19 January 2009).

69 'Shaista raises concern', *Fiji Times Online*, 3 February 2008, no longer available online.

70 'Government no audience for IBA', Fiji Broadcasting Corporation, 11 February 2008.

71 'Stop arrival order for IBA delegation', FijiTV.com, 15 February 2008, at: http://fijitv.com.fj/index.cfm?si=main.resources&cmd=forumview&cbegin=8488&uid=newsnational&cid=8487, last accessed 19 January 2009.

72 'Stop arrival order for IBA delegation', FijiTV.com, 15 February 2008, at http://fijitv.com.fj/index.cfm?si=main.resources&cmd=forumview&cbegin=8488&uid=newsnational&cid=8487 (last accessed 19 January 2009).

73 'British lawyer deported from Fiji', BBC News, 18 February 2008, at http://news.bbc.co.uk/2/hi/uk_news/7249493.stm (last accessed 19 January 2009).

74 'Entry is Privilege', *Fiji Times Online*, 18 February 2008, no longer available online.

75 'Law Society seeks audience with PM', Fiji Broadcasting Corporation Limited, 17 February 2008.

2.37 Then Prime Minister of New Zealand Helen Clark criticised the ban, suggesting that it evidenced the sensitivity of the interim government towards its poor human rights record. She stated: 'The IBA would very much stand for upholding the rule of law and constitutions and peoples' individual rights and liberties, so I think we can read quite a lot into the refusal to have them visit Fiji'.[76]

2.38 In response to the ban, Australian Foreign Minister Stephen Smith stated:

> 'The decision to ban a visit by a high-level delegation from the International Bar Association provides further evidence that the independence of the judiciary and legal system in Fiji is under serious pressure. In co-ordination with other members of the international community, including the Pacific Islands Forum, Australia continues to urge the regime to return Fiji to democracy and the rule of law.'[77]

2.39 On 20 February 2008, the President of LAWASIA, Mr Weng Kwai Mah, wrote to the interim Attorney-General criticising his decision to ban the entry of the IBAHRI delegation. He wrote:

> 'We were surprised to learn of this [stop order], especially given our own experience when we undertook a mission in March 2007. LAWASIA was at that time impressed by the fact that, although feelings in Fiji ran very high, its mission was not only welcomed into the country, but was also entirely free to meet with many who held vastly differing views… We believe that the IBA is a fully independent body and that, with its long experience of undertaking missions of this sort, it is well-placed to deliver an informed, unbiased and well-considered report.'[78]

2.40 The Commonwealth Human Rights Initiative stated:

> 'The interim Government's repeated moves to suppress freedom of speech, the independence of the judiciary and in failing to promote the rule of law, all represent the continued derogation of human rights within Fiji. With the independence of the judiciary is a key element in the rule of law, the purpose of the IBA's visit was to assess this independence in Fiji, in the absence of consent, questions are automatically raised as to the Interim Government's commitment to democracy and good governance. In the end, the recent decision, inevitably deprives Fijians of the opportunity to have an open discussion and objective feedback on issues that are clearly of concern for both the country and the international community.'[79]

2.41 Similarly, bar associations throughout the region condemned the move. The President of the Australian Bar Association, Mr Tom Bathurst QC, stated:

> 'The IBA has a well deserved reputation for its long established work in support of the independence of the judiciary and the right of lawyers to practise their profession without interference… An independent judiciary is all that stands between the State and the individual and in the interests of the Fijian people, the Fijian Government is strongly urged

76 'Fiji's IBA ban shows Government worried about human rights record – NZ Prime Minister', Radio New Zealand International, 17 February 2008, at www.rnzi.com/pages/news.php?op=read&id=38092 (last accessed 11 January 2009).

77 'Fiji knocks back human rights delegation', *The Australian*, 22 February 2008, at www.theaustralian.news.com.au/story/0,25197,23253856-17044,00.html (last accessed 7 January 2009).

78 Mah Weng Kwai, 'LAWASIA's letter to the Attorney General of Fiji', The Malaysian Bar, at www.malaysianbar.org.my/letters_others/lawasia_s_letter_to_the_attorney_general_of_fiji.html (last accessed 6 January 2009).

79 'Fiji – update 29-02-08', Commonwealth Human Rights Initiative, 29 February 2008.

to reverse its decision and allow the IBA visit to go ahead as proposed.'[80]

2.42 The Indian Bar Association spoke out strongly, stating that:

> 'Fiji Government's pretensions about adhering to the Rule of Law have been exposed by its recent blatant and draconian step of imposing a ban on the visit of the IBA's delegation to Fiji. The Bar Association of India… condemns this undemocratic, dictatorial and despotic act and calls upon the Government of Fiji to withdraw the ban.'[81]

2.43 The President of the Malaysian Bar, Dato' Ambiga Sreenevasan, identified the decision as a missed opportunity for the government to show that they have nothing to hide. She stated 'I am confident that the IBA will be very professional and neutral in its observations as they are highly experienced in undertaking missions of this sort'.[82]

2.44 The New Zealand Law Society also expressed its concern, with its President Mr John Marshall QC, offering assistance to the FLS if required.[83]

An apparent change in position

2.45 In late March 2008, the Fijian Government appeared to be relenting on its position. The Foreign Affairs Minister, Ratu Epeli Nailatikau, stated, 'I am sure, given the appropriateness of timing, the IBA will be most welcome to visit Fiji to undertake their own assessments.'[84] Then on 16 May 2008, *The Australian* newspaper reported that the interim Attorney-General had stated that the time 'looked pretty good' for a new visit by the IBA.[85] He was reported as stating that 'I would think that the timing is pretty good… What has happened is that the tribunal proceedings in respect of the suspended chief justice has [sic] been put on hold.'[86]

Proposed December 2008 visit to Fiji

2.46 Following the release of the decision in the *Qarase v Bainimarama* case, the apparent suspension of the misconduct proceedings against the former Chief Justice Fatiaki, and in light of the reported comments made by the interim Attorney-General in May 2008, the IBAHRI rescheduled its visit from 8–12 December 2008.

2.47 In the interests of obtaining as many viewpoints as possible, the IBAHRI again wrote on 6 November 2008 to the interim Attorney-General to request him to meet with the delegation during its rescheduled visit. This letter is at Attachment H.

2.48 On 24 November 2008, the interim Attorney-General wrote back stating that 'the Government of Fiji does not welcome nor approve this proposed unilateral visit by the IBA and accordingly

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80 'The Australian Bar Association condemns Fijian Government's decision to ban International Bar Association Visit', Australian Bar Association, 18 February 2008, at www.austbar.asn.au/index.php?option=com_content&task=view&id=39&Itemid=46 (last accessed 19 January 2009).

81 'Resolution passed by the Executive Committee of the Bar Association of India', 20 February 2008.

82 'Roger Tan barred from entering Fiji', Malaysian Bar Council, 17 February 2008.

83 'IBA visit to Fiji stopped in its tracks', New Zealand Law Society, *LawTalk*, Issue 703, at www.lawsociety.org.nz/publications_and_submissions/lawtalk/2008_articles/3_march/iba_visit_to_fiji_stopped_in_tracks (last accessed 11 January 2009).

84 'We Are On Track – Fiji Foreign Affairs Minister', *Scoop*, 25 March 2008, at www.scoop.co.nz/stories/WO0803/S00210.htm (last accessed 6 January 2009).

85 Chris Merritt, 'Fiji relents on visit by the International Bar Association', *The Australian*, 16 May 2008, at www.theaustralian.news.com.au/story/0,25197,23705247-17044,00.html (last accessed 6 January 2009).

86 *Ibid.*

appropriate steps will be taken'. This threat – made as it was against a delegation including a Queensland Supreme Court Judge and a leading Malaysian lawyer – shocked both the IBA and the international legal community more broadly. The full text of this letter is at Attachment I.

2.49 In response to this letter, on 25 November 2008 the IBAHRI released a press statement (at Attachment J), condemning the threats made against the high level delegation. This press statement stated:

> 'The IBA is disappointed that the Fijian Government is not supportive of independent reviews of the rule of law and independence of the judiciary. The IBA is also troubled by this latest attempt to thwart the efforts of a non-political professional association to assess the situation… The IBA is not deterred, however, in carrying out its review. Using other avenues available, the IBA will continue its work to provide an independent assessment of the rule of law and independence of the judiciary in Fiji. A report will be issued in the near future. The IBA regrets that the Fiji Government will not meet with the delegation to present its own views on the rule of law in Fiji.'[87]

Mark Ellis stated:

'The Fijian Government has again indicated its lack of support for an independent review of the situation in Fiji. The threats made by the Attorney-General against the delegation are unacceptable in a free and democratic society and reflect badly on the state of affairs in Fiji.'[88]

Then President of the IBA, Fernando Pombo, commented:

> 'The rescheduled visit had attracted the support of a variety of stakeholders including judges, lawyers and non-government organisations. It is deeply saddening to see that the Fijian Government wishes to prevent this visit from taking place in light of the manner in which it has been welcomed by the rest of the community.'[89]

2.50 On the same day, the IBAHRI wrote back to the interim Attorney-General repeating the many reassurances that had already been made. Mr Ellis reiterated that, as had already been explained, the IBAHRI is independent, and hence it does not consult with governments as to the timing of its visits. He stated: 'It is regrettable that, despite our efforts to seek your views, you have refused to meet with the delegation and are actively hindering its attempts to meet with other stakeholders.' He further stated:

> 'The IBA has scheduled numerous meetings with the judiciary, lawyers and non-government organisations based in Fiji in preparation for this visit. All of these stakeholders are supportive of the delegation's visit. Thus, it is of deep concern that you have decided to oppose the visit…
>
> As announced in our recent press statement, the IBA will conduct its review of Fiji remotely, and will seek all views in reaching its objective and unbiased assessment of the situation. Any persons wishing to submit their views on the situation in Fiji will be welcome to do so.'[90]

87 'IBA condemns Fiji Government's threat against high-level delegation', IBA Press Statement, November 2008.
88 *Ibid.*
89 *Ibid.*
90 Letter from Mark Ellis, Executive Director of the IBA to Aiyaz Sayed-Khaiyum, interim Attorney-General of Fiji, 25 November 2008.

The full text of this letter is at Attachment K.

2.51 Despite the text of his letter, the interim Attorney-General denied making threats against the high-level delegation[91] and further criticised the IBA:

> 'I wasn't threatening. If I had sent you a copy of their letter you would find out how condescending it was. My letter definitely was not threatening… The previous scheduled visit of theirs was biased and I said that to them.'[92]

2.52 He reiterated the allegations he had made in early 2008 in which he claimed that the IBA was prejudiced. This was despite those claims being groundless and having been responded to in full by the IBA in a number of letters. He said the government wrote to the IBA stating they had 'not explained from their previous scheduled visit the very prejudiced position that they took even before they undertook their investigations, thereby compromising their independence.'[93]

2.53 Using similar terms to those used in February 2008, the interim Attorney-General took pains to imply that the IBAHRI would be allowed into the country in the future: 'At this stage they're not welcome but they're welcome at a later stage'.[94] However, unlike the situation in February where he identified tangible events after which the IBAHRI could return to Fiji, the interim Attorney-General failed to identify any specific reasons why the timing of this visit was considered to be inappropriate. He claimed (falsely, as is considered further below), that there had already been three independent reviews of the judiciary, and therefore:

> 'Accordingly what we are saying is that's enough at the moment and we can have more at a later date in the future, but at the time being we don't because we've got a lot of matters underfoot at the moment'.[95]

2.54 The interim Attorney-General insisted that certain protocols, including the requirement to be cleared by the government, were necessary for such visits.[96] Generally, however, non-governmental organisations do not consult with governments on the timing or arrangements of their visits. The IBAHRI was not willing to allow its visit to be controlled by the interim Attorney-General or the military regime more broadly. This was particularly of concern to the IBAHRI given that the interim Attorney-General had instructed the IBAHRI to cease communications with certain lawyers within Fiji.[97] As had been repeated numerous times throughout the IBA's letters and press statements, the IBAHRI refused to limit its meetings in any way and was open to meeting with all stakeholders about the situation.

2.55 The interim Attorney-General pointed to the LAWASIA and EU missions as evidence that he was not blocking the IBAHRI delegation.[98] However, he did not note that LAWASIA had visited almost two years previously, or that the EU is Fiji's largest external aid provider.

2.56 The second cancellation of the IBAHRI visit garnered criticism both within Fiji and abroad. FLS

91 'IBA wanted to come in unrequested: AG', Fiji Broadcasting Co-operation, 27 November 2008.
92 'Fiji accused of threats to judicial review', *supra* n 43.
93 'Khaiyum clarifies IBA issue', *Fiji Daily Post*, 27 November 2008, at www.fijidailypost.com/print.php?type=news&index=20496 (last accessed 19 January 2009).
94 'AG agrees in writing to the IBA', Fiji Broadcasting Cooperation Limited, 26 November 2008.
95 *Ibid.*
96 'IBA wanted to come in unrequested: AG', *supra* n 91.
97 'Let IBA team in: CCF', *Fiji Times Online*, 27 November 2008, at www.fijitimes.com/story.aspx?id=107407 (last accessed 19 January 2009).
98 *Ibid.*

President Dorsami Naidu stated that the interim regime's rejection of the IBAHRI's visit 'made the government appear dishonest'.[99] He said: 'This regime is always talking about things being okay and the judiciary being independent, etc and unless the interim Government has something to hide I can't see any other reason for stopping these people from coming in.'[100] He further stated:

> 'The FLS is gravely concerned that the barring of the impending visit by this independent, high powered international delegation which comprises of senior judges and jurists does not augur well for the nation's perception and indeed, the international community, on the actual state of the rule of law in this country… The FLS is also gravely concerned if threats were indeed made by the AG, in that he would take appropriate measures should the IBA delegates attempt a visit anyway as this clearly shows that the interim regime will go to any length to stop or stifle the voices of reason.'[101]…
>
> 'The only agenda they were entering this country with was premised on assessing independently the state of the rule of law and independence of the judiciary… It is about time the IAG and the interim regime took stock of where they are taking this country.'[102]
>
> 'It appears that the government through the interim Attorney-General is not honest in its dealings about taking this country back to democracy via elections'.[103]

2.57 The CCF also called on the interim regime to allow the IBA to visit the country following the second cancellation of an IBA visit. The CCF's executive director, Reverend Akuila Yabaki, stated:

> 'At a time when the interim Government has welcomed and encouraged assistance from the UN and the Commonwealth to help with the political dialogue, CCF is gravely concerned that the interim Attorney-General, Aiyaz Sayed-Khaiyum, has reportedly cancelled a second scheduled visit of the IBA for 2008… The 2006 Bangalore Principles of Judicial Conduct recognised that public confidence in the judicial system and in the moral authority and in the integrity of the judiciary is of the utmost importance in a modern democratic society and that the proper administration of justice is essential to the protection of all human rights. The IBA delegation could provide constructive feedback on effective ways to address the issues set out in the Bangalore Principles of Judicial Conduct.
>
> The Interim Attorney-General has continuously maintained that the Fiji Judiciary is independent and impartial. Allowing the IBA delegation to visit Fiji would demonstrate that the Interim Government is committed to improving the integrity and promoting public confidence in the courts.
>
> It would also allow any issues regarding legal reform, the rule of law and independence of the judiciary to be included in the agenda for the political forum. Cancelling or postponing the IBA visit does not assist in moving Fiji forward.'[104]

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99 'Fiji bans delegation of international jurists', ABC Radio Australia, 26 November 2008, at www.radioaustralia.net.au/news/stories/200811/s2430503.htm?tab=pacific (last accessed 19 January 2009).

100 *Ibid.*

101 'Law Society disappointed by IBA decision', The Malaysian Bar, 27 November 2008, at www.malaysianbar.org.my/legal/general_news/law_society_disappointed_by_iba_decision.html (last accessed 19 January 2009).

102 'IBA ban raises queries', *The Fiji Times Online*, 28 November 2008, at www.fijitimes.com/story.aspx?id=107438 (last accessed 19 January 2009).

103 'Law Society disappointed by IBA decision', *supra* n 101.

104 'Let IBA team in: CCF', *supra* n 97.

2.58 Lawyer Graham Leung described the ban as 'disappointing but not surprising'. He is reported as stating:

> 'What does the interim Attorney-General have to fear from the scrutiny of senior judges and lawyers from the IBA?… It is an insult to the intelligence of the IBA delegation because the regime's ban implies that these experts cannot make their own independent assessments on Fiji – on the rule of law and the judiciary… It's a great pity that an opportunity for the Fiji judges themselves to have met the IBA and made known their own views on the situation here has been lost… You have to ask why a high powered panel of credible legal experts has been stopped not once, but twice, from visiting our shores… I think informed observers on Fiji know the real reason behind this latest attempt at avoiding scrutiny by the regime.'[105]

2.59 The New Zealand Government also expressed its concern at the barring of the IBAHRI's second visit. At the time, Foreign Affairs Minister Murray McCully said he hoped Fiji's interim government would reconsider its position.[106]

2.60 Another issue of concern to the IBAHRI is the response of certain members of Fiji's judiciary to the cancellation of the second IBAHRI visit. Despite the agreement of then Acting Chief Justice Gates to arrange a meeting with two High Court judges and further agreement from Justice Byrne (and with him, Justice Hickie) to meet with the delegation, once the interim Attorney-General announced his decision to prevent the delegation from visiting the country, both judges failed to respond to emails from the IBAHRI requesting either a teleconference in lieu of the agreed meeting time, or confirmation that they were now refusing to meet with the delegation. This failure to respond was deeply disturbing, and was in stark contrast to the judges' prompt replies prior to the interim Attorney-General's announcement. While additional follow-up emails remained unanswered, Acting Chief Justice Gates' comments at the 10th Attorney-General's Conference, held in December 2008, appeared to relate to the IBAHRI visit:

> 'The procedure followed is a good deal less structured than the court proceedings which judges are compelled to follow in their cases… The procedure is characterised by unidentified accusers, undisclosed material, rumour, gossip, and ever-present 'perceptions' which as you know would not count for much in a forensic inquiry or a murder trial. A report is then issued… One wants to be open-minded and frank but how many more inquiries should be submitted to before they become oppressive and could be described as patronising?'[107]

2.61 These comments differ significantly from his earlier agreement to meet with the delegation, and have disappointingly familiar echoes of the interim Attorney-General's inaccurate allegations.

2.62 The methodology of this report has already been discussed at paragraphs 1.6-1.9. In addition, the importance of 'perceptions', particularly as it relates to the independence of the judiciary, is considered later in this report at paragraphs 3.121 – 3.159. Regardless of these accusations, it is of

105 'IBA upset with entry denial', *The Fiji Times Online*, 27 November 2008, at www.fijitimes.com/story.aspx?id=107336 (last accessed 19 January 2009).

106 'NZ concerned with IBA's entry ban', EINNEWS.com, 27 November 2008; 'Concern at Fiji's move to block bar association', Newstalk ZB, 27 November 2008, at www.newstalkzb.co.nz/newsdetail1.asp?storyID=148621 (last accessed 19 January 2009); 'NZ hopes Fiji will reconsider IBA decision', Fijilive, 27 November 2008; 'NZ concerned with IBA's entry ban', *The Fiji Times Online*, 27 November 2008.

107 'Fiji Judiciary survives', Office of the Attorney-General, Press release, 28 November 2008, available at: http://www.fiji.gov.fj/publish/printer_13608.shtml, last accessed 19 January 2009.

concern to the IBAHRI that the judges failed to provide to the IBAHRI any response or reasons for their decision not to speak with the delegation following the cancellation of the mission. In such circumstances, they appear to have been influenced by the interim Attorney-General. If no such influence was exerted, it is disappointing that the judges refused to respond to emails to clarify the reasons for their unwillingness to carry out the prior-agreed interviews by telephone.

Previous independent reviews

2.63 Following the cancellation of the IBAHRI's second proposed mission, the interim Attorney-General was quoted widely as claiming that three independent reviews of Fiji's judiciary have already taken place, none of which found any executive interference in the judiciary.[108] For example, the interim Attorney-General has stated:

> 'We've already had three reports on the judiciary, one was the Foreign Eminent Persons group, then we had LAWAISA and then the European Group that came in and none have found any interference with the judiciary by the executive.'[109]

2.64 This statement is simply incorrect. It was therefore with even deeper concern that the IBAHRI noted that at least two judges (then Acting Chief Justice Gates and Justice Hickie) have been quoted as repeating these fallacious claims.[110] These statements have been used by the interim regime and the judiciary to support the claim that the IBAHRI's review is unnecessary, patronising and/or a waste of judicial resources. To illustrate this in detail, each visit will be considered separately.

Forum Eminent Persons' Group Report – Fiji

29 January–1 February 2007

2.65 The Eminent Persons Group (EPG) was established by a meeting of Pacific Islands Forum Foreign Affairs Ministers on 1 December 2006, 'to visit Fiji to meet all the relevant parties to the impasse, and to make recommendations for a way forward'.[111]

2.66 This was later developed into more detailed terms of reference, which were:

> '– to assess the underlying causes and the nature of the overthrow of the Government of Fiji by the RFMF;
>
> – to assess the prospects for appropriate resolution of the present situation in Fiji in the short and medium term, and obstacles to such a resolution;
>
> – to identify steps that the parties in Fiji may take to move swiftly and peacefully toward the restoration of democratic government, within the boundaries of Fiji's Constitution and the rule of law;

108 'Khaiyum clarifies IBA issue', *supra* n 93; 'Let IBA team in: CCF', *supra* n 97; 'IBA wanted to come in unrequested: AG', *supra* n 91; for example, the interim Attorney-General's comments in his interview with ABC Radio presenter Bruce Hill, dated 27 November 2008, at www.radioaustralia.net.au/programguide/stories/200811/s2431581.htm (last accessed 20 December 2008); and *ibid.*

109 'AG agrees writing to IBA', Radio Fiji, 26 November 2008, at www.radiofiji.com.fj/fiji2/fullstory.php?id=16134 (last accessed 19 January 2009).

110 For Acting Chief Justice Gates see: 'Fiji Judiciary Survives', *supra* n 107; for Justice Hickie see: 'Judges whinge over lack of invites', *Fiji Times Online*, 11 December 2008, at www.fijitimes.com/story.aspx?id=108582 (last accessed 9 January 2009).

111 'Report: Fiji', Forum Eminent Persons' Group, 29 January – 1 February 2007, at www.forumsec.org/_resources/article/files/FIJI%20EPG%20REPORT,%2029%20Jan%20to%201%20Feb%2020071.pdf (last accessed 11 January 2009).

– to consider the role the Forum and its members might most usefully play in assisting Fiji achieve this outcome'.[112]

2.67 As is evident from a consideration of these terms of reference, no mention is made of the judiciary or of any intention of conducting any kind of review into the judiciary. Indeed, even the list of persons to be met by the delegation does not include the judiciary.

2.68 However, in its findings the EPG does mention the judiciary:

> 'The EPG heard the view that the Judiciary, the Police, Government Departments and the Human Rights Commission have been compromised since the events of 5 December. The circumstances surrounding the standing aside of Chief Justice Fatiaki, the appointment of Justice Gates as Acting Chief Justice, and the suspension of the Chief Magistrate have all been questioned. The EPG understands that while the interim Government believes that due process was followed in the appointment of Justice Gates and the suspension of Chief Justice Fatiaki, it is not a view shared by many in the Fiji legal community. The EPG was told that the Judiciary has become politicised and also advised that the Court of Appeal and the Supreme Court may confront an operational crisis by mid year as offshore judges may not seek re-appointment or refuse to sit in protest against the events of 5 December and since…
>
> The EPG recognises that any legal and constitutional resolution of the current political situation will require an independent and untainted Judiciary. The EPG noted that the view within the community that the Judiciary, government departments and other institutions of government had been compromised. *Specifically, there is serious concern that due constitutional process was not followed in the suspension of Chief Justice Fatiaki and the appointment of Justice Gates as Acting Chief Justice. The EPG noted that there is a considerable danger that the Judiciary will not be able to carry out its Constitutional role.* The EPG was advised that at some point, Fiji might need to seek international assistance to restore confidence to the judiciary system. …
>
> *The continuing independent functioning of the Judiciary has been compromised by the process and manner in which the Chief Justice was requested to take leave and then suspended and an Acting Chief Justice appointed***.'**[113] [emphasis added]

2.69 In its recommendations, the EPG stated that:

> 'The interim regime (RFMF) should immediately cease all interference with the Judiciary and accountable institutions, the Chief Justice should be reinstated to office'.[114]

2.70 Therefore, although it was not originally part of the EPG's mandate, its concerns about the executive interference in the judiciary as early as January 2007 were sufficient to cause it to express concern a number of times throughout its short report, and to make a recommendation calling on the interim regime to reinstate Chief Justice Fatiaki and to cease interfering in the judiciary.

2.71 Contrary to the claims made by the interim Attorney-General, Acting Chief Justice Gates and Justice Hickie that no independent review had found interference, this review found that there

112 *Ibid.*
113 *Ibid.*
114 *Ibid.*

was interference in the judiciary, and that the situation was of 'serious concern'.

The LAWASIA observer mission

25–28 March 2007

2.72 Unlike the EPG mission, LAWASIA's 3-day mission was directly intended to include a review of the rule of law and the independence of the judiciary. The first summary finding of the delegation was as follows:

> 'the rule of law in Fiji may be compromised by the ongoing uncertainty as to the status and future of suspended Chief Justice Fatiaki and by the ongoing public perception, right or wrong, that the judiciary is politicised and divided'.[115]

2.73 Further, the report recommended that an independent enquiry be established to 'examine the entire judiciary and to make recommendations as to how any current dysfunctionality can best be addressed'.[116]

2.74 Unlike EPG, LAWASIA resolved to present the arguments about the existence or not of executive interference in the judiciary without drawing conclusions. Its report therefore cannot be cited as evidence that no executive interference exists. Rather, the call for a full review indicates the likelihood that LAWASIA was concerned about the problems identified within the judiciary and was unable to conduct a full review within its short visit.[117]

The European Union mission

28 November–1 December 2008

2.75 Despite the number of times in which the EU report has been cited by the interim Attorney-General and the other judges, the report has not been made public. Similar to the EPG report, the EU mission was not intended to review the independence of the judiciary, but to assess the progress towards elections. The public statements made so far by the EU suggest that their findings were not favourable.

2.76 For example, the EU delegation has been reported as condemning 'any threats or restrictions targeting individuals or organisations seeking to exercise their right to freedom of expression' and stated that 'it could not confirm that credible and timely preparations for elections are underway', which is a condition for the EU's resumption of financial support.[118]

2.77 The IBAHRI is unable to understand how such statements could be interpreted as indicating a finding that the Fiji judiciary is free from executive interference.

2.78 It should be noted that, in addition to the IBAHRI's attempts, the United Nations Special Rapporteur on the Independence of Judges and Lawyers has also been prevented from visiting Fiji, despite attempting to do so from June 2007.[119]

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115 'Report of visit to Fiji by LAWASIA Observer Mission', supra n 7.

116 *Ibid.*

117 *Ibid.*

118 'European Union disappointed by Fiji visit', Pacific Islands Development Program/East–West Centre, Pacific Islands Report, 2 December 2008; 'EU wants Fiji to hold elections in 2009', *The Age*, 2 December 2008, at http://news.theage.com.au/world/eu-wants-fiji-to-hold-elections-in-2009-20081202-6poz.html (last accessed 30 December 2008).

119 Confirmed by e-mail from the Special Rapporteur on the Independence of Judges and Lawyers' Assistant to Felicia Johnston, IBAHRI Programme Lawyer, 27 November 2008.

Chapter 3: The independence of the judiciary

Background

> 'There is strong public division between the judges of the High Court of Fiji, a position which goes back at least to the events associated with the coup attempt of May 2000. This division has been expressed both judicially and ex-judicially.'[120]

3.1 The concerns stakeholders raised with the delegation regarding the current state of the judiciary can only be understood in the context of a long-standing dispute between members of the bench. The LAWASIA mission to Fiji in 2007 found that there were 'a number of senior judges [who] themselves hold overtly hostile and publicly documented views about other judges, with allegations and counter allegations of inappropriate behaviour'.[121]

3.2 The split in the judiciary can be traced back to allegations that during the 2000 coup, the then Chief Justice Tuivaga and Justices Fatiaki and Michael Scott assisted the military, particularly during the hostage crisis, by providing the President with legal advice that 'supported the abrogation of the 1997 and the abolition of the Supreme Court'.[122] Justice Fatiaki has denied providing any assistance to the military regime.[123] Chief Justice Tuivaga was also then involved in the drafting of a draft decree for the military regime related to administration of justice. Chief Justice Tuivaga's actions were heavily criticised, and the allegations that the three judges assisted the military government led to serious divisions within Fiji's judiciary.

3.3 The delegation was told there was a sense that at this time Justice Fatiaki had acted in a way that was inconsistent with his role as judge. One prominent lawyer, Richard Naidu, has commented that:

> 'It would appear that, within a few days of Speight's rebellion, they had divided into what I shall call the pragmatists, led by the Chief Justice, Sir Timoci Tuivaga, and including Justices Michael Scott and Daniel Fatiaki. On the other side were a number of 'constitutionalists', of whom Justice Anthony Gates has become the most well-known'.[124]

3.4 The divide is aptly illustrated by Justice Fatiaki's decision in *CCF v President*,[125] which dealt with issues relating to the 2000 coup. Justice Fatiaki was asked by the applicant in this case to excuse

120 James Crawford, 'Re: Judicial Services Commission of Fiji – Recommendation for Appointment of Acting Chief Justice', Matrix Chambers, 20 February 2007, p 2.

121 'Report of visit to Fiji by LAWASIA Observer Mission', *supra* n 7.

122 'Fiji names new Chief Justice', Radio New Zealand International, 24 July 2002, at www.rnzi.com/pages/news.php?op=read&id=1293, last accessed 30 October 2008.

123 'Report of visit to Fiji by LAWASIA Observer Mission', *supra* n 7, p 8.

124 'Report of visit to Fiji by LAWASIA Observer Mission', *supra* n 7, p 18.

125 *Citizens' Constitutional Forum v President* [2001] FJHC 28.

himself on the basis of bias, as (among other grounds) Justice Fatiaki had assisted the military during the coup. Among affidavits tendered to support the allegation of bias were affidavits sworn by Justices Byrne and Nazhat Shameem. The affidavits set out a series of meetings between the judges during the crisis, where a press release was drafted and legal advice prepared for the President was discussed.

3.5 Justice Fatiaki did not excuse himself from hearing the case, but did refer the file for reassignment to another judge, writing that:

> 'Suffice it to say that the clumsy attempt by my colleagues to undermine me in this present application are unworthy and I suggest reveals more about them that it does to me. It also speaks volumes of the environment in which I work and the relationships that exists between the judges of this Court. These are characterised by an absence of collegiality, back-biting, envy, hidden-agendas, hypocrisy and disloyalty. By comparison, Hamlet's Denmark is a holiday camp.'[126]

3.6 The delegation was informed that at this point, the judiciary was polarised, on one hand, judges such as Justices Fatiaki and Scott, and on the other, judges including Justices Gates, Byrne and Shameem, who supported strict compliance with the Constitution and opposed any involvement of the judiciary in governance arrangements in the aftermath of the 2000 coup. There were also reportedly a number of judges who were not associated with either faction.

3.7 Following Chief Justice Tuivaga's retirement, judges from both groups were understood to have expressed an interest in the Chief Justice vacancy. Justice Fatiaki was appointed to this role according to established procedure under the Constitution. The delegation was told that during his term as Chief Justice, Justice Fatiaki did not take action to heal the breach within the judiciary, instead marginalising Justices Gates and Shameem. At the same time, Justice Scott was promoted to the Court of Appeal. The delegation was informed that, given the belief that these judges had acted in breach of the Constitution, this was particularly galling for the other judges on the bench who had upheld the Constitution. It was also exacerbated by other events, for example, the delegation received reports that during this period the government did not support Justice Shameem's nomination to the International Criminal Court, despite widespread support for her nomination across the Pacific. The delegation heard that this was considered to be harsh treatment of a worthy candidate by a government for political reasons.

3.8 The IBAHRI found that there is a view in Fiji that the 2006 coup gave the marginalised group within the judiciary an opportunity to assert dominance over the bench. This is of relevance when attempting to understand Justice Shameem's motivations in convening the JSC and appointing Justice Gates as Acting Chief Justice (considered further at 3.22 – 3.38).

3.9 The situation, which started in 2000, did not improve. Upon his resignation in January 2008, Justice Roger Coventry alluded to the divide:

> 'Judges are human. They have their likes and dislikes in the same way as everyone else. These must be put aside when cases are to be heard and justice delivered. Personalities must play no part in justice. One of the best pieces of advice I ever received was to pause before starting

126 *Ibid.*

to hear every case and to put out of my mind everything save doing justice in that case'.[127]

Removal of the Chief Justice

> 'Fiji's judiciary has taken some hard knocks in 2000 and 2006. There is no doubt that as an institution the judiciary has haemorrhaged and is continuing to bleed as a result of a succession of political crises since 1987'.[128]

3.10 The circumstances surrounding the removal of Chief Justice Fatiaki raise a number of serious concerns about the independence of the judiciary. Chief Justice Fatiaki was removed from his office by representatives of the current interim regime and forced to take leave under duress. Separate from this removal, Chief Justice Fatiaki was charged with a range of misconduct offences, and subjected over time to a questionable, delayed disciplinary process which was finally dissolved as part of a 'settlement' negotiation between him and the regime reached in December 2008. As part of the settlement, Chief Justice Fatiaki resigned as Chief Justice from December 2008, almost two years after his removal.

> 'The continuing independent functioning of the Judiciary has been compromised by the process and manner in which the Chief Justice was requested to take leave and then suspended and an Acting Chief Justice appointed'.[129]
>
> – *Eminent Persons Group Report*

3.11 At 4.15pm on 3 January 2007, two military officers met with Chief Justice Fatiaki in his chambers.[130] The military officers were the Deputy Commander of the Military, Captain Teleni and Lieutenant Colonel Aziz, a military lawyer. The Chief Magistrate and Acting Chief Registrar also attended the meeting. Captain Teleni told Chief Justice Fatiaki that he was representing Commodore Bainimarama, and had come to request him to go on leave, pending inquiry into complaints received with respect to the judiciary and the judicial system. No details of the complaints were provided. Captain Teleni advised Fatiaki that the alternative to voluntary leave was termination. Fatiaki agreed to take leave, later describing his mental state as 'fearful, anxious and under duress'.[131] He was then presented with a letter signed by Commodore

127 Justice Roger Coventry, 'Farewell Address', 24 January 2008.

128 Graham Leung, 'Judicial Independence and the Rule of Law', Fiji Law Society Convention, 20 July 2007, at www.fls.org.fj/doc/Judicial-Independence-&-the-Rule-of-Law.pdf (last accessed 23 October 2008).

129 'Report: Fiji', *supra* n 111, p 17.

130 Affidavit of Daniel Vafoou Fatiaki (undated) (copy not filed) to be filed in support of originating summons and summons for interlocutory relief (*Fatiaki v Bainimarama etc al*) at 2.

131 *Ibid*, at 3.

Bainimarama thanking him for agreeing to take leave.[132] Fatiaki later denied that he went on leave voluntarily, describing his decision to leave office as 'forced leave'.[133]

3.12 Justice Gates was appointed as Acting Chief Justice on 16 January 2007. On 18 January 2007, Justice Fatiaki returned to his chambers and attempted to resume his duties as Chief Justice.[134] He attempted to hold a press conference, which was interrupted when he received a message that a military officer was requesting to see him. Chief Justice Fatiaki received Captain Soata in his chambers. A short discussion followed, during which Chief Justice Fatiaki signalled his intention to return to his duties as Chief Justice.[135] Captain Soata left and another military officer, Captain Peni, entered Chief Justice Fatiaki's chambers, and advised Chief Justice Fatiaki that two soldiers would be posted in his office for as long as he intended to stay. Captain Soata, and a third officer, Captain Tunidau, returned to sit in Chief Justice Fatiaki's office.[136] Later, the acting Police Commissioner, Jahir Khan, was sent by Commodore Bainimarama to speak to Fatiaki. After a conversation with acting Police Commissioner Khan, Chief Justice Fatiaki agreed to leave his chambers. Chief Justice Fatiaki later swore that 'out of loyalty to our friendship [between himself and Khan] and with some sympathy for ACP Khan, I reluctantly agreed [to leave]'.[137]

3.13 On the same day, a notice headed 'Presidential Instrument of Notice of Suspension of Chief Justice Upon Establishment of a Tribunal to Investigate Serious Allegations of Misbehaviour Made Against Him' was published in the Government Gazette. The notice suspended the Chief Justice on the basis that a tribunal had been formed to investigate claims of misbehaviour.[138] The Attorney-General's office later reported that:

> 'Justice Daniel Fatiaki was suspended on 18 January 2007 as provided for under the Constitution for allegations of misbehaviour. He was suspended with full pay and with the right to remain in the Chief Justice's official residence. Justice Fatiaki has continued to receive his full pay and occupy the official residence throughout his suspension.'[139]

3.14 In an advice examining the legitimacy of Chief Justice Fatiaki's removal, Crawford found that 'for a judge to be confronted by members of the military and given instructions to go on leave or be "terminated" is an obvious violation of the Constitution.'[140]

3.15 The tribunal was appointed on 20 November 2007 and sittings began on 26 November 2007.[141] At the initial hearing, directions were given for disclosure, production of documents and tendering of witness statements. A return date of 13 February 2008 was fixed.[142] The following vague charges, which were never publicly particularised, were laid before the Tribunal:

- that Chief Justice Fatiaki failed to uphold the dignity and high standing of the office of a

132 *Ibid*, at 3.
133 *Ibid*, at 6 and 7.
134 *Ibid*, at 8.
135 Ibid, at 8.
136 *Ibid*, at 8.
137 *Ibid*, at 9.
138 Section 138, Fiji Constitution, *supra* n 19.
139 'Fatiaki Tribunal named', Office of the Attorney-General, 20 November 2007, at www.ag.gov.fj/default.aspx?Page=news&newsId=56 (last accessed 27 October 2008).
140 Crawford, *supra* n 120, p 7.
141 'Fatiaki Tribunal named', *supra* n 139.
142 'Preliminary hearing by Fatiaki tribunal', Attorney-General's Office, 26 November 2007,at www.ag.gov.fj/deafult.aspx?Page=news&newsId=65 (last accessed 11 January 2009).

High Court Judge;

- that Chief Justice Fatiaki failed to ensure that his conduct was above reproach in the eyes of a reasonably informed observer;
- that Chief Justice Fatiaki failed to conduct himself in a manner that would reaffirm the public's faith in the integrity of the judiciary;
- that Chief Justice Fatiaki falsified income tax returns;
- that then Justice Fatiaki participated in discussions during the May 2000 coup to prepare advice to then president to prorogue parliament, appoint a caretaker prime minister, dismiss parliament and then accept the resignation of the caretaker prime minister; and
- that together with the then Chief Justice, Sir Timoci Tuivaga, and Justice Michael Scott, then Justice Fatiaki allegedly assisted in the drafting of decrees during the 2000 coup to abolish the Supreme Court and extend the retirement ages of judges.[143]

3.16 The Tribunal's processes were suspended pending the determination of Chief Justice Fatiaki's challenge to the constitutionality of the Tribunal in the High Court. Mr Leung, acting for Chief Justice Fatiaki, sought 'a declaration that the Presidential instrument notice in [Fatiaki's] suspension in January this year and th[e] tribunal's role to proceed is unlawful, void and not effect'.[144] The Tribunal was dissolved following the settlement with former Chief Justice Fatiaki.

3.17 The delegation was told that the general understanding was that the charges laid before the Tribunal were false or, at best, inappropriate. For example, the last charge alleging that Justice Fatiaki assisted in the drafting of decrees to assist the 2000 coup was by far the most serious allegation, yet it was made at the end of the list of charges. The delegation received reports that the interim regime had experienced difficulties in finding evidence to underpin the charges, however, the IBAHRI was unable to confirm the veracity of this claim. Mr Beddoes, the previous Opposition leader, questioned the framing of the charges on the basis that a number related to tax and personal income which would be subject to a current amnesty, and two related to the 2000 coup.[145] Nevertheless, the delegation did receive numerous criticisms of Chief Justice Fatiaki, evidencing that he was not a popular head of court amongst all members of the legal community. However, most stakeholders commented that regardless of their views, the treatment of him was unacceptable and that adherence to the Constitution was mandatory.

3.18 On 5 December 2008, the interim Attorney-General announced that the state had reached a 'settlement' with Chief Justice Fatiaki. Under the terms of the settlement, Chief Justice Fatiaki resigned and discontinued proceedings challenging the legitimacy of his suspension and the tribunal. In turn, the interim government made a settlement payment of F$275,000, withdrew misconduct allegations and dissolved the disciplinary tribunal. Former Chief Justice Fatiaki will

143 'Suspended Fiji chief justice to face tribunal next week', Radio New Zealand, 20 November 2007, at www.rnzi.com/pages/news.php?op=read&id=36534 (last accessed 27 October 2008).

144 'Judges reject Fatiaki bid', *Fiji Times*, 26 November 2008, at www.fijiworldnews.com/news/publish/Local_2/Judges_reject_Fatiaki_bid.shtml (last accessed 27 October 2008).

145 'Questions asked in Fiji why Fatiaki hearing revolves around tax matters when there's a tax amnesty', Radio New Zealand, 23 November 2008, at www.rzni.com/pages/news.php?op=read&id=36614 (last accessed 11 January 2009).

continue to receive benefits as a retired judge.[146]

3.19 It is of significant concern to the IBAHRI that the suspension of the former Chief Justice has been concluded in this way. If the allegations were true, they were extremely serious and warranted investigation and consideration by an independent tribunal. In such circumstances, it is highly inappropriate for the interim regime to have dropped the charges and made a large payment to the former Chief Justice to facilitate his resignation. Such actions undermine the rule of law by suggesting that alleged serious misconduct by the Chief Justice will not be investigated and in fact may result in a large financial payout. Alternatively, if the allegations were false, the fact that the interim regime suspended the Chief Justice and prevented him from returning to office was entirely without foundation, which constitutes a serious and unwarranted violation by the interim regime in the independence of the judiciary. There is no conclusion that can be drawn from the resolution of the suspension of the Chief Justice that does not have serious negative implications for the rule of law in Fiji.

Threats and attacks against judges

3.20 The IBAHRI was seriously concerned by the reports received as to physical threats and attacks against judges in 2007. For example, the IBAHRI understands that in August 2007 Justice Gordon Ward's home was burned down while he was on holidays out of the country. The IBAHRI received reports that there has been no conclusion to any investigation into this fire, although there is reported circumstantial evidence that it was arson. The IBAHRI also received reports concerning the sabotage of Justice Gerard Winter's car, involving the removal of key mechanical components which could have resulted in a serious accident. Justice Winter later left Fiji when his contract expired. The IBAHRI has also received reports that Justice Coventry was followed by military officers after he made a ruling awarding F$20,000 in costs against the interim Attorney-General.

3.21 Threats and attacks against the judiciary are never acceptable in any circumstances, and these attacks are deeply concerning to the IBAHRI. The IBAHRI was not in a position to investigate these attacks in further detail during its mission, but it calls on the interim regime to ensure that these and any other threats or attacks against the judiciary are investigated and the perpetrators brought to justice.

Appointment of Acting Chief Justice and Chief Justice

3.22 The IBAHRI has received reports that, following the suspension of Chief Justice Fatiaki, there was concern that the military regime would unilaterally appoint an Acting Chief Justice in the absence of Chief Justice Fatiaki. In early January 2007, a group of all judges remaining in Fiji at that time were convened by Justice Ward, then President of the Court of Appeal. The group of judges met to discuss the situation and resolved that the judiciary needed to consider appointing an Acting Chief Justice from within their own ranks.[147] Justice Ward was suggested but reportedly there was some dissent. The meeting also recognised that it was important to follow the process set out in

146 'Chief Justice Fatiaki Resigns', Office of the Attorney-General, Press Release, 5 December 2008, at www.ag.gov.fj/default.aspx?Page=news&newsId=267 (last accessed 19 January 2009).

147 Affidavit of Nazhat Shameem filed on 21 November 2007 in the High Court of Fiji, Civil Action number No. 370 of 2007, (*Fatiaki v Bainimarama et al*).

the Constitution, which required the President of the FLS to be involved in the appointment. The meeting did not consider convening a meeting of the JSC or suggest that Justice Shameem (who reportedly was present at this meeting) convene a meeting of the JSC. However, it was reportedly agreed that no action would be taken without the approval of the judiciary as a whole. According to a summary reportedly prepared by Justice Ward:

> 'At the outset, all judges were handed a letter from the Chief Jsutice, dated 3 January 2007 explaining that, as a result of the difficult circumstances at the time he made the decision to go on leave, he had not been able to make any interim arrangements and had, therefore, asked me to "hold the fort" for him. I explained that I had called the meeting on that basis…The meeting discussed at some length the position of the Court and the judges following the Chief Justice's decision to go on leave and the manner in which that had to be made. It was agreed that:
>
> 1. The Chief Justice is on leave and so he continues to be the Chief Justice as he agreed to go on leave…
>
> 5. It is not certain what is meant by the delegation to Gates J and Connors J to manage files and further discussion was adjourned to a meeting when they can be present. Ward JA expressed concern that the military was making orders in relation to the internal administration of justice…
>
> The suggested "request" to Connors and Gates to handle file management was an unwarranted interference with the day to day administration of the courts. Ward P expected that both judges would undoubtedly consider that part of Bainimarama's statement should simply be ignored.
>
> [Amongst other things, the judges also discussed that] the constitutional requirements left a circular situation whereby [the appointment of an Acting Chief Justice] needed advice to the President from the JSC but, until there was an Acting Chief Justice (and in the absence of a Chairman of the PSC), there was no quorum for a JSC meeting… if executive power was returned to President Iloilo, it may be possible for him to make an acting appointment in order to overcome this impasse especially if he consulted, for example, with the judges in lieu of the JSC or the Minister.'[148]

3.23 Justice Shameem has reported that:

> 'On the…8th of January 2007, I was shown a circular memorandum…which was signed by A.L. Butukoro, Acting Chief Registrar. It stated that he had been called to the Military Strategic Command on the 5th of January 2007 and had been told by the Deputy Commander that the interim arrangements of the Chief Justice to appoint Justice Ward to administer the judiciary were to be disregarded. It also stated that a decision would be made later on an Acting Chief Justice and an Acting Chief Magistrate.'[149]

3.24 Shortly afterwards, on 15 January 2007, the interim Attorney-General asked Justice Shameem

148 'Summary of meeting held in the Judges' Common Room, 4 January 2007, 11.30am' constituting Attachment E to the Affidavit of Nazhat Shameem, *ibid.*

149 Affidavit of Nazhat Shameem, supra note 147.

to convene a meeting of the JSC. The interim Attorney-General released a press statement the following day that said 'I asked the most senior, substantive judge Madam Justice Nazhat Shameem to convene a meeting of the Judicial Services Commission yesterday.'[150] The IBAHRI understands that Justice Shameem did not consult with all of the other sitting judges before convening the meeting.

3.25 The IBAHRI understands that there are ongoing court processes regarding the constitutional validity of this meeting, and so will not present its own views as to the validity of the JSC meeting or the appointments made by it. These views will be presented following the finalisation of all court processes. However, the IBAHRI will take this opportunity to present the facts and various views that have been expressed regarding this meeting and the ensuing events.

3.26 Others at the JSC meeting with Justice Shameem were Mr Rishi Ram, who was in the process of being appointed by the military as Chairman of the Public Service Commission, following the forced removal of the Commission's previous head by the interim regime, and Devanesh Sharma, President of the FLS at the time. Mr Sharma reportedly attended the meeting on the basis that it was to deal with extending tenures of five members of the Court of Appeal due to expire on 10 January 2007.

3.27 Minutes of the meeting were leaked to the public following the JSC meeting. The IBAHRI has relied on these minutes for the purposes of this assessment. At 2pm that day, Justice Shameem, Mr Ram and Mr Sharma met in Justice Shameem's chambers. The delegation was told that before the meeting formally began, the three had a short conversation, during which Justice Shameem advised that Chief Justice Fatiaki had stood aside and that as the senior puisne judge, she was standing in for him.

3.28 The meeting was then formally convened by Justice Shameem, who provided a copy of an advice drafted by a Hong Kong barrister Gerard McCoy, that supported her convening of the meeting in the temporary absence of the Chief Justice (the McCoy advice). According to the minutes of the meeting, Justice Shameem thanked Mr Ram and Mr Sharma for attending and said that the meeting was to discuss appointing an Acting Chief Justice in the absence of a judicial head. The minutes go on to record Justice Shameem as saying:

> 'Basically the JSC is chaired by the Chief Justice and is made up of the President of the Law Society and the Chairman of the Public Services Commission. Now, one suggestion is that the two of you could make appointments to the judiciary without a Chief Justice but there is a difficulty with that because you would not be consulting members of the judiciary. According to the advice we have been given that would be quite wrong and we should have somebody from the judiciary there. The legal advice that we've received is that in the absence of the Chief Justice, the senior substantive puisne judge should chair the JSC. So when it was suggested to me this morning that I should do that, I discussed the matter with Mr Sharma, he agreed that really we have got to meet and recommend whatever appointment is necessary. The judiciary is really in a pretty difficult situation at the moment, and I have to say that one of the saddest things about this kind of situation is that our judges may fall out over the issue of judicial leadership. It is important that we

150 'Gates sworn in as Acting Chief Justice', Fiji Government, 16 January 2007, at www.fiji.gov.fj/publish/page_8181.shtml (last accessed 11 January 2009).

preserve judicial collegiality and independence, so that is the reason why we've decided to have this meeting, and the only thing holding it up today is whether we have a Chairman of the PSC. This morning we were told it was Mr Hector Hatch, and then we were told there was no Chairman, and then we were told by the AG's chambers and by Mr Sharma that Mr Ram's appointment was imminent. As I have explained to you, I don't want to take any part in making decisions about appointments of any other judges or the extension of contracts of any other judges, or even on the basis of the CJ's absence. It may well in the next meeting with whoever is the acting CJ, you may decide that you would like to ask the CJ to come back, and that is entirely within your powers as the JSC so this is just a stop-gap holding decision until such time as we have a substantive CJ.'[151]

3.29 The group considered who the next most senior judge was, ruling out Justice Pathik on the basis he was in an acting role due to his age, and the President of the Court of Appeal on the basis of illegality (as the President of the Court of Appeal and the Chief Justice are separated under section 127(a) of the Constitution). The next most senior judge was considered to be Justice Shameem, but she declined the role, saying:

> '… I have never been interested in that position with or without a military coup. I've explained this very carefully also to Mr Justice Gates when I asked him. He was very uncomfortable because I'm the senior judge and he asked me to consider it. However I told him that one of the greatest pleasures in my life is going to court and hearing the stories of ordinary people. And I don't want to stop doing that and I certainly don't want to do any administrative job at all certainly at this stage in my career, and I'm simply not interested'.[152]

3.30 The group considered the next most senior judge to be Justice Gates. The meeting resolved to recommend that Justice Gates be appointed as Acting Chief Justice.

3.31 A letter sent from Justice Shameem to President Iloilo the following day explained that the meeting was convened in order to appoint an Acting Chief Justice on the advice of leading counsel and 'in the interests of maintaining judicial administrative continuity'.[153] The letter also stated that '… the Chief Justice of Fiji… has voluntarily gone on leave pending a judicial inquiry'.[154] However, at the time, no inquiry had been announced or convened.[155] The letter went on to say that 'at the meeting, all members of the Commission agreed that Mr Justice Gates should be appointed Acting Chief Justice. After this unanimous decision [in the presence of the other attendees], the interim Attorney-General Mr Sayed-Khaiyum was consulted on the telephone. He agreed with our recommendation'.[156]

3.32 Justice Gates was sworn in as Acting Chief Justice on 16 January 2007.[157] At Justice Gates' swearing in, the interim Attorney-General was also quoted as stating: 'We do not want to

151 Minutes of Judicial Services Commission Meeting held on 15 January 2007, Justice Nazhat Shameem's Chambers, 4.00pm.
152 *Ibid.*
153 Letter from Justice Shameem to President Iloilo, quoted in 'Report of visit to Fiji by LAWASIA Observer Mission', *supra* n 7, p 15.
154 Letter from Justice Shameem to President Iloilo, quoted in Crawford, *supra* n 120, p 4.
155 *Ibid.*
156 Letter from Justice Shameem to President Iloilo, quoted in James Dingeman and James Hawkins, 'The Judicial Services Commission and the Chief Justice of the Republic of Fiji', 30 March 2007, p 4.
157 As the IBAHRI is not currently taking a position on whether it considers appointments made by the military to be valid, the titles used by the interim regime have been used for ease of reading, including the title 'Acting Chief Justice' and 'interim Attorney-General'. However, this should not be taken to imply that the IBAHRI accepts the appointments as valid.

interfere with the judicial process and the administration of justice.'[158] In April 2007, the FLS applied for judicial review of Justice Gates' appointment.[159] On 28 November 2008, Justice Andrew Bruce granted leave to review the decision, ruling that 'this judgment does not determine that the appointment of Justice Gates to be Acting Chief Justice was unconstitutional. All that has happened is that the court has recognised that the contentions of the applicant for judicial review are arguable'.[160] Following this, it is understood that while leave for judicial review has been granted, a stay exists on this decision until all appeal processes have been exhausted.[161] On 19 December 2008, the Attorney-General's office released a press statement advising that Acting Chief Justice Gates had been appointed as Chief Justice.[162]

3.33 As outlined in greater detail in Chapter One, the JSC is established under section 131 of the Constitution, and consists of the Chief Justice (who is Chair), the Chair of the Public Service Commission and the President of the FLS. Section 132 of the Constitution gives the JSC the power to recommend judicial appointments, both of permanent and acting judges, except for the permanent Chief Justice, who is appointed by the President on the advice of the Prime Minister (in consultation with the leader of the opposition).

The advices

3.34 As this matter is still under judicial consideration, the IBAHRI will not share its views as to the legality or otherwise of the JSC meeting appointing Acting Chief Justice Gates at this time. A full statement of these views will be made upon the finalisation of all court processes. However, a number of opinions and advices have been released concerning the meeting, and warrant consideration in this section.

3.35 The IBAHRI was not able to obtain a copy of the McCoy advice. However, the IBAHRI notes two alternative advices prepared by London-based barristers considering Justice Gates' appointment as Acting Chief Justice that are in the public domain.

3.36 The first was prepared by James Crawford on behalf of FLS (the Crawford opinion). Mr Crawford found that Chief Justice Fatiaki's suspension from office was unconstitutional, but noted that even if Chief Justice Fatiaki had been unable to perform the functions of his office, the meeting was improperly constituted as Justice Shameem was not a member of the JSC. Accordingly, Mr Crawford considers that Acting Chief Justice Gates' appointment is invalid.[163]

3.37 The second was prepared by James Dingeman and James Hawkins, also for the Fiji Law Society (the Dingeman opinion). Mr Dingeman and Mr Hawkins found that there are a limited number of circumstances where a meeting of the JSC could be chaired by someone other than the Chief Justice, but that those circumstances did not exist on 15 January 2007. Accordingly, their view was that the meeting of the JSC was not properly constituted. Mr Dingeman and Mr

158 'Gates sworn in as Acting Chief Justice', *supra* n 150.

159 'Stay granted on Justice Gates review', *Fiji Daily Post*, 28 November 2008.

160 Harold Koi, 'FLS gets leave to seek review', *Fiji Times*, 28 November 2008, at www.fijitimes.com/story.aspx?id=107420 (last accessed 21 January 2009).

161 Mr Sayed-Khaiyum, 'Closing address at the 10th Attorney-General's Conference 2008', 29 November 2008, at www.fiji.gov.fj/publish/page_13614.shtml (last accessed 11 January 2009).

162 'President Appoints New Chief Justice', Office of the Attorney-General, 19 December 2008, at www.ag.gov.fj/default.aspx?Page=news&newsId=271 (last accessed 11 January 2009).

163 Crawford, *supra* n 120, pp 1–2.

Hawkins found this conclusion further supported by Justice Shameem's involvement, which they considered was not provided for under the Constitution.[164] Mr Dingeman and Mr Hawkins also noted that:

> 'if (which needs to be confirmed) the chairman of the Public Services Commission had not been appointed in accordance with the Constitution, the presence of this person would be a further ground for holding that the meeting was unconstitutional'.[165]

3.38 Different views on the level of seniority of judges at the time were expressed to the delegation. On the basis of date of appointment, the view was expressed that Justice Pathik was the next most senior judge. However, the delegation was told that, as he had reached retirement age and was then appointed in an acting capacity, Justice Pathik's previous seniority had been dissolved. Following Justice Pathik, Justice Shameem was the next most senior judge. Justice Ward was the President of the Court of Appeal at the time, so could also have arguably been considered the next most senior judge. However, under the Constitution, the roles of Chief Justice and President of the Court of Appeal are specifically separated, to ensure independence of the hierarchy, so the delegation was informed that Justice Ward could not have been appointed Acting Chief Justice.

Exodus of judges from the bench

3.39 According to reports received by the delegation, many of the judiciary at the time appeared to be uncomfortable with the appointment of Justice Gates as Acting Chief Justice. Justice John Henry from the Court of Appeal resigned, reportedly in protest. The remainder decided to continue to remain on the bench.

3.40 Throughout 2007, a number of judges from the High Court and the Court of Appeal chose not to renew their contracts: reportedly, this decision was made due to their belief that acceptance of a new contract would have breached the Constitution. At the end of 2007, Justice Sir Thomas Eichelbaum, Justice Ian Barker, Justice Tony Ford, Justice Bruce McPherson, Justice Peter Penlington and Justice Robert Smellie resigned from the Court of Appeal, causing consternation throughout the international legal community.[166] The IBAHRI received reports that they made this decision because they were no longer able to carry out their duties effectively within the newly shaped court. However, no public statement was made by this group of judges.

3.41 However, other judges have spoken out. Justice Robert French (now Chief Justice of the High Court of Australia) served on the Supreme Court of Fiji from 2003. He has said that 'while continuance of the rule of law is of vital importance to Fiji, the implicit bargain involved in accepting appointment to the highest court of that country by a military government, the lawfulness of which is under significant challenge, comes at too high a price.'[167]

164 Dingeman and Hawkins, *supra* n 156, pp 1–2.

165 *Ibid*, pp 10.

166 A number of publications and individuals interviewed claimed that no judges had resigned. Based on the stakeholders consulted and various other publications, the IBAHRI has determined that a number of resignations did take place, see: 'Six remaining expatriate judges of Fiji Appeal Court resign their warrants', Radio New Zealand International, 3 September 2007, at www.rnzi.com/pages/news.php?op=read&id=34880 (last accessed 21 January 2009). Confirmed by interviews.

167 Robert French, 'Judges in Fiji face "interim" problem', *The Australian*, 2 May 2008, at www.theaustralian.news.com.au/story/0,25197,23631157-30537,00.html (last accessed 19 January 2009).

3.42 Justice Winter (appointed 2003) allowed his appointment to lapse in January 2008 explaining that 'I too would not accept a renewed appointment from the unelected military government as the risk to the maintenance of the rule of law was too great a price to pay.'[168] Justice Winter also said 'I decided to stay throughout 2007 for as long as I had judicial effect. I also then decided that I could not renew my warrant in 2008 if the military regime was still in power as to do so would run contrary to my original oath of office.'[169]

3.43 Justice Coventry, at his farewell celebration upon resigning, publicly stated:

> 'It is with great sadness that I stand here this evening. If there could be some other course consistent with principle whereby I could stay then I would take it. I regret there is not. I saw in a newspaper last Saturday that I came to Fiji in 2004, that I am now going to Solomon Islands and that I decided not to renew my contract. I do not know who gave that information to the press but it is wrong…. It is not a question of renewing a contract. I terminated it. This was not a sudden decision. I have been regularly considering what is the right course since January last year…
>
> The immediate future is not rosy. There are, if I may say, certain things that lawyers can and should do. The first is to uphold according to law judicial office, whether or not you like the individual office holder. Do not accept illegality for the sake of expediency or for any other reason. If you do not draw your line here, then when you do draw your line it will be many steps back. Speak out. Judges cannot. Bring cases, raise the issues. Acquiescence is the friend of illegality.'[170]

3.44 As the various judges resigned or allowed their appointments to lapse throughout 2007–2008, a number of new appointments have been made to the bench and as a result the High Court and the Court of Appeal have been reshaped.

Appointments made since January 2007

3.45 While the IBAHRI will not make a statement at this time as to its views about the legality of the appointment of Acting Chief Justice Gates by the JSC meeting, it is necessary to consider the implications for the other appointments made to the bench since the coup, should Acting Chief Justice Gates' appointment be held to be invalid. If his appointment is invalid, each of the appointments to the bench since the coup by the JSC may also have been invalid for at least one of three reasons. First, after the purported appointment of Justice Gates as Acting Chief Justice, he took over as Chair of the JSC. If his appointment was not constitutional, he may not have the power to chair or sit on the JSC; second, the head of the Public Service Commission has remained a military appointee, and so may not be entitled to sit on the JSC; third, the President of the FLS has not attended most JSC meetings since the appointment of Acting Chief Justice Gates on the basis that he felt it was improperly constituted. In his absence the JSC may not have been properly constituted. However, it should be noted that the newly elected FLS President Dorsami Naidu has said that he will engage with the interim government and the JSC.

168 Chris Merritt, 'Another expat denounces Fiji military regime', *The Australian*, 15 August 2008.
169 *Ibid.*
170 Justice Coventry, *supra* n 127.

3.46 After the conclusion of the delegation's mission on 13 December 2008, the IBAHRI received reports that Acting Chief Justice Gates was appointed as permanent Chief Justice on 19 December 2008. While the delegation was not able to consult with stakeholders on this issue, the IBAHRI considers that the constitutionality of the permanent Chief Justice appointment is questionable. This is because the Constitution empowers the President to appoint a Chief Justice, on the advice of the Prime Minister, who is required to consult with the Leader of the Opposition. Given the dissolution of Parliament, such consultation would not have been possible. Further review of the permanent appointment of the Chief Justice is necessary.

3.47 If the appointments of Chief Justice Gates – as both acting and permanent Chief Justice – are unlawful, those judges appointed by the current and future JSC will also be compromised by the process of their appointment. Justice French has noted that:

> 'By continuing to serve, they do not take any position on the lawfulness of the Interim Government… The position is different for a judge appointed by the Interim Government. Even so, it is not black and white. Judges and courts will be necessary to maintain the basic framework of the rule of law, which is essential to the continuance of civil society in Fiji. But such an appointment may be seen as involving an implicit bargain with the Interim Government.'[171]

3.48 The IBAHRI is concerned about the legality of appointments made to the bench since the dismissal of Chief Justice Fatiaki in January 2007. However, it is not in a position to comment on this further given ongoing judicial cases. In the circumstances, the IBAHRI considers that further appointments to the judiciary should not be made until the matter is resolved so as to avoid further concerns about judicial independence and legality.

The judicial oath

> 'Judges should remember their oaths of judicial office to uphold the Constitution.'
>
> – Justice Gates as he then was in *Prasad*[172]

3.49 Under the Constitution, a judge is required to swear or affirm that he or she will 'in all things uphold the Constitution; and… will do right to all manner of people in accordance with the laws and usages of the Republic, without fear or favour, affection or ill will'.[173] Many stakeholders consulted by the delegation indicated their view that the manner of appointments of new judges to the bench breaches this oath.

Future vacancies

3.50 A number of current appointments to the Supreme Court are due to expire in early 2009.

171 French, *supra* n 167.
172 *Prasad v Republic of Fiji* [2000] FJHC 121; Hbc0217.2000l.
173 Chapter 17, Fiji Constitution, *supra* n 19.

While full details of these appointments could not be obtained, reports have indicated that such appointees include the following eminent current or former Australian judges: Justices Ron Sackville, Mark Weinberg, Keith Mason, David Ipp and Ken Handley.[174] Concern was expressed to the delegation that the military regime will take this opportunity to reshape the bench of the Supreme Court to ensure that it includes only those judges perceived to be 'friendly'. Additionally, the Presidency of the Court of Appeal has been vacant for some time.

3.51 Given the outstanding cases and doubtful constitutionality of the appointment of many members of the existing judicial bench, the upcoming vacancies are of significant concern to the IBAHRI. At this stage, it appears that there is no way to make unquestioningly legitimate appointments to these roles or vacancies as any person who accepts a nomination may be perceived as compromised by the method of appointment.

Judicial conduct

Recusals and listings

3.52 The law of recusal, or disqualification, is based on the principle that a judge may not preside over a matter in which he or she holds an interest,[175] and that justice must be seen to be done.[176] The English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor* described the basic rule of disqualification as:

> 'if a judge has a personal interest in the outcome of an issue which he is to resolve, he is improperly acting as a judge in his own cause; and that such a proceeding would, without more, undermine public confidence in the integrity of the administration of justice'.[177]

3.53 The law concerning automatic disqualification was described by the Court:

> 'the question is not whether the judge has some link with a party involved in a cause before the judge but whether the outcome of that cause could, realistically, affect the judge's interest.'[178]

3.54 The law requires that a judge must disclose any interest at the outset of proceedings, and, if given the consent of the parties, may continue to preside. However, should a judge fail to disclose an interest any decision reached can be overturned if it can be established that the judge had a pecuniary or direct interest in the outcome of the case.[179] Such interests, other than where *de minimus*, gives rise to a presumption of bias and automatic disqualification.[180]

3.55 Where there has been non-disclosure of a non-pecuniary interest, common law tests apply to determine the likelihood of bias. The two tests that have developed in the common law are

174 French, *supra* n 167.

175 See *Dimes v Grand Junction Canal (Proprietors of)* [1852] III HLC, 759, at p 793, per Lord Campbell.

176 See *R v Sussex Justices, ex parte McCarthy* [1924] KB 256, 259, per Lord Hewitt, as cited in K Malleson, 'Judicial Bias and Disqualification after *Pinochet (No 2)*, *The Modern Law Review*, Vol 63(1), 2000, p 120.

177 Locabail (UK) Ltd v Bayfield Properties Ltd & Anor [1999] EWCA Cuv 3004, at [7]; see also *R v Gough* [1993] AC 646.

178 *Locabail, ibid.*

179 Malleson, *supra* n 176, p 120; however, this no longer applies as strictly in circumstances where a judge has a negligible or very remote interest such as a small stock holding in a very large company, see for instance, JP Frank, 'Disqualification of Judges', *The Yale Law Journal*, Vol 56(4), 1947, 605–639.

180 For instance see *Locabail, supra* n 177; or *Vakalalabure v State* [2006] FJSC 3; CAV0003U.2004S for a consideration of these principles in the Supreme Court of Fiji.

that of the 'real likelihood' or 'real danger' test of bias,[181] and that described by Lord Denning as requiring 'a reasonable apprehension or suspicion of bias on the part of a fair-minded and informed member of the public'.[182]

3.56 The IBAHRI is seriously concerned by the failures of certain judges in Fiji to recuse themselves from cases that bear on the legitimacy of their own appointment or the constitution of the bench. Justice Coventry, who resigned from the High Court on 9 January 2008,[183] has said that:

> 'Following upon the Judicial Services Commission meeting in January 2007, some judges were appointed and began sitting and hearing cases. There were challenges to the legality of their appointments. Now in those circumstances, I'm not going to pass comment, because it's still before a court, as to whether those appointments were legitimate or not. But in the meantime, what a judge should do is simply this: if any case comes before him or her, which goes to the root of the legality of their appointment, then they should say, "No, I can't hear this, for the simple reason my position is dependent on finding it in a particular way".' [184]

3.57 He has also stated that 'I have been concerned over the rule that requires a judge to recuse him or herself if that judge's position is dependent upon a particular answer to that question.'[185] The IBAHRI shares Justice Coventry's concerns and supports his view that a judge should recuse him or herself if the way in which the case is determined bears in any way on the legality or constitutionality of the judge's appointment.

3.58 One example of this conflict of interest is Justice Byrne's decision in *Bainimarama & Ors v Heffernan*,[186] where an application that Justice Byrne recuse himself was submitted on the basis that the judgment would require him to make a decision on whether his own appointment was proper – the application included requests for a series of declarations ruling that aspects of the military government's actions during the 2006 coup unlawful. Justice Byrne, discussing submissions of both illegality and possible bias, summarised aspects of the claim as:

> 'The Respondent claims… that even if my appointment had been attended with complete regularity, I would still have been disqualified from hearing the application since I have been appointed in controversial circumstances… and I draw a Judicial salary as a consequence of that appointment… This it seems to me is in line with other submissions of the Respondent to which I have referred, the purpose of which it seems is to disparage and denigrate the circumstances of my appointment and my ability to preside in this case. This is a serious allegation and to have any credence I would require strong evidence. In my opinion it is pure assumption and sound arguments are not based on speculation or assumption.'[187]

3.59 On the legality of his appointment, Justice Byrne ruled that:

> 'In my judgment the presumption of legality applies to any actions or rulings which I have

181 *R v Barnsley Licensing Justices, ex Parte Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167 at pp 186–187, as cited in Malleson, *supra* n 176, p 121.

182 *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at p.599, as cited in *ibid.*

183 Chris Merritt, 'Media join in opposing Bainimarama', *The Australian*, 29 February 2008, at www.theaustralian.news.com.au/story/0,25197,23293153-7582,00.html (last accessed 11 January 2009).

184 ABC Law Report, 'Fiji's faltering freedoms', 4 March 2008, at www.abc.net.au/rn/lawreport/stories/2008/2177850.htm (last accessed 23 January 2009).

185 Justice Coventry, *supra* n 127.

186 *Bainimarama & Ors v Heffernan*, Fiji Court of Appeal, Civil Appeal No ABU0034 of 2007, Byrne J, 30 July 2007.

187 *Ibid.*

given since my re-appointment as a Judge on the 16th of April 2007.'[188]

3.60 Given the serious concerns held by many that many appointments including Justice Byrne's are constitutionally invalid, the IBAHRI considers that, in the circumstances, Justice Byrne should have recused himself and should not have presumed legality to his appointment and all his actions in this way.

3.61 Another example is the presence of both Acting Chief Justice Gates and Justice Byrne on bench hearing *Qarase v Bainimarama*. The position of Acting Chief Justice was obtained by Justice Gates as a direct result of the military takeover, which removed Chief Justice Fatiaki and facilitated Acting Chief Justice Gates' appointment, while Justice Byrne was also re-appointed to the bench following the coup. The IBAHRI understands that there were a number of judges appointed prior to the coup who could have heard the case. They included, for example, Justice Gwendoline Phillips, Justice Jiten Singh and Justice Filimoni Jitoko. Therefore, there appear to have been at least three judges available whose appointments were in no way related to the December 2006 coup. In such circumstances, it was inappropriate for Acting Chief Justice Gates and Justice Byrne to fail to recuse themselves from hearing matters that directly related to their own positions.[189]

3.62 The IBAHRI considers it inappropriate for a judge to fail to recuse themselves from a case that bears on the legitimacy of their ability to hear the case or on a case which relates directly or indirectly to their own position.

Listing of constitutional cases and cases relating to the military

3.63 Concerns were raised with the delegation that the listing process for constitutional cases, or other cases that involve a decision on the legitimacy of the conduct of the military or its members, is not fair and unbiased. There is a perception in Fiji that these cases are only listed before judges that are likely to make a decision that is favourable to the military regime.

3.64 An example of this concern was the constitution of the bench in the *Qarase* decision. This High Court case considered the 'lawfulness or otherwise of certain acts carried out by the President following military intervention in the government of the State'.[190] It was heard by Acting Chief Justice Gates, Justice Byrne and Justice Pathik. Each of these judges is perceived to be pro-regime. The case has gone to appeal in the Court of Appeal. To the best of the IBAHRI's knowledge, judges have not yet been allocated to hear the appeal but it is scheduled to be heard in the March 2009 sitting. There is also a perception within Fiji's legal community that urgent, *ex parte* applications for stays on decisions that are not favourable to the interim government have been heard by Justice Byrne on a number of occasions in circumstances that cause the IBAHRI concern. In these cases, the IBAHRI heard claims that Justice Byrne has heard the applications at the request of the Acting Chief Justice. The delegation was unable to verify these claims, but the existence of such a perception is disturbing. This is discussed further at paragraphs 3.121-3.159.

3.65 Members of the military government have also made clear their preference for relevant matters

188 *Ibid*, p 19.
189 It also seems unusual for an Acting Chief Justice to sit on a court of first instance.
190 *Qarase, supra* n 13, at [1].

to be heard before particular judges. For example, on 10 September 2007, the Commissioner of Police wrote to the Permanent Secretary, stating that Justices Winter and Jitoko were biased against the military and requesting that no cases related to the military or its members be listed before either of them.[191] The Permanent Secretary replied the following day, writing:

> 'I note with thanks your concerns… I have related these to the Chief Justice who is ultimately responsible for assigning cases to the bench… I am sure the Chief Justice will take the necessary steps to ensure your concerns are addressed accordingly. I will revert to you on the outcome of my discussions with the Chief Justice on this matter.'[192]

3.66 According to reports, Justices Winter and Jitoko were not advised of the contents of the letter by Acting Chief Justice Gates, nor were they given an opportunity to respond. The letter became public as a result of a court hearing. The IBAHRI received reports that Commodore Bainimarama's brother-in-law was being tried for murder/manslaughter before Justice Winter. When the accused's counsel applied for Justice Winter's recusal, he was required to show evidence in an affidavit, to which the letter from the Permanent Secretary was attached.

3.67 Despite the apparent listings of constitutional cases with judges perceived to be pro-regime, the interim Attorney-General has criticised the number of constitutional cases currently against the state, considering them to be money-spinners for lawyers:

> 'Following the events of 5 December 2006, the Attorney-General's Chambers has been inundated with challenges against the state. I believe that some of these challenges are frivolous and vexatious. The question of course is why are there so many challenges? We already have a substantive matter before a 3 member panel of the High Court, the ruling of which should address many of the principles of law raised in these numerous proceedings. Could it be that the reason why we have so many challenges is because lawyers are ill-advising their clients? Has money become more important than principles? However I must also say, even if these challenges are a waste of resources, it is encouraging to see that so many litigants continue to have faith in our judiciary.'[193]

3.68 The IBAHRI considers it disturbing that the interim Attorney-General takes this view of the situation, and affirms its support for all legal challenges to actions of doubtful constitutionality in Fiji.

Ex parte *stays*

3.69 The delegation was told that there is a practice of a particular judge granting urgent *ex parte* stays where a decision is not favourable to the interim government. The view expressed to the delegation was that the stays are inappropriate and without legal basis, as well as being granted in questionable circumstances. This issue also raises a question about the impartiality of the listing process as previously discussed.

3.70 An example of an urgent *ex parte* stay granted in a constitutional case is *Ratu Josefa Iloilo*

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191 Affidavit of Francis Bulewa Kean filed 1 October 07 as part of recusal application (*The State v Kean, High Court*, Criminal Case No: HAC 037 OF 2007).

192 *Ibid.*

193 Mr Sayed-Khaiyum, *supra* n 161.

Uluivada and others v SDL:[194] (the Charter case). In this case, Justice Jitoko granted an injunction preventing the military government from making changes to the electoral system or proceeding with the National Council for Building a Better Fiji, which was developing the People's Charter. This application was heard on notice with both parties having the opportunity to make submissions. The injunction was granted in the High Court at 11am on Friday 14 November 2008. Just before 5.30pm that day, Justice Byrne granted an *ex parte* stay of the injunction, pending appeal. Justice Byrne published reasons on 20 November 2008. Justice Byrne found that there was insufficient evidence that the work being undertaken on the Charter would lead to amendments to the Constitution without the involvement of Parliament. Justice Byrne described this is 'sheer speculation'.[195] The interim Attorney-General circulated a press release advising of the stay on the same day.[196]

3.71 The granting of the stay was criticised on the basis that it should have been considered by the trial judge, Justice Jitoko, before all parties. The delegation was told that both court practice and the Court of Appeal Rules mean such an application would be heard by the trial judge. The delegation was not able to confirm this either through a consideration of court practice or the rules. However, the IBAHRI considers that in the interests of fairness, all parties should be present wherever possible in such situations. The delegation was told that counsel for all parties would have been available and contactable, and had appeared at short notice in other cases in previous weeks.

3.72 In Justice Byrne's reasons, he addresses criticism of the context in which the stay was granted:

> 'It was suggested, if not by direct accusation, but certainly by the clearest implication that I was wrong in hearing the application and that it could easily have waited until the following week. I was satisfied it could not, for government parties were in the field canvassing the charter and some had gone to Rotuma. This criticism, implied or actual, is baseless for it ignores the practice governing such applications provided in the High Court Rules and in Section 20 of the Court of Appeal Act.'[197]

3.73 Section 20 of the Court of Appeal Act does not specifically reference *ex parte* hearings, nor the circumstances in which they should be held. It states:

> **'20**. *Powers of a single judge of appeal*[198]
>
> The powers of the Court under this Part –
>
> *(a)* to give leave to appeal;
>
> *(b)* to extend the time within which a notice of appeal or an application for leave to appeal may be given or within which any other matter or thing may be done;
>
> *(c)* to give leave to amend a notice of appeal or respondent's notice;

194 Decision of Justice Byrne, Fiji Court of Appeal, 20 November 2008.

195 *Bainimarama v Heffernan, supra* n 186.

196 'Court of Appeal Explains Stay Order Ruling', Office of the Attorney General, 20 November 2008, at www.fiji.gov.fj/publish/page_13517.shtml (last accessed 19 January 2009).

197 *Ibid.*

198 Court of Appeal Act [Cap 12].

(d) to give directions as to service;

(e) to admit a person to appeal in *forma pauperis*;

(f) to stay execution or make any interim order to prevent prejudice to the claims of any party pending an appeal;

(g) generally, to hear any application, make any order, or give any direction incidental to an appeal or intended appeal, not involving the decision of the appeal,

– may be exercised by any judge of the Court in the same manner as they may be exercised by the Court and subject to the same provisions; but, if the judge refuses an application to exercise any such power or if any party is aggrieved by the exercise of such power, the applicant or party aggrieved shall be entitled to have the matter determined by the Court as duly constituted for the hearing and determining of appeals under this Act.'

3.74 The interim Attorney-General's press release sets out Justice Byrne's findings of fact.[199] According to the statement, representatives of the Attorney-General's office went to the High Court's civil registry at 3.30pm on the Friday afternoon, and spoke to the Acting Court Officer of the High Court. The officer telephoned Justice Jitoko's secretary, and then his home, and was told that Justice Jitoko was not available. The delegation received reports that he was on his way home at this stage. The Acting Chief Justice advised the officer that the application would have to be heard on the following Monday, before Justice Jitoko, and this advice was passed to the interim Attorney-General's staff.[200] According to the press release, 'it was shortly after this at about 4pm that Justice Byrne was asked to hear the application which the Court was told was urgent.'[201] The press statement does not set out who asked Justice Byrne to hear the application, or in what circumstances.

3.75 Justice Byrne has also granted *ex parte* stays at short notice in other cases where a decision has not been favourable to the interim government, including in *Bainimarama & Ors v Heffernan*.[202] In this case, Ms Heffernan was seeking a range of declarations related to the validity of regulations passed by the military to support its administration and a number of injunctions seeking to prevent the military regime from limiting Ms Heffernan's (and her legal advisors') freedom of movement. On 4 June 2007, lawyers for the military government applied *ex parte* to stay High Court proceedings set for the following week, pending determination of an appeal on earlier interlocutory orders granted by the High Court. The Acting Chief Justice requested Justice Byrne to consider the application, which he did, *ex parte*, at 4.30pm, staying the High Court proceedings at 5.30pm. An application was subsequently made to the President of the Court of Appeal, who had been overseas at the time the application was heard, requesting that the Court set aside the stay and rehear the matter *inter partes*. This application was limited to the question of whether it was appropriate for the President to intervene in ongoing proceedings. In his decision, in which he held that it would not be appropriate to intervene, the President noted that 'whatever the reasons for the late timing of the application, there would still have

199 'Court of Appeal Explains Stay Order Ruling', *supra* n 196.
200 *Ibid.*
201 *Ibid.*
202 *Bainimarama v Heffernan, supra* n 186.

been time for the matter to be heard *inter partes*'.[203]

3.76 Justice Byrne also granted an *ex parte* stay against an order made by Justice Jitoko that attempted to prevent the deportation of Evan Hannah, publisher of the *Fiji Times*. The order had been served on a number of government and immigration officers prior to Mr Hannah's deportation, but to no effect: Hannah was deported. Justice Byrne stayed Justice Jitoko's order, pending appeal to the Full Court, on the basis that it had become unenforceable when Hannah left the country.[204]

'Beratement' proceedings

3.77 The delegation was told that there have been instances of inappropriate judicial involvement in issues outside court. For example, on Tuesday 12 February 2008, an article published in the *Fiji Sun* newspaper attributed a number of quotes to Virisila Buadromo, the Director of the Fiji Women's Rights Movement, a non-government organisation. The article quoted Ms Buadromo as criticising appointments to the Court of Appeal on the basis of illegality and compromised judicial independence, including the following statement:

> '…Buadromo said the appointments including [sic] two female judges and the gender of the appointees was irrelevant given the circumstances in which they were appointed… She said the country was on shaky ground when the Interim Government was hand picking the judges for the court that might ultimately decide the legality of its takeover.'[205]

The article was published shortly after Justice Jocelyne Scutt had been appointed.

3.78 Ms Buadromo and a representative of the newspaper were requested, by letter, to attend court. They appeared with counsel before Justices Shameem, Scutt and Daniel Goundar later the same day. The court transcript states that the discussion took place in the Fiji Court of Appeal, and is marked 'Judges' concern on Fiji Sun article'. The transcript reflects some discussion of the nature of the proceedings, which are described by Justice Shameem as a quiet explanation of the judiciary's concerns about the article, rather than an action for contempt. During the course of the proceedings, Justice Shameem raised four matters of concern with Ms Buadromo regarding the truth of her statements about the illegality of appointments to the judiciary and the relationship between the interim government and the judiciary. Counsel appearing for the interim Attorney-General noted at one point that 'one of the remedies that this court could in fact adopt today is to formally caution, not just the person who has made this statement, but generally since the media is here, about such misleading statements being made.'[206] The hearing ended without any findings being made.

3.79 The IBAHRI considers this proceeding to be of concern: no charge had been laid and no civil proceeding was on foot. It appears that the judges involved used their positions in order to intimidate a critic of the bench, by conducting a court hearing without any initiating process and which was not in the course of any other matter. In the interests of free expression, the IBAHRI finds this to be a chilling use of judicial powers.

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203 *Ibid.*

204 *Ravatudei & Ors v Hannah*, Civil Appeal No 32 of 2008, 26 September 2008 Byrne J, Fiji Court of Appeal.

205 Court transcript, 'Judges concern on Fiji Sun Article', 12 February 2008 at 2.

206 *Ibid.*

Judge shopping

3.80 The delegation was told that judge shopping has long been an issue in Fiji, despite a number of attempts to introduce systems that would prevent the practice. The delegation was informed that judge shopping has mostly taken the form of either bribing registry staff or manipulating registry processes to ensure a particular judge will hear the case. The interim Attorney-General has made strong public comments regarding judge shopping.[207]

3.81 At the Attorney-General's annual conference in December 2008, Commodore Bainimarama addressed the issue of judge shopping, saying that:

> 'In the judiciary too, there are allegations of judge-shopping. Judge-shopping is not done by lay people. It is done by lawyers, who either play the case allocation system to get a judge of their choice, or bribe court staff to get that result. Preliminary investigations show that a number of very 'respectable' law firms have been engaged in such activity. And these same lawyers and law firms are the most outspoken against the interim Government supposedly in the protection of the rule of law.'[208]

3.82 The delegation received reports that the interim government is considering reform to address the problem of judge shopping. However, it has not yet released details of any planned reform or approach beyond general comments.

3.83 The IBAHRI agrees that it is important to ensure that appropriate processes are in place to prevent judge shopping. However, the IBAHRI considers that it is not appropriate for the interim government to undertake significant reform of judicial processes, given both the potential and perception that such reform could allow illegitimate political interference into judicial processes.

Judicial perjury

3.84 In late 2004, then Justice Gates presided over a criminal trial that resulted in Ratu Inoke Takiveikata being convicted of three charges of incitement to mutiny and one charge of aiding soldiers in an act of mutiny. Following the trial, Ratu Takiveikata's lawyers filed an appeal with the Court of Appeal, claiming that during the trial Justice Gates had attended a cocktail party at the French Ambassador's residence, and had told two other guests (the Brodies) that he would ensure that Ratu Takiveikata was 'put away'.[209] Ratu Takiveikata's lawyers claimed that this constituted prejudgment of the charges and a miscarriage of justice. Justice Gates filed an affidavit disputing the claims through the Solicitor General, who represented the state. During the hearing of the appeal, both Justice Gates and the Brodies

207 See, for example, the interim Attorney-General's comments in Aiyaiz Sayed-Khaiyum, *supra* n 161. The IBAHRI is also concerned about an emerging trend of constitutional cases being heard by judges perceived to be regime-friendly judges. In these cases, there is a perception that judges are making decisions based on the military government's agenda, rather than the facts and law. The delegation heard reports that since January 2007, cases that raise significant constitutional questions have come before the High Court and Court of Appeal – including the *Qarase and Heffernan* cases – have tended to be listed before judges that are perceived to be regime-friendly. The delegation received allegations that Chief Justice Gates is manipulating court listings to ensure that constitutional cases come before particular judges. These allegations are serious and of concern, but, apart from confirming the existence of such a trend in public court records, the IBAHRI delegation was not able to confirm deny them. Should such actions be taking place, they would seriously undermine the independent adjudication of issues on the basis of fact and law in Fiji.

208 Commodore JV Bainimarama, 'Address at the 9th Attorney General's Conference 2007', Fiji Government Online, 30 November 2007, at www.fiji.gov.fj/publish/printer_10719.shtml (last accessed 19 January 2009).

209 See: *State v Takiveikata* [2008] FJSC 16; CAV0015.2007S & CAV0016.2007S (24 July 2008).

gave evidence and were cross-examined.[210]

3.85 Justices Ellis, Penlington and McPherson of the Court of Appeal found the Brodies' evidence reliable and found 'we are satisfied that the Judge did say to the Brodies "I will put him away" as they claim', quashing the convictions and ordering a retrial.[211] Justice Gates sought to appeal the finding of fact that he had lied under oath, but the Supreme Court ruled that it had no jurisdiction to rule on findings of fact by the Court of Appeal and that as Justice Gates had not been a party to the Court of Appeal case, he had no standing to appeal its findings. The Supreme Court remarked that Justice Gates was 'essentially in the same position as any witness whose evidence has not been accepted by a court'.[212]

3.86 The IBAHRI considers that the Court of Appeal's finding that Justice Gates lied under oath is a contravention of his promise, as a judge, to 'do right to all manner of people in accordance with the laws and usages of the Republic, without fear or favour, affection or ill will'. It is of concern that the Acting Chief Justice has been found by a superior court to have contravened both basic court processes and his own oath of service, undermining both the position of judges and the courts and bringing the office into disrepute.

Writing letters to clients with solicitors on the record

3.87 The delegation was told that there have been examples of the Court Registry directly contacting parties to proceedings before the Court where they have solicitors on the record. One example that was provided was from a series of hearings that followed an application by Ms Angie Heffernan. In that proceeding, the Court awarded personal costs against Ms Heffernan's lawyer, Dor Sami Naidu. He appealed the decision, but was found not to have any standing, as he was not a party to the proceeding. The delegation understands that the court registry wrote to Ms Heffernan personally, asking whether she had provided instructions to Mr Naidu. Ms Heffernan replied that she had not, and her letter was tendered as evidence that Mr Naidu did not have instructions.

3.88 The IBAHRI considers it highly inappropriate for the Court Registry to contact parties with solicitors on the record directly.

Contempt

> 'Fiji has a colourful, not always respectable history of prosecutions for scandalizing the court. I say, not always respectable, because past cases show us how the contempt powers of a court can sometimes be used to stifle legitimate submissions by counsel, and forthright and critical comments on judicial conduct, by the media.'[213]
>
> – Justice Shameem, December 2004 Attorney-General's Conference

210 *Ibid.*
211 *Takiveikata v State* [2007] FJCA 45; AAU0065.2004
212 *State v Takiveikata, supra* n 209, at 34.
213 Justice Nazahat Shameem, 'Contempt of Court', Attorney-General's Conference, December 2004.

3.89 The IBAHRI is concerned that the use – or threat of – contempt proceedings is being used to stifle legitimate discussion and debate on legal issues, the conduct of the military government, the operation of the judiciary and the publication of political comment in newspapers. Lawyers have also been inappropriately threatened with contempt proceedings by members of the judiciary and the appointees of the military government, both in court and in other public forums.

3.90 The application of contempt proceedings to political discussion is not a recent development in Fiji, although there has been an increased level of the threat or use of such proceedings to silence legitimate comment following the 2006 coup. An example of the use of contempt proceedings prior to the 2006 coup, is *Chaudhry v Attorney General*, where Mahendra Chaudhry, then leader of the Fiji Labour Party, was found guilty of contempt, after he published the following in a political pamphlet that alleged corruption in the judicial process:

> 'There has been public suspicion since the coups that many in our judicial system are corrupt. In several cases well known lawyers have been identified as receiving agents for magistrates and judges. A number of lawyers are known to arrange for them to appear before their preferred magistrates or judges.'[214]

3.91 The Court of Appeal upheld Justice Fatiaki's determination in the High Court that this amounted to contempt. The Court of Appeal considered the common law of contempt, particularly with respect to scandalising the court, and found that Chaudhry had committed contempt, saying that:

> '[his statement] went far beyond the voicing of mere suspicions. We are satisfied that his considered and unsubstantiated allegations of corruption were serious enough to constitute a real risk to the authority and independence of the Courts, and we agree with Fatiaki J that the charge against him was proved'. [215]

According to the judgment, Mr Chaudry was liable to pay F$500 costs.[216]

3.92 On 17 October 2008, the *Fiji Daily Post* published a letter to the editor criticising the decision in the *Qarase* case. The letter was re-published by the *Fiji Times* on 22 October 2008.[217] The letter described the decision as 'totally biased, corrupt and self preserving'[218] and went on to claim:

> 'The judiciary was tainted from the day Justice Daniel Fatiaki was forcefully removed and Anthony Gates unashamedly usurped his position. Gates' efforts to legalise the immunity is laughable given the immunity was designed to protect him also.'[219]

3.93 Following the initiation of proceedings against them, both newspapers subsequently publicly apologised for publishing the letter. The *Fiji Daily Post* wrote:

> 'We acknowledge that if Fiji has to move forward, all of us will need to respect the Constitution, respect the rule of law, honour the offices of President and Chief Justice and

214 *Chaudhry v Attorney-General*, Fiji Court of Appeal, Criminal Appeal No AAU0009 of 19998S (High Court Criminal Case No HBM3 of 1998), 4 May 1999.

215 *Ibid.*

216 *Ibid.*

217 'Another Fiji daily held in contempt', Fijilive, 11 November 2008, at www.fijilive.com/news_new/index.php/news/show_news/10495 (last accessed 2 January 2009).

218 'Letter to the Editor', *Fiji Daily Post*, 17 October 2008, at http://hdl.handle.net/123456789/1631 (last accessed 2 January 2009).

219 *Ibid.*

> Prime Minister under the Constitution, and value the objectivity of our judiciary… Whilst the letter-writer appeared to have written it in good faith, we apologise to our readers and to the subjects of the letter for insufficiently editing the writer's comments to allow his concerns to be read and heard in words that were less inflammatory and which did not insult the good reputation of our nation's key political and judicial institutions.'[220]

3.94 The interim Attorney-General began contempt of court proceedings shortly after, seeking a custodial sentence for the editors and publishers of each newspaper, and fines against the companies that owned the newspapers.[221] The Chief Executive of the CCF Reverend Akuila Yabaki, commented that:

> '[prosecuting] the media and other persons for contempt stifles free speech in an oppressive manner. Judges and courts are entitled to respect, but they are also open to criticism. It is vital that the media, the legal profession and the public are able to engage in open debate about matters of public interest, no matter how controversial those matters might be'.[222]

On 22 January 2009 the High Court imposed a fine of US$54,000 on the *Fiji Times*. Editor in Chief of the *Fiji Times*, Netani Rika, received three months imprisonment, suspended for twelve months, and publisher Rex Gardener was discharged on the condition that 'he enters into a bond without surety and be of good behaviour for twelve months'.[223] Similar proceedings against the *Fiji Daily Post* will be heard in April 2009.[224]

3.95 In another case, the interim Attorney-General sought leave to bring contempt proceedings against the Vice President of the FLS, Ms Tupou Draunidalo, who had made a statement on television to the effect that 'the confidence of lawyers in the judicial system let alone the public is shattered'.[225] Defending the application, the interim Attorney-General said:

> 'In bringing this proceeding, as the Attorney-General, I am acting in the public interest to ensure that the Judicial arm of the State is not scandalised and that the respect, integrity and authority of the Judiciary and the courts in Fiji are not undermined by such statements.'[226]

Ms Draunidalo responded on New Zealand radio, saying:

> 'From history tyrants have always used this proceeding as a way to stifle opposition. It's just their attempt to shut me up because I've been vocal since December 5th. You might call me a fool but I really don't care if I'm harmed physically or otherwise. It doesn't matter. My life is cheap, I'm just one individual, there are many others and the idea lives on.'[227]

On 20 November 2007 Justice Coventry gave leave for the interim Attorney-General to withdraw

220 'Apology and explanation from Fiji Daily Post, its publisher and editor', *Fiji Daily Post*, 14 November 2008.

221 'Another Fiji daily held in contempt', *supra* n 217.

222 'Court proceedings stifle free speech', *Fiji Daily Post*, 13 November 2008, at http://fijidailypost.com/news.php?section=1&fijidailynews=20203 (last accessed 2 January 2009).

223 'Fiji Times given hefty fine over controversial letter', Radio New Zealand International, 22 January 2009, at www.rnzi.com/pages/news.php?op=read&id=44321 (last accessed 22 January 2009).

224 *Ibid.*

225 Aiyaz Sayed-Khaiyum, 'Media Statement', 11 July 2007, at www.fiji.gov.fj/publish/page_9418.shtml (last accessed 2 January 2009).

226 *Ibid.*

227 'Fiji Law Society's Draunidalo says she won't be silenced', Radio New Zealand, 12 July 2007, at www.rnzi.com/pages/news.php?op=read&id=33621 (last accessed 2 January 2009).

the proceedings but awarded indemnity costs of F$20,000 against the interim Attorney-General on the basis that the proceedings had been brought 'irresponsibly' and for an 'ulterior purpose'.[228] Justice Coventry also commented that it was:[229]

> 'beyond understanding how the Attorney-General could put Ms Draunidalo at risk of fine and imprisonment for words she uttered when he himself had publicly used far stronger words only a few days earlier [against the President of the Court of Appeal]'.

The interim Attorney-General's application for leave to appeal the costs order was dismissed on 7 December 2007.[230] However, on 22 January 2008 in a hearing in chambers, Justice Byrne ordered a stay on the decision and granted leave to appeal.[231] Justice Byrne commented that 'on the face of it, costs of $20,000 awarded by the trial judge, Justice Coventry, were excessive and the judgment raised questionable points of law'.[232]

3.96 In addition, in *Bainimarama & Ors v Angie Heffernan*,[233] Justice Byrne referred to submissions by Dr John Cameron that Justice Byrne should disqualify himself from hearing the matter as 'a clear example of contempt'. Dr Cameron had claimed bias as Justice Byrne was a 'military appointee'. Justice Byrne sent a copy of his ruling to the FLS in anticipation of possible disciplinary action against Dr Cameron.[234]

3.97 In October 2007, Justice Winter referred to contempt proceedings, noting:

> '"Contempt of Court" is an unfortunate and misleading phrase. It suggests that it exists to protect the dignity of Judges. Nothing can be further from the truth. The power exists to ensure that justice shall be done; and solely to this end it prohibits acts and words tending to obstruct the administration of justice: see Jennison v Baker [1972] All ER 997.'[235]

International law and conventions on contempt of court

3.98 The right of freedom of expression is enshrined in Article 19 of the International Covenant on Civil and Political Rights, which also sets out instances in which freedom of expression can be restricted by the State. Only in a situation where a restriction is prescribed by law and is either necessary to maintain respect of the rights or reputations of others, or the protection of national security or of public order (*ordre public*), or of public health or morals, is it valid under international law (Art 19 (3)). The Human Rights Committee[236] has declared that any restrictions 'must meet a strict test of justification'.[237]

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228 See: *Attorney-General of Fiji v Draunidalo*, Miscellaneous Action No 0053 of 2007, 7 December 2007, in the High Court at Suva.

229 *Ibid.*

230 *Ibid.*

231 'Costs Excessive, says Judge', Office of the Attorney-General, 22 January 2008, at www.ag.gov.fj/default.aspx?Page=news&newsId=101 (last accessed 23 January 2009).

232 *Ibid.*

233 *Bainimarama v Heffernan* [2007] FJCA 57; ABU0034.2007.

234 *Ibid.*

235 Justice Gerard Winter, 'Decision on Recusal Application', *The State v Francis Bulewa Kean*, Criminal case no HAC 037 OF, Fiji High Court, (9 October 2007).

236 The Human Rights Committee was established to monitor the implementation of the ICCPR and its protocols by States parties.

237 *Tae Hoon Park v. Republic of Korea.* CCPR/C/64/D/628/1995. UN Human Rights Committee (HRC). 3 November 1998, para [10.3], at www.unhcr.org/refworld/docid/3f588effe.html (last accessed 19 January 2009).

Domestic case law

3.99 In many common law countries, there exists the common law offence of contempt of court by 'scandalising' the court through comment. It is rarely used. The offence of 'scandalising' the court was originally defined in the English case of *R v Gray*,[238] in which Lord Russell declared that 'any act done or writing published calculated to bring a court or a judge of the court into contempt, or lower his authority, is a contempt of court'. He offered however the qualification that 'judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court'.[239] The Privy Council has held that the field of application is narrowed by 'the need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern'.[240]

3.100 In the Canadian case of *R v Koypyto*, the Ontario Supreme Court held that the offence of 'scandalising' is incompatible with the Canadian Charter of Human Rights. Mr Kopyto made comments to a reporter about a court's decision which included that it was a 'mockery of justice' and that Mr Kopyto had 'lost faith in the judicial system to render justice'.[241] The Court concluded, per Cory JA, that 'the experience of other free and democratic jurisdictions which possess a constitutional guarantee of freedom of expression, does not support the argument that the offence constitutes a permissible limit on that protection'.[242]

3.101 However, many other national jurisdictions including Fiji have continued to prosecute the offence; for example Fiji (*Chaudhry v Attorney-General*),[243] Zimbabwe (*In re: Chinamasa*),[244] Hong Kong (*Wong Yeung Ng v Secretary of State for Justice*)[245] and South Africa (*S v Mamabolo*).[246]

International case law

3.102 The European Court of Human Rights considers that contempt of court and freedom of expression must be carefully balanced. The Court has held in *Sunday Times v The United Kingdom* that to be valid any restrictions on freedom of speech must comply with three separate principles: the principle of legality; the condition of legitimate purpose; and the principle of necessity in a democratic society. The European Court of Human Rights addressed the question of contempt of court by a lawyer in the case of *Schopfer v Switzerland*.[247] Mr Schopfer was disciplined by a professional lawyers' body for making critical remarks to the press about the actions of a district prefect and two district clerks in a pending criminal case in which Mr Schopfer was the defence counsel. The Court considered that 'the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence' and held that, with regard to 'the key role of lawyers in this field, it is legitimate

238 *R v Gray* [1900] 2 QB 36, 40.
239 *Ibid*, per Lord Russell CJ.
240 *Ahnee, Sydney Selvon and Le Mauricien v DPP* [1999] 2 WLR 1305 citing *Reg v Gray* [1900] 2 QB 36, 40; *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322,335.
241 *R v Kopyto* (1987) 47 DLR (4th) 213.
242 *Ibid.*
243 *Chaudhry v Attorney-General* [1999] FJCA 27.
244 *In re: Chinamasa* (2000) 12 BCLR 1294.
245 *Wong Yeung Ng v Secretary of State for Justice* [1999] HKCFA 46.
246 *S v Mamabolo* (2001) 3 SA 409.
247 *Schopfer v Switzerland* (56/1997/840/1046) 20 May 1998.

to expect them to contribute to the proper administration of justice, and thus maintain public confidence therein'.[248] However, the Court reiterated that the need to maintain public confidence in a judiciary must be balanced with 'the public's right to receive information about questions arising from judicial decisions, the requirement of the proper administration of justice and the dignity of the legal profession'.[249]

3.103 The IBAHRI is concerned that the use of contempt powers in Fiji does not accord with international principles.

Judges seeking to intervene in cases where they are the trial judge

3.104 The delegation was told that there have been instances of judges intervening in appeal cases where they were the trial judge. If true, this illustrates the extent of the division across the bench and is an example of how clashes of personality can manifest themselves as inappropriate conduct that weakens the judiciary and the court system. It should be noted that these reports date back before the 2006 coup.

3.105 One example of alleged inappropriate intervention came about in the course of appeals from criminal proceedings presided over by Justice Shameem in 2004.[250] One of the defendants convicted by Justice Shameem of taking unlawful and treasonous oaths, the politician Ratu Rajuita Vakalalabure, appealed unsuccessfully to the Court of Appeal. He then applied to the Supreme Court for special leave to appeal, which was granted, and the matter was heard before Chief Justice Fatiaki, Justice Kenneth Handley and Justice Scott.

3.106 Justice Shameem sought to intervene in the appeal, arguing that the level of personal animosity that existed between herself and Justice Scott meant that he would be biased when determining an appeal from a decision she had made. Justice Shameem attempted to file a summons with a supporting affidavit. A full bench of the Supreme Court later summarised this affidavit:

> 'The affidavit sworn by Shameem J commenced by noting that she had been the trial judge in the matter of Ratu Rakuita Vakalalabure, then before the Supreme Court. She said that she had only discovered that Scott JA had been a member of the bench hearing the appeal from reading the Fiji Times of 18 October 2005. She said that she wished to place evidence before the Supreme Court that would demonstrate actual, and apprehended, bias towards her, on the part of Scott JA. She deposed to a series of statements and other acts on the part of Scott JA that she claimed demonstrated his continuing hostility towards her. Indeed, she alleged that Scott JA was similarly biased against another member of the High Court, Gates J, and a former member of that Court, Byrne J. It is important to appreciate that she accused Scott JA of "actual malice" towards her.'[251]

The Chief Justice asked the Registrar to refer the matter to Justice Handley, who gave a direction to the Registrar that:

> '… A judicial officer is not a necessary or proper party to an appeal from his or her

248 *Ibid.*
249 *Ibid.*
250 *State v Seniloli* [2004] FJHC 49; HAC0028J.2003S.
251 *Vakalalabure, supra* n 180, at 19.

decision, or to any appeal to a Court of final appeal from an intermediate court of appeal. It is unheard of for a Judge to intervene, or seek leave to intervene in such an appeal, even in a case where his or her judgment is severely criticised, or he or she is said to be disqualified for actual or ostensible bias.'[252]

3.107 The full bench of the Supreme Court upheld Justice Handley's findings on appeal, dismissing Justice Shameem's application for leave to intervene, saying:

> 'The hostility that exists between Scott JA, and Shameem J, and appears to be reciprocal, is now a matter of public record. It is known that their difficulties go back at least as far as the tumultuous events of May 2000. Their differences are obviously both real and personal. It is a matter of regret that there appears to be little that can be done to persuade them to reconcile. It may be accepted, as Shameem J, contends, that she is better placed than either the petitioner or the Director of Public Prosecutions, to appreciate the level of hostility that she regards Scott JA as manifesting towards her. It may also be accepted that she is in a better position to place evidence before the Court that might support her claim of actual bias on his part. Neither of these facts, if true, gives her "a special interest" in the proceeding of a kind that would warrant granting leave to intervene. Nor does her position as a judge of the High Court. She is no more bound, by virtue of that position, to uphold the Constitution, than is any other citizen of this country, irrespective of whether that person has taken an oath to do so.' [253]

3.108 The Court found that Justice Shameem did not have standing to intervene in the appeal and that if she did, her intervention would be refused as a matter of discretion.[254]

Separation of powers

3.109 Section 118 of the Fiji Constitution states that 'The judges of the State are independent of the legislative and executive branches of government.'

3.110 The delegation was told that the military government has blurred the distinction between the three branches of government. This erosion of the separation of powers has been demonstrated by statements and activities of both members of the judiciary and the interim Attorney-General. A number of key positions within the executive, such as the interim Attorney-General and the Solicitor General, have been taken by military appointees, while there are now also numerous military officials working within the public service and police service.

The interim Attorney-General and the judiciary

3.111 Under the Constitution, the Attorney-General is a Minister and the government's chief legal adviser.[255] Mr Aiyaz Sayed-Khaiyum was sworn in as interim Attorney General and Minister for Justice, Electoral Reform and Anti-Corruption on 8 January 2007 along with seven other Ministers in the interim government.[256] According to the submission to the High Court

252 *Ibid*, at 20.
253 *Ibid*, at 116–118.
254 *Ibid*, at 120.
255 Section 100, Fiji Constitution, *supra* n 19.
256 'Eight Cabinet Ministers sworn in the new interim government', Fiji Government Online Portal, 8 January 2007, at www.fiji.gov.fj/publish/page_8147.shtml (last accessed 21 January 2009).

at Suva of Dr Cameron in *Heffernan v Bainimarama*,[257] Mr Sayed-Khaiyum had not been appointed in accordance with provisions of section 100 of the Constitution, in particular, that of section 100(3) that requires the Attorney-General to be a member of either the House of Representatives or the Senate.[258] Justice Singh held that Dr Cameron's submission, which argued section 15 of the Crown Proceedings Act did not apply to bar his client's suit on the grounds that it only applied to a 'lawful state' (and as a corollary, a lawful 'representative of the State'), held 'much force' and was 'clearly arguable'.[259]

3.112 It was reported to the delegation that there is a concern that fair comment regarding the independence of the judiciary is immediately and aggressively denounced by the interim Attorney-General. He has also been critical of other governments making statements on the rule of law and democracy in Fiji. For example, at the 2008 Attorney-General's conference, held in December 2008, he made the comment that:

> 'Fiji welcomes assistance from neighbouring states in its attempt to secure the necessary checks and balances… However we cannot and should not permit agendas whose end product is the control and domination of our affairs under the guise of good governance or the rule of law.'[260]

3.113 On the other hand, the interim Attorney-General has strongly criticised those judges perceived to be outside the interim regime's influence. For example, in response to Justice Gordon Ward's comments in mid-2007 that appointment or reappointment of judges would in the circumstances be contrary to the terms of the Constitution, the interim Attorney-General accused Justice Ward of prejudging matters before the court and compromising his judicial independence.[261] On this basis the interim Attorney-General called for Justice Ward's resignation as the President of the Fiji Court of Appeal.[262] In a press statement on 13 February 2008, the interim Attorney-General claimed that Justices Ward and Coventry (both of whom had by then left their judicial offices in Fiji) had 'crossed the line' and compromised their judicial independence.[263] When Justice French published an article criticising the situation regarding the judiciary in Fiji, the interim Attorney-General released a press statement which included the following personal attack:

> 'This article coming from a sitting judge of the Fiji bench is un-judicial and quite shocking.
>
> Judges do not in my experience write articles in the national newspapers on controversial topics, nor mention cases which are still before the courts and which are likely to come before the author. Justice French's decision arrived at firmly now not to renew his term, with the reasons given, implies prejudgment of issues in cases that are likely to come before

257 *Heffernan v Bainimarama* [2007] FJHC 21.

258 *Ibid.*

259 Although the order for relief was overturned on appeal, it was on the grounds that the trial judge failed to apply the proper test (being 'more likely than not', rather than 'clearly arguable') in exercising his discretion to grant relief, *Bainimarama v Heffernan* [2008] FJCA 78.

260 Mr Sayed-Khaiyum, *supra* n 161.

261 See: 'Fiji's interim Attorney-General calls for senior judge to resign', Radio New Zealand International, 10 June 2007, at www.rnzi.com/pages/news.php?op=read&id=32871 (last accessed 23 January 2009); and 'Judges yet to be named for court', *Fiji Times*, 23 August 2007, at www.fijitimes.com/story.aspx?id=69035 (last accessed 23 January 2009).

262 'Judges yet to be named for court', *ibid.*

263 'Press Statement by Attorney-General, Aiyaz Sayed-Khaiyum', Fiji Government Online, 13 Februrary 2008, at www.fiji.gov.fj/publish/printer_11204.shtml (last accessed 23 January 2009).

the Supreme Court.

In making his announcement now, Justice French raises questions that reflect on the impartiality of the entire bench. He forgets Lord Denning's warning of the need to keep the judiciary insulated from the controversies of the day. "So long as a judge keeps silent", he said "his reputation for wisdom and impartiality remains unassailable".

These public statements merely foster recusal applications which are embarrassing at this level of appellate court, Fiji's final court of appeal. He should have known better. Would a judge of the High Court of Australia, Australia's final court of appeal, have dared to write such an article reflecting on litigation which was to come before the court? Such an opinion publicly expressed, also puts improper pressure on trial judges when an appellate judge appears to indicate the answer to litigation before judgment is given.

Should Justice French not have waited for the expiry of his current term as a judge and until he had left the Fiji bench?'[264]

3.114 The interim Attorney-General is widely considered to have stepped outside the legitimate bounds of his position and interfered with the judiciary on a number of occasions. For example, the interim Attorney-General requested Justice Shameem to convene the meeting of the JSC that led to Justice Gates' appointment as Acting Chief Justice and has been implicated as involved in the granting of after hours *ex parte* stays in the Court of Appeal in cases where the High Court has made orders that are unfavourable to the interim Government (see paragraphs 3.69 – 3.76).

Politicisation and militarisation of the police and the public service

'At some stage the appointment of the Chairman of the Public Service Commission was terminated by the Republic of Fiji Military Forces, and another person was appointed as Chairman. The circumstances in which this occurred are not clear, but it does not appear that either the termination of the appointment of the Chairman of the Public Service Commission, or the appointment of the new Chairman, was carried out in accordance with the provisions of the Constitution.'[265]

3.115 The delegation received reports that the interim government has made a significant number of political appointments to positions within the executive and military appointments to both the police and the public service. There is a perception within the Fijian community that military officers involved in the December 2006 coup have been rewarded with high profile positions within other branches of government. For example, the current Commissioner

264 'An o'er speaking Judge, is like an ill-tuned cymbal', Fiji Government Online Portal, 7 May 2008, available at: www.fiji.gov.fj/publish/page_11788.shtml (last accessed 11 January 2009).

265 Dingeman and Hawkins, *supra* n 158, p 3.

of Police was formerly a military officer, and in his role as a representative of the military government, was involved in the removal of Chief Justice Fatiaki from his office. The delegation was told that the current number of military personnel employed in non-military positions within the public service and government is unprecedented in Fiji's history.

3.116 On Wednesday 6 December 2006, immediately following the takeover, the military government terminated the following appointments by notice in the Gazette: the Police Commissioner, the Assistant Police Commissioner, the Solicitor General and the Supervisor of Elections. Under the Constitution, the Police Commissioner is appointed by the Constitutional Officers Commission in consultation with the relevant Minister,[266] and the Solicitor General is appointed by the JSC following consultation with the Attorney-General.[267] The Supervisor of Elections is, like the Police Commissioner, appointed by the Constitutional Offices Commission in consultation with the relevant Minister.[268]

3.117 Stuart Hugett, the Chair of the Public Service Commission, who was also acting as the Chair of the Constitutional Offices Commission, was dismissed by Commodore Bainimarama shortly after the military takeover on the grounds of conflict of interest.[269]

3.118 This raises questions of the constitutionality of all the forementioned positions. In the case of the Public Service Commission, if it isn't properly constituted, other related bodies to which the Chair is appointed, including the Constitutional Offices Commission and the JSC, may also be improperly constituted.

3.119 The position of Ombudsman (who is automatically the Chair of the Fiji Human Rights Commission) had been open for some time prior to the coup, as the Constitutional Offices Commission was considering its choice of nomination. A newly constituted Constitutional Offices Commission appointed Dr Shaista Shameem (Justice Shameem's sister) as Ombudsman. The delegation was told she is viewed in Fiji as a supporter of the military government and her term as Chair of the Human Rights Commission has been widely criticised. This is dealt with in more detail at paragraphs 5.4 – 5.17.

Public confidence in the judiciary

The importance of appearance in the independence of the judiciary

3.120 A common claim made by the interim regime has been that no independent review has found actual interference by the executive in the judiciary. While the fallacy of this claim was outlined above at paragraphs 2.63 – 2.78, the statement itself warrants further consideration.

3.121 There is extensive commentary in international law that 'actual' interference is not the only concern when considering the independence of the judiciary, but that appearances are also very important. This section will consider the law, conventions and commentary that exist on the importance of the appearance of independence, followed by an analysis as to the

266 Sections 146(1)(f) and 111, Fiji Constitution, supra n 19.

267 Section 113, Fiji Constitution, *ibid.*

268 Sections 146(1)(a), 79, Fiji Constitution, *ibid.*

269 Dr Shaista Shameem, 'The Assumption of Executive Authority on December 5 2006 by Commodore JV Bainimarama, Commander of the Republic of Fiji Military Forces: Legal, Constitutional and Human Rights Issues.', Human Rights Commission, p 20.

appearance of independence of the judiciary in Fiji.

International law, conventions and commentary

3.122 The right to a hearing before an independent and impartial tribunal is protected by Article 6(1) of the European Convention on Human Rights, Article 9 of the Universal Declaration of Human Rights, Article 14(1) of the International Covenant on Civil and Political Rights, Article 8(1) of the American Convention on Human Rights, and Article 7(1) of the African Charter for Human Rights. The requirement of impartiality has been defined by the European Court of Human Rights to include both subjective and objective elements. See, for example, the case of *Daktaras v Lithuania*:[270]

> '… there are two aspects to the requirement of impartiality in Article 6 § 1 of the Convention. First, the tribunal must be subjectively impartial, that is, no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is presumed unless there is evidence to the contrary. *Secondly, the tribunal must also be impartial from an objective viewpoint, meaning it must offer sufficient guarantees to exclude any legitimate doubt in this respect* (see Academy Trading Ltd and Others v. Greece, no. 30342/96, § 43, 4 April 2000, unreported)… Under the objective test, *it must be determined whether there are ascertainable facts, which may nevertheless raise doubts as to their impartiality. In this respect even appearances may be of a certain importance*. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings' [emphasis added].[271]

3.123 The Bangalore Principles of Judicial Conduct[272] (the Principles), were adopted by the Judicial Group on Strengthening Judicial Integrity (the Judicial Integrity Group), a round-table meeting of Chief Justices, in November 2002 and endorsed at the 59th session of the UN Human Rights Commission in 2003. The Group drew from 24 national judicial codes of conduct, together with regional and international instruments, to draft a set of principles related to six 'core values', to be adopted by States[273] and used as a model for individual state judicial codes. The Preamble recognises the importance of maintaining not only actual independence and impartiality but also the appearance thereof, in order to maintain 'public confidence in the judicial system and in the moral authority and integrity of the judiciary [which] is of the utmost importance in a modern democratic society'.[274] In its commentary to the Principles, the Judicial Integrity Group cites Frankfurter J in *Baker v Carr*,[275] and remarks that:

> 'The Court's authority… possessed of neither the purse nor the sword… ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by

270 *Daktaras v Lithuania* (Application no 42095/98), Judgment of 10 October 2000.

271 *Ibid* at para 30–32, following the decision in *Gregory v United Kingdom*, European Court of Human Rights, (1997) 25 EHRR 577.

272 A copy of the Bangalore Principles of Judicial Conduct can be found at www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (last accessed 19 January 2009).

273 Fiji has endorsed these principles, see: Justice Gerard Winter, 'Judicial Guidelines: The Five Way Test', *International Judicial Monitor*, Vol 1(2), May 2006, at www.judicialmonitor.org/archive_0506/globaljudicialdialogue.html (last accessed 19 January 2009); or Laisenia Qarase, 'Hon Qarase – Prime Minister's Corporate Governance Summit', Fiji Government Online, 12 March 2005, at www.fiji.gov.fj/cgi-bin/cms/exec/view.cgi/63/4256/printer (last accessed 19 January 2009).

274 Preamble, Bangalore Principles of Judicial Conduct, *supra* n 272.

275 *Baker v Carr*, Supreme Court of the United States, (1962) 369 US 186.

the Court's complete detachment, *in fact and in appearance*, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.'[276] [emphasis added]

3.124 The Preamble also asserts that it is the responsibility of judicial officers to 'strive to enhance and maintain confidence in the judicial system'.

3.125 Principle 1.3 of the Bangalore Principles states that 'A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but *must also appear to a reasonable observer to be free therefrom***.'**[277] [emphasis added.] The Judicial Integrity Group expands upon this principle, remarking that:

> 'It is important that the judiciary should be perceived as independent, and that the test for independence should include that perception. It is a perception of whether a particular tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees. An individual who wishes to challenge the independence of a tribunal need not prove an actual lack of independence, although that, if proved, would be decisive for the challenge. Instead, the test for this purpose is the same as the test for determining whether a decision-maker is biased. *The question is whether a reasonable observer would (or in some jurisdictions "might") perceive the tribunal as independent.* Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, the test for independence is thus whether the tribunal may be reasonably perceived as independent.'[278] [emphasis added.]

3.126 Principle 2.1 states that 'Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made'.[279] The accompanying commentary remarks that:

> 'Impartiality is the fundamental quality required of a judge and the core attribute of the judiciary. *Impartiality must exist both as a matter of fact and as a matter of reasonable perception***.** If partiality is reasonably perceived, that perception is likely to leave a sense of grievance and of injustice having been done, thereby destroying confidence in the judicial system. The perception of impartiality is measured by the standard of a reasonable observer. *The perception that a judge is not impartial may arise in a number of ways, for instance, by a perceived conflict of interest, by the judge's behaviour on the bench, or by the judge's out-of-court associations and activities***.'**[280] [emphasis added.]

3.127 The Judicial Integrity Group relies on the European Court of Human Rights' interpretation of the two elements of impartiality in *Gregory v United Kingdom***,**[281] which maintained that impartiality must be both subjectively and objectively observed.

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276 *Ibid*, per Frankfurter J.

277 Bangalore Principles, Principle 1.3, *supra* n 272.

278 'Commentary on The Bangalore Principles of Judicial Conduct', *The Judicial Integrity Group*, March 2007, paragraph 37, at www.coe.int/t/dghl/cooperation/ccje/textes/BangalorePrinciplesComment.PDF (last accessed 19 January 2009).

279 Bangalore Principles, Principle 2.1, *supra* n 272.

280 'Commentary on The Bangalore Principles of Judicial Conduct', *supra* n 278.

281 *Gregory, supra* n 271.

3.128 Principle 2.1 also states that 'a judge shall perform his or her judicial duties without favour, bias or prejudice'. The Judicial Integrity Group clearly states that the avoidance of the apprehension of bias is as fundamentally important as the prohibition against actual bias. As Lord Hewart CJ stated in *R v Sussex Justices,* ex parte *McCarthy* that 'justice must not only be done, but should manifestly and undoubtedly be seen to be done'.[282]

International bodies

3.129 The importance of the appearance, not just the existence, of impartiality has been supported in many regional and international forums discussing judicial conduct. The Consultative Council of European Judges has stated that 'not merely the parties to a particular dispute, but society as a whole must be able to trust the judiciary'.[283]

3.130 The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, of which Chief Justice Tuivaga (on behalf of Fiji) is a signatory, includes a provision that 'Judges shall uphold the integrity and independence of the judiciary by avoiding impropriety and the appearance of impropriety in all their activities.'[284]

3.131 Many distinguished judicial officers have also commented upon the importance of freedom from any apprehension of partiality or bias. Sir Gerard Brennan, then Chief Justice of Australia, in addressing the National Judicial Orientation Programme in 1996 remarked that 'it is only when the community has confidence in the integrity and capacity of the judiciary that the community is governed by the rule of law'.[285]

3.132 Justice Sandra Day O'Connor of the United States Supreme Court has similarly argued that 'Judges must not only avoid impropriety, but also the appearance of impropriety, if public confidence in the judiciary is to be maintained.'[286]

Case law

3.133 The European Court of Human Rights in *Incal v Turkey*[287] considered that the question was not simply whether an accused person would perceive a lack of impartiality, but whether the court appears impartial to the reasonable person (and therefore the general public). In this case, the European Court looked at 'aspects of [the] judges' status' in assessing whether the National Security Court could be seen to be independent and impartial. In that case, the court noted with concern the membership of some judges in the military, pointing out that those judges have strong links to the executive and remain subject to military discipline.

282 [1924] 1 KB 256 at 259.

283 'Opinion no 1 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges (Recommendation No R (94) 12 on the independence, efficiency and role of judges and the relevance of its standards and any other international standards to current problems in these fields)', Council of Europe, 23 November 2001, at https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2001)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3 (last accessed 19 January 2009).

284 'Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region', as amended at Manila, 28 August 1997, at http://lawasia.asn.au/beijing-statement.htm (last accessed 19 January 2009).

285 Sir Gerard Brennan, 'The Role of the Judge', Remarks at the National Judicial Orientation Programme, Australia, 13 October 1996, at www.hcourt.gov.au./speeches/brennanj/brennanj_wollong.htm (last accessed 19 January 2009).

286 Sandra Day O'Conner, 'The Importance of Judicial Independence', Remarks at the Arab Judicial Forum, Bahrain, 15 September 2003, at http://usinfo.state.gov/journals/itdhr/0304/ijde/oconnor.htm (last accessed 19 January 2009).

287 *Case of Incal v Turkey* (Application no 22678/93), Eur Crt HR Judgment of 9 June 1998: (41/1997/825/1031).

The Court concluded that:

> 'In deciding whether there was a legitimate reason to fear that a particular court lacks independence and impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts could be held to be objectively justified.'[288]

3.134 The question of impartiality ultimately leads back to the central principle that the maintenance of public confidence in the judicial system is of the utmost importance. The principle was at the core of the Court's decision in *Ferrantelli and Satangelo v Italy* in which an appeal against conviction was made on the basis that the presiding judge had previously presided over the conviction of a co-accused. In this case, the applicants:

> 'did not question the personal impartiality of the judge concerned. It remained for the Court to determine whether, quite apart from the judge's conduct, there were ascertainable facts which might raise doubts as to his impartiality. In this respect even appearances might be of a certain importance. *What was at stake was the confidence which the courts in a democratic society must inspire in the public.* This implied that in deciding whether in a given case there was a legitimate reason to fear that a particular judge lacked impartiality, the standpoint of the accused was important but not decisive. What was decisive was whether that fear could be held objectively justified'.[289] [emphasis added]

3.135 This assessment has made it clear that actual interference in the independence of the judiciary is not a necessary condition for the independence of the judiciary to be threatened.

3.136 Determining whether there is a legitimate fear that the judiciary in Fiji is compromised is a difficult task. Different members of society appear to view the situation differently. However, a majority of the stakeholders who spoke with the delegation raised significant concerns about the independence of the judiciary in Fiji, and identified examples of cases where they considered these concerns had been realised. The delegation also encountered a strong perception in the legal community that the general public considered the judiciary to be compromised. Excluding the suspension of Chief Justice Fatiaki, the view generally appeared to be that while there was no identifiable illegitimate executive interference in commercial disputes or general matters before the courts, there appeared to be serious concern in relation to the existence of interference or influence over constitutional cases or other cases that could impact on the legitimacy of the interim regime.

3.137 The interim regime and various members of the judiciary have made public statements attesting to the independence of the judiciary in Fiji. These stakeholders were contacted but declined to speak with the delegation during its review. Therefore, the assessment of their views is based solely on public statements that have appeared in the media and on the Office of the Attorney-General of Fiji's website.[290]

3.138 In addition to its discussions with the delegation, another method for determining the public perception of the judiciary in Fiji is possible from a consideration of the media coverage of the judiciary over recent years.

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288 *Ibid.*

289 *Case of Ferrantelli and Santangelo v Italy* (Application no 19874/92), Judgment of 7 August 1996.

290 Available at www.ag.gov.fj (last accessed 22 January 2009).

3.139 For example, in February 2008, the *Fiji Times online* published an article which reported that the Fiji Indigenous Lawyers Association publicly supported the FLS's claims that 'the appointments of puisne and appeal judges of the Fiji Court of Appeal since the events of December 2006 were illegal'.[291]

3.140 Since the coup, there have been widespread accusations that Fiji's judicial system has lost its independence.[292] For example, the appointment of new appeal judges by the Acting Chief Justice was criticised by the Young People's Concerned Network in the *Fiji Times*, which stated that it was inappropriate to make such appointments when the legitimacy of the Acting Chief Justice's appointment was before the courts.[293] Spokesperson for the Network, Peter Waqavonovono stated that the newly appointed appeal judges 'carry within them into the highest court in the nation questionable agendas and their appointments are illegal and unconstitutional', and noted that the previous panel had refused to renew their contracts on the basis that such action would have been illegal.[294]

3.141 Another non-governmental organisation, the Pacific Centre for Public Integrity, called for the resignation of one of the new appointees, Justice Jocelynne Scutt, following public comments she had made on a report on elections by the Human Rights Commissioner.[295] The elections were the subject of some ongoing litigation, but Justice Scutt had reportedly commended the Human Rights Commission's report on the credibility of the 2006 elections.[296] Spokesperson for the Pacific Centre Angie Heffernan claimed that these comments had compromised Justice Scutt's position on the bench.[297] Attempts by the Pacific Centre to seek disciplinary action through Justice Scutt's membership of the Victorian Law Society were ineffective, as it claimed it had no jurisdiction over foreign activities.[298] Fiji Women's Rights Movement spokesperson Tara Chetty was reported in the Australian press as stating:

> 'It's easy for women's groups to be seduced by the appointment of someone with a strong track record in women's rights. Unfortunately, our foundation believes in democracy and the rule of law, so we cannot support the appointment under the current interim regime, which we see as unlawful.'[299]

3.142 The concerns about Justice Scutt's comments were also made by then-FLS President Isereli Fa, which were reported in the *Fiji Times*.[300] The interim Attorney-General rejected this criticism, stating that 'I agree that all judges should stay out of the political arena. They should avoid making public statements in particular in those areas which may be the subject of litigation. However, scrutinising her comments carefully, her comments do not appear to have crossed

291 'Fijian lawyers support Fiji Law Society call', *Fiji Times Online*, 10 February 2008, at www.fijitimes.com/story.aspx?id=80965 (last accessed 22 January 2009).

292 'Fiji accused of threats to stop judicial review', TVNZ, 26 November 2008, at http://tvnz.co.nz/view/page/536641/2334356 (last accessed 22 January 2009).

293 'Appeal Judges Opportunists', *Fiji Times*, 12 February 2008, at www.fijitimes.com.fj/story.aspx?id=81124 (last accessed 1 November 2008).

294 *Ibid.*

295 'Judges should resign: PCPI', FijiLive, 7 February 2008, at www.fijilive.com/news_new/index.php/news/show_news/1724 (last accessed 11 January 2009).

296 *Ibid.*

297 *Ibid.*

298 Chris Merrit and Nicola Berkovic, 'Fiji's democracy lobby tries to scuttle Scutt appointment', *The Australian*, 14 March 2008, at www.theaustralian.news.com.au/story/0,25197,23371137-16953,00.html (last accessed 22 January 2009).

299 Nicola Berkovic, 'Judge criticised over Fiji posting', *The Australian*, 21 December 2008, at www.theaustralian.news.com.au/story/0,25197,23347340-2702,00.html (last accessed 9 January 2009).

300 'Registrar defends judge', *Fiji Times*, 9 February 2008, at www.fijitimes.com/story.aspx?id=80813 (last accessed 31 December 2008).

that line – that line which would compromise her – her independence.'[301]

3.143 The Fiji press has maintained commentary on the progress of the various legal challenges against the judiciary. For example, the *Fiji Times*, within the context of the FLS's challenge to his appointment in the High Court, reported the FLS's view that the Acting Chief Justice's appointment was illegal.[302]

3.144 On his part, the interim Attorney-General has maintained a barrage of press statements claiming that the judiciary is independent. He has responded defensively to criticisms of the judiciary, and has publicly criticised those who have spoken out on their concerns. However, some of his criticisms have been misleading. For example, following a speech by Graham Leung to the LAWASIA conference in Kuala Lumpur in October 2008, the interim Attorney-General released a statement alleging that Leung was 'not candid, selective in his analysis and not upfront when presenting his views on the judiciary in Fiji'.[303] One of the pieces of 'evidence' he cited to support this criticism was that 'the LAWASIA fact finding mission including the EU fact finding mission did not find any interference with the judiciary by the Executive following the appointment of the interim Government by His Excellency our President. This very important fact was not revealed to the conference by Graham Leung'.[304] As examined above at paragraphs 2.63 – 2.78, this claim is inaccurate and is not supported by any of the reports of these missions. The interim Attorney-General noted towards the end of his speech that 'the law firm of Howards and Munro Leys [Leung's law firm and another whose members have criticised the coup] no longer get legal work from the government'.[305] This could be seen as a veiled threat against firms which are critical of the regime. Alternatively, it could be an attempt to explain why these law firms would be critical of the interim regime and its impact on the judiciary.

3.145 The interim Attorney-General has also defended the judiciary in response to criticisms by other highly respected non-governmental organisations, including Amnesty International. In rejecting Amnesty International's claim that the judiciary has been compromised, he stated 'to date not a single person has been able to show a single shred of evidence to say the executive has interfered with the independence of the judiciary'.[306] To many minds the suspension of Chief Justice Fatiaki by the interim regime and his removal from office by the interim regime could be considered interference in judicial independence. The interim Attorney-General's comments also fail to appreciate the importance of the appearance of independence, as considered at 3.119 – 3.159.

3.146 The interim Attorney-General has stated:

> 'Fiji now has a full complement of very highly qualified, respected and eminent judges sitting in the High Court, the Court of Appeal, and the Supreme Court. They comprise a mixture of local and expatriate judges. The public continues to bring matters before

301 Office of the Attorney-General, Untitled News Article, 12 February 2008.

302 Sakiasa Nawaikama, 'CJ illegal, says FLS', *Fiji Times*, 25 November 2008, at www.fijitimes.com/story.aspx?id=107103 (last accessed 11 January 2009).

303 'A-G responds to Leung's attack on the judiciary', Office of the Attorney-General, 2 November 2008, at www.ag.gov.fj/default.aspx?Page=news&newsId=247 (last accessed 22 January 2009).

304 *Ibid.*

305 *Ibid.*

306 'Amnesty International's report undermines its credibility: A-G', Office of the Attorney-General, 29 May 2008.

the courts, they are heard in a timely manner, and in the event they do not receive the judgment they want, they are able to exercise the option to appeal the decision. It is business as usual for the courts in Fiji.'[307]

3.147 He has strongly criticised judges who have spoken about the situation within the judiciary in Fiji. For example, Justice French wrote an article for the *Fiji Times* entitled 'Judges face a legal dilemma' where his Honour commented that future decisions made by judges appointed by the military regime would require consideration of the validity of the regime:

> 'The judge so appointed may vow honestly and fearlessly to uphold the rule of law in accordance with his or her oath. But when faced with a challenge to the lawfulness of the government itself, such a judge could be seen to have a conflict of interest.'[308]

Judges speak out

3.148 According to various reports, the judiciary has also defended its independence publicly, for example, Acting Chief Justice Gates has claimed that what is important is 'the end products of our work, the judgements however, are the real hallmark of our utility'.[309] Given the numerous criticisms of some recent judgments, and the delay in the release of such judgments, it is difficult to regard this as a valid defence to suggestions of lack of independence.

3.149 Another of the new appointees, Justice Thomas Hickie, has also publicly defended the judiciary during the short period of his tenure:

> 'Over the past three months during my time working in the High Court at Suva and Court of Appeal I have never met the Interim Prime Minister, I have never met the Attorney-General or any other member of the Interim Government… Since being sworn in on 3 March 2008, I have never been told how to deal with a case'.[310]

3.150 Similarly, Justice Gounder is reported to have stated 'No Minister or any member of the Interim Government has ever interfered in my work though I have made decisions against the State'.[311] He said he welcomed criticism, although he is reported to have stated 'when criticisms are made, it should be constructive criticism based on specific conduct of judiciary rather than attacking in a very open unconstructive manner'.[312]

3.151 From his public statements, the interim Attorney-General appears to consider that the criticisms of the judiciary are based in personal political preferences and vendettas, rather than in an interest in the rule of law. For example, he has stated:

> '[T]here are some practitioners and plaintiffs who are bent on destroying the integrity of individual judges and the judiciary at large… If they are indeed concerned about the

307 'Judicial Courts or Media Courts? Legal Professionalism and Responsible Reporting', Office of the Attorney-General, 29 April 2008, at www.ag.gov.fj/default.aspx?Page=news&newsId=142 (last accessed 31 December 2008).

308 Robert French, 'Judges face a legal dilemma', *Fiji Times Online*, 3 May 2008, at www.fijitimes.com/story.aspx?id=88102 (last accessed 11 January 2009).

309 'Fiji judiciary survives', *supra* n 107.

310 'Judge clears air of uncertainty', Office of the Attorney-General, 4 June 2008, at www.ag.gov.fj/default.aspx?Page=news&newsId=176 (last accessed 31 December 2008).

311 'Fiji's judiciary is still independent', Office of the Attorney-General, 21 November 2008, at www.ag.gov.fj/default.aspx?Page=news&newsId=260 (last accessed 31 December 2008).

312 *Ibid.*

judiciary in Fiji, they should leave the judges alone and let the judges do their jobs without fear or favour, and decide cases brought before them based on the law and the evidence brought to them.'[313]

International perceptions

3.152 Sir Thomas Eichelbaum, the retired Chief Justice of New Zealand and former Judge of the Fiji Court of Appeal, has spoken about the judiciary in Fiji:

> 'One of the foundations of judicial independence is the support of the community. Not only lawyers, but also the wider community; business people, professionals, the man and woman in the street. In most societies, there are enough people about who, without any evidence, are prepared to believe the judiciary is simply a tool of the government. If the actions of the judiciary provide any support for this view, the ranks swell…
>
> [T]he judiciary must never be seen to be taking part in matters that are properly within the realm of politics. I say "be seen" deliberately because even the appearance of straying into forbidden territory is enough to be damaging to judicial independence. We all know this, yet Fiji and Vanuatu provide stark examples of how easy it is for Judges to infringe; even experienced Judges, in the case of Fiji.'[314]

3.153 As mentioned above, Amnesty International's 2008 report criticised the interim regime's impact on freedom of expression and the justice system. In particular, it noted that the Chief Justice had been indefinitely suspended after being forced to take leave in January. Further, Amnesty International noted that:

> '[t]he President of the Fiji Court of Appeal challenged the legality of the interim Government, prompting the interim Attorney-General to call for his resignation in June. In September, six prominent judges of the Fiji Court of Appeal resigned after not being invited to sit on the court'.[315]

3.154 Human Rights Watch also expressed concern about the situation in Fiji in 2007 following the coup, and urged the President and interim Prime Minister Commodore Bainimarama to protect the independence of the judiciary and the media.[316]

3.155 Governments in the region have understandably also been very concerned about the developments in Fiji, particularly as it relates to the independence of the judiciary. In March 2008, following the departure of the previous judges and criticisms of the appointment of Justice Scutt, a spokeswoman for the Australian Minister for Foreign Affairs stated 'The state of the Fijian judiciary is a matter of concern, as evidenced by the fact that most expatriate judges, including a number of Australian nationals, have resigned or have refused to

313 'Let judges do their jobs: AG', Office of the Attorney-General, 26 October 2007, at www.ag.gov.fj/default.aspx?Page=news&newsId=35 (last accessed 31 December 2008).

314 Sir Thomas Eichelbaum, 'Interference with Judicial Independence in the Pacific', at www.paclii.org/PJDP/resources/PJC/Interference_%20with_Judicial_Independence_in_the_Pacific.pdf(last accessed 31 December 2008).

315 'Amnesty International Report 2008 – Fiji', Amnesty International, at www.amnesty.org/en/region/fiji/report-2008 (accessed 5 January 2009).

316 'Letter to Interim Prime Minister Voreqe Bainimarama and President Ratu Josefa Iloilo of Fiji', Human Rights Watch, 4 February 2007, at www.hrw.org/en/news/2007/02/04/letter-interim-prime-minister-voreqe-bainimarama-and-president-ratu-josefa-iloilo-fi (last accessed 5 January 2009).

renew their contracts… The Australian Government continues to urge the Fijian interim Government to return Fiji to democracy and the rule of law.'[317]

3.156 The Australian Government was sufficiently concerned about the interference with the judiciary in Fiji in mid-2007 to report its conduct to the United Nations Human Rights Council. Australia's representative to the UN Human Rights Council, Caroline Millar, indicated her concerns that the judiciary was compromised in Fiji.[318]

3.157 One of the rare dissenting voices in this debate is Freedom House, whose 2008 report, while criticising significant backlogs for court hearings, differed from many international commentators by stating that 'the judiciary is independent'.[319] However, its comment is not detailed and there is no analysis of this statement within its report.

3.158 The United Nations Special Rapporteur on the Independence of Judges and Lawyers has been attempting to visit Fiji since mid-2007.[320] On 8 June 2007, the Special Rapporteur wrote to the interim regime concerning the suspension of Chief Justice Fatiaki. No response was received to this letter by late 2007, so the Special Rapporteur wrote again to the interim regime expressing concern about the failure of the government to respond to the letter.[321] The Special Rapporteur has, over the past two years, requested an invitation from the government to visit the country. He has reiterated this interest several times in public sessions of a couple of UN bodies. However, such invitation has not yet been forthcoming.

3.159 The IBAHRI considers that the concerns outlined in this chapter are sufficient to constitute a reasonable doubt about a lack of judicial independence within the current Fiji judiciary.

317 Berkovic, *supra* n 299.

318 'Australia concerned about treatment of Fiji lawyers', Radio New Zealand International, 13 June 2007, at www.rnzi.com/pages/news.php?op=read&id=32948 (last accessed 5 January 2009).

319 'Freedom in the World 2008 – Fiji', Freedom House, 2 July 2008, at www.unhcr.org/refworld/docid/487ca20ac.html (last accessed 5 January 2009).

320 Leandro Despouy, 'Report of the Special Rapporteur on the independence of judges and lawyers, Addendum: Situations in Specific Countries or Territories', UN Human Rights Council, 2008, at: www.unhcr.org/refworld/docid/484d18fa2.html (last accessed 5 January 2009).

321 *Ibid.*

Chapter 4: The independence of the legal profession

The Fiji Law Society

4.1 The Fiji Law Society (FLS) is both a professional association and disciplinary body for lawyers. It has a President elected by its members (currently Dorsami Naidu) and a six-member council. All legal practitioners in Fiji must be a member of the FLS. The Society is set up under the Legal Practitioners Act 1997 (formerly under the repealed Legal Practitioners Act, but continued on by this Act).

4.2 According to section 13 of the Legal Practitioners Act, the objects of the society include:

> '(a) to maintain and improve the standards of conduct and learning of the legal profession in Fiji;
>
> (b) to promote the welfare and to preserve and maintain the integrity and status of the legal profession;
>
> (c) to assist the Government and the courts in all matters affecting legislation and law reform and the administration and practice of the law in Fiji;
>
> (d) to aid and give countenance to law reform and to represent the views, interests and wishes of the legal profession;
>
> (e) to represent, protect and assist members of the legal profession in Fiji as regards conditions of practice and otherwise;
>
> …
>
> (j) to investigate charges of professional misconduct against any practitioner and to take such action thereon as may seem proper
>
> …
>
> (r) to tender advice to the Chief Justice as respects any of his powers and duties under the provisions of this Act.'

4.3 The FLS's role in disciplining the legal profession is discussed further at 4.17 – 4.31.

4.4 The FLS is responsible for making rules of professional conduct and practice, with the approval of the Minister.[322] Failure to comply with those rules may amount to professional misconduct.[323] The FLS is further entitled to publish standards of professional courtesy, behaviour, performance and practice.[324]

4.5 The FLS has had a difficult relationship with the interim regime since the coup in December

322 Section 101, *Legal Practitioners Act 1997.*
323 *Ibid.*
324 *Ibid.*

2006. Under the Constitution, the President of the FLS is one of the three-member panel that constitutes the JSC.[325] As discussed above, then President Devanesh Sharma attended the JSC meeting in which Acting Chief Justice Gates was appointed. Mr Sharma was later heavily criticised by other members of the society for his involvement in this meeting. Similar to the judiciary, it appears that the FLS had been polarised through opposition to the previous government, which has translated into support for the military regime. Following the JSC meeting chaired by Justice Shameem, Mr Sharma and subsequent Presidents of the FLS boycotted meetings of the JSC on the basis that its composition was not constitutional. This boycott continued throughout the Presidency of Isireli Fa until the election of Dorsami Naidu on 27 September 2008 on a platform of pursuing engagement with the interim regime; he has since signalled his intent to sit on the JSC.

4.6 While the IBAHRI believes that FLS has not made a formal statement that it considers the coup illegal, individual members of the FLS have made statements to that effect. Current President Dorsami Naidu was reported to have said at the time:

> 'The illegal and unlawful takeover of a democratically-elected government will never be condoned. We all may not agree with the policies of the Government but that does not give anyone the right to do what the military has.'[326]

4.7 However, both the FLS and the legal profession generally have been criticised for not strongly objecting to the coup. At the 2007 FLS convention a former President of the FLS and outspoken critic of the interim government, Graham Leung, stated:

> 'The legal profession has been all but moribund over the last several months; it has all but slept while the rule of law has been raped and the judiciary tinkered with. There is a view that the profession has acquiesced in the removal of the Chief Justice.'[327]

4.8 A number of military lawyers were reportedly struck off the roll following the coup, due to their reported involvement in it. The IBAHRI was unable to determine additional details of this, but heard reports that all these lawyers had since been reinstated.

4.9 The IBAHRI received reports that law firms with expatriate lawyers were threatened with having their work permits cancelled should they criticise the coup.

4.10 The IBAHRI has received reports that the divide within the FLS effectively prevented it from taking strong action against the interim regime and the events that followed. However, the FLS spoke out strongly in favour of the IBAHRI's mission. The delegation heard reports that former President Isireli Fa clashed with the Human Rights Commissioner and the interim regime in the press on a number of occasions. The new presidency intends to engage with the interim regime, although has expressed its opposition to the coup.[328]

4.11 Before Chief Justice Fatiaki's resignation, the FLS initiated litigation challenging the legality of the appointment of Acting Chief Justice Gates. On 28 November 2008 Justice Bruce granted

325 Section 131, Fiji Constitution. *supra* n 19.

326 Shailendra Singh, 'Coup may hasten exodus of ethnic Indians', Pacific Media Watch, at www.pmw.c2o.org/2006/fiji5091.html (last accessed 22 October 2008).

327 Leung, *supra* n 128.

328 'Fiji Law Society President explains about face on interim regime', Radio New Zealand, 29 September 2008, at www.rnzi.com/pages/news.php?op=read&id=42261 (last accessed 22 October 2008).

leave to review the decision, with the FLS arguing that the Chief Justice was not absent on leave at the time of the JSC meeting and that this was not considered during the meeting.[329] It is not clear whether the FLS will pursue this litigation in light of the change in its presidency, the resignation of Chief Justice Fatiaki and the permanent appointment of Chief Justice Gates. As noted, while the FLS has not recognised the military government as legitimate,[330] Mr Naidu, the new President, has pledged to engage with the interim government by participating in the JSC. However, it should be noted that the FLS has objected to the permanent appointment of Chief Justice Gates, on the basis that it considers it to be in breach of the Constitution.

Threats of physical and psychological violence

4.12 The delegation was told that there were numerous incidents where agents of the military government used physical and psychological violence against people who made public comments that were critical of the regime's actions. The delegation was informed that the majority of these incidents took place shortly after the coup.

4.13 The delegation was also told that lawyers have been taken from their homes late at night and detained in military barracks for a number of hours. During this time, they were subject to physical and mental violence and threats were made that unless they desisted from speaking out against the military government, their families would also be subject to detention and torture. One case that has been documented publicly is Richard Naidu, who was removed from his family's home late at night by a group of armed soldiers.[331] Reportedly, his head was covered by a hood and he was driven to military barracks, where was tied to a post and subjected to torture, including having a gun shot a number of times at close range to his head. He was later allegedly abandoned by the side of the road. [332] One person interviewed by the delegation rationalised this incident as 'just childish behaviour' by the military.

Removal of government work

4.14 The delegation was told that the government has removed government work from law firms that it considers to be opposed to its actions. For example, in a Cabinet Memorandum circulated on 21 May 2007, Commodore Bainimarama set out that:

> 'Given the need to consolidate Government's position and avoid conflicts of interest, it is hereby directed that no Government Ministry, statutory bodies or Government corporate entities, use the legal services of the law firms of Munro Leys [Richard Naidu's firm] and Howards [Graham Leung's firm].'[333]

4.15 Two different views were presented to the delegation of the impact of the memorandum. One was that the firms targeted by the memorandum now express opposition to the interim government's actions and policies as they had had lucrative government work taken

329 Nawaikama, *supra* n 302.

330 'Fiji Law Society President explains about face on interim regime', *supra* n 328.

331 This story was widely publicised. See, for example, Kate Gibbs, 'Top Lawyers embattled in Fiji Coup', Lawyers Weekly Online, available at www.lawyersweekly.com.au/articles/Top-lawyer-embattled-in-Fiji-coup_z69226.htm and 'Military regime questions lawyer critic Richard Naidu', *Fiji Live* 24 January 2007, available at www.pmw.c2o.org/2007/fiji5105.html.

332 *Ibid.*

333 Prime Minister Bainimarama, 'Cabinet Memorandum', 21 May 2007.

from them and have suffered financially as a result. The other view is that there has been little commercial impact on the firms as the government work was a small percentage of instructions received, and was generally billed at a heavily discounted rate. Regardless of which view is accepted, it is concerning that the interim government attempts to use the threat of commercial sanction to attempt to control the activities of lawyers, particularly with regard to their work for independent statutory bodies that should be free to go about their business without illegitimate government interference.

Contempt proceedings used to silence lawyers

4.16 The misuse of contempt proceedings to stifle debate is discussed above. Contempt proceedings have been inappropriately issued against lawyers who have made comments about the operation of the judiciary. An example of this was the contempt proceedings brought against the Vice President of the FLS, after her comments regarding the perception of the state of the judiciary. Judges have also described legal argument in court as akin to contempt. For example, in *Bainimarama v Heffernan*, Justice Byrne, commenting on a reference to him as a 'military appointee' (and therefore open to bias), said:

> 'There is no doubt that the "military appointee" is myself and it is then alleged that I might be more inclined to entertain an ex parte application and deliver a favourable decision. It imputes not possible but rather likely bias for which there is no foundation. For such a submission to be made by counsel of Dr Cameron's claimed experience is ill-becoming an officer of this Court as I assume Dr Cameron to be. In my opinion, it is a clear example of contempt and I am inclined to deal with it.'[334]

Justice Byrne reportedly sent a copy of his judgment to the FLS in response to this.

Professional discipline of lawyers

4.17 At the current time, the FLS is responsible for disciplining members of the legal profession who engage in misconduct or other breaches of professional ethics.

4.18 The Legal Practitioners Act 1997 sets out the process. Under section 81, a Disciplinary Committee is established, consisting of eight persons appointed by the FLS Council and five lay persons appointed by the Attorney-General (who may not be either legal practitioners or employees of government). Section 81(8) states:

> 'It is the function of the Committee without unreasonable delay –
>
> - to inquire into charges referred to it of malpractice, professional misconduct, or unprofessional conduct or practice on the part of a practitioner;
> - to inquire into charges referred to it of misconduct or default in respect of a practitioner's practice by a clerk or servant employed in relation to that practice; and
> - to make or cause to be made such investigations as it considers necessary for the purposes of its hearings.'

334 *Bainimarama v Heffernan, supra* n.186, at 37.

4.19 Any person may make a complaint to the FLS regarding any 'alleged malpractice, professional misconduct, or unprofessional conduct or practice by any practitioner, or any servant or agent of any practitioner'.[335] Upon receipt of the complaint, the FLS, after undertaking appropriate investigations, may: reject the complaint; censure the practitioner; facilitate the resolution of the matter in an appropriate way; or refer the matter to the Committee.[336]

4.20 The Legal Practitioners Act also incorporates the possibility for the Attorney-General to be involved in disciplinary complaints against lawyers. When the Attorney-General has received a complaint, he or she may refer the matter to the Society for investigation, and if dissatisfied with the FLS's response, may refer the matter to the Committee for determination.[337]

4.21 The Disciplinary Committee has a wide range of powers available to it to respond to complaints against legal practitioners. These are outlined in section 93 of the Legal Practitioners Act, and include fines, censures, striking off from the roll, attendance at additional courses and a range of other orders.

4.22 An appeal lies from the decision of the Disciplinary Committee to the Court of Appeal, and will be a rehearing *de novo*.[338]

4.23 The FLS has been seriously criticised by the interim government for failing to adequately discipline lawyers. During the 2007 Attorney-General's conference, Commodore Bainimarama said:

> 'It is time for the legal profession to clean up its act. People in glass houses cannot throw stones. There is a long backlog of lawyers waiting to be disciplined. Why? Lawyers who have helped themselves to trust funds are readmitted to practice, and one was made the Attorney-General. Why? Because we sat back and let it happen. We stopped expecting our lawyers to be honest, and for dishonest lawyers to be disciplined by the Fiji Law Society'.[339]

4.24 These criticisms and concerns were corroborated by the delegation's discussions with stakeholders throughout Fiji. Reports confirmed that there is a significant backlog in discipline cases, and that public confidence in the legal profession is low due to non-responsiveness to complaints. It also appeared from discussions with the delegation that disciplinary punishments for some serious offences, such as the misuse of client funds, were temporary only, and lawyers were allowed to return to the profession rather than being permanently struck off the roll. However, the IBAHRI heard reports that the FLS requires far greater resources to help it clear its backlog of disciplinary cases.

4.25 On 24 September 2008, the interim Attorney-General announced that the military government plans to establish a Legal Services Commission to hear complaints against lawyers.[340] The delegation found that while there is an accepted view within the legal profession that the FLS has not fulfilled its disciplinary role, there is also strong opposition to the Legal Services Commission proposal due to fears that the Commission will not operate fairly or act independently of the interim regime.

335 Section 83, Legal Practitioners Act 1997.
336 Section 84, Legal Practitioners Act 1997.
337 Section 86, Legal Practitioners Act 1997.
338 Section 100, Legal Practitioners Act 1997.
339 Bainimarama, *supra* n.208.
340 'The merit of a legal services commission', *The Fiji Daily Post*, Editorial, 25 September 2008, at http://fijidailypost.com/editorial.php?date=20080925&index=629 (last accessed 30 October 2008).

4.26 The President of the FLS, Dorsami Naidu, argues that the proposal is unnecessary, as the Legal Practitioners Act already provides adequate procedures for the disciplining of lawyers.[341] As examined above, the Attorney-General already has significant opportunity to be involved in disciplinary cases.

4.27 The UN Basic Principles on the Role of Lawyers requires that disciplinary proceedings against lawyers must be brought before a disciplinary committee established by the legal profession, an independent statutory authority or a court. Principle 28 specifically provides for independent judicial review.

4.28 Regardless of the current level of effectiveness of the FLS's disciplinary processes, the IBAHRI considers that it is inappropriate for a debate on alternative proposals to take place until democracy is restored. Legitimate governments may have a role to play in establishing disciplinary frameworks for lawyers, but even where there is a legitimate and democratically-elected government in place, the IBAHRI considers that primary responsibility for such discipline must remain with the legal profession, in association with the judiciary. In Fiji's current situation, where there is an illegitimate military regime, and particularly where that regime has been involved in threatening lawyers, there is no room for its involvement in disciplinary proceedings. Unilateral action by the military government to bring the disciplining of lawyers within its own jurisdiction is unacceptable and could lead to a significant erosion of independence in the legal profession.

4.29 The IBAHRI is concerned that the intention of the new disciplinary proceedings being proposed by the interim regime may not be to remedy the problems identified in the FLS's existing disciplinary procedures, but to use the process as another avenue of intimidation over lawyers that criticise the regime.

4.30 In order to address the problems identified in the FLS's disciplinary procedures, the IBAHRI urges the FLS to review its existing procedures and to establish more efficient procedures in order to ensure that complaints against lawyers are dealt with fairly and expeditiously. Further, the FLS is urged to investigate avenues for fund-raising to enable it to establish these procedures as soon as possible.

Travel bans used to censor lawyers

4.31 Concerns were raised with the delegation that the interim government has used travel bans against lawyers in an attempt to suppress public statements of opposition. Examples include Graham Leung, who has said that he was subject to a travel ban in June 2007 after making a speech in Hong Kong criticising events in Fiji.[342] There have also been instances of foreign lawyers being denied entry or deported from Fiji. For example, Dr John Cameron, an Australian lawyer who was representing Angie Heffernan and the Pacific Centre for Public Integrity in cases against Commodore Bainimarama was effectively deported from Fiji in June 2007 on the basis that he had breached his work permit. The delegation understands that this deportation is widely considered to have been a political decision by the interim government aimed at preventing Dr Cameron from continuing to act in cases that had potentially unfavourable consequences for the military government.

341 'Law Society head opposes regime's change', FijiLive, 29 September 2008, at www.fijilive.com/news_new/index.php/news/show_news/9070 (last accessed 1 October 2008).

342 'Fiji's faltering freedoms', *supra* n 184.

Chapter 5: Alternative accountability mechanisms – other issues of concern

5.1 Both the Fiji Human Rights Commission and Fiji's media have important roles to play ensuring accountability of the government. The Commission and the media have, in the past, had reputations for making independent, robust and balanced contributions to Fiji's political discourse. However, this has changed since the 2006 coup. There is a perception that the leadership of the Human Rights Commission has been taken over by a military appointee who is strongly sympathetic to the military government and no longer fulfils its mandate. The media has been silenced by the deportation of key media figures and the misuse of contempt proceedings to shut down debate.

Human rights in Fiji

5.2 Fiji has a poor record of international human rights instrument ratification. It is not a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights or the Convention Against Torture.

5.3 Fiji has acceded to the Convention on the Elimination of All Forms of Racial Discrimination and has ratified the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. In these cases, Fiji has entered extensive reservations. It has complied with its reporting requirements.

Fiji Human Rights Commission

> 'The Fiji Human Rights Commission used to be a body that upheld human rights. It is not that any longer, if anything, it's the opposite.'[343]
>
> – former publisher of the *Fiji Sun* magazine, Russell Hunter

5.4 The Fiji Human Rights Commission is a constitutional body mandated to educate the public on human rights issues and advise the government on its human rights obligations.[344] Under the Human Rights Commission Act 1999, the Commission is empowered to receive public representations on human rights issues, make recommendations to government and investigate alleged human rights violations either following a complaint or of its own volition.[345] The Commission is made up of the Ombudsman, a judge and another member, each appointed by the President on the advice of the Prime Minister who must consult with the Leader of the Opposition and a member of the relevant House of Representatives standing committee.[346]

343 *Ibid.*
344 Section 42(2), Fiji Constitution, *supra* n 19.
345 Part II, *Human Rights Commission Act* 1999, at www.hurights.or.jp/database/E/nhri_law/fiji.html (last accessed 11 January 2009).
346 Section 43(2), Fiji Constitution, *supra* n 19.

5.5 The Commission's response to the military coup and its subsequent conduct has been widely criticised, including by its own Commissioners. The delegation was told that the Commission is now functioning under the direct control of Dr Shaista Shameem, who has been Director of the Commission since 2002, and became the Chair of the Commission after being appointed Ombudsman by the Constitutional Offices Commission. This latter body may not be correctly constituted following the military government's suspension of its Chair. The delegation was told that Dr Shameem is Justice Shameem's sister and has close personal relationships with a number of the people appointed into high public service positions by the military government. It was not clear to the IBAHRI delegation whether there are currently any legitimately appointed Commissioners.

Response to the coup

5.6 In the wake of the 2006 coup, the Human Rights Commission released a media statement indicating in stern and punitive language that it would continue to fulfil its role:

> 'The Commission reminds all state institutions that the Bill of Rights provisions in the Constitution must be strictly followed and human rights laws of Fiji upheld at all times…. any violation of rights will not be tolerated. Those who breach human rights laws of Fiji will face the consequences of their actions'.[347]

5.7 However, the Commission's subsequent public statements and reports have supported Commodore Bainimarama, the military takeover and the interim government. On 1 January 2006, Dr Shameem gave public support to the coup, opining that the previous Qarase Government had committed 'rampant abuse of power and privilege', and that the military led by Commodore Bainimarama had acted for the 'security, defence and well-being of Fiji'.[348]

5.8 A January 2006 report on the coup, authored by Dr Shameem and purportedly published under the authority of the Commission, found that the military takeover was valid because the previous government had been formed on the basis of illegality and the 2006 elections had been unconstitutional.[349] The report also found that the military's constitutional mandate to ensure Fiji's security and protect the population justified its actions.[350] Other members of the Commission have publicly distanced themselves from the report. A response drafted by Commissioner Shamima Ali expressed concern that the report purported to carry the authority of the Commission. She stated that it was 'riddled with legal inaccuracies, misapplications of the law and a selective reading of case law'.[351] According to her response, the report is:

> 'a veiled justification for the actions of the RFMF, [and demonstrates] a pathological dislike of Prime Minister Qarase and his two governments… The report has compromised

347 'Press Statement', Fiji Human Rights Commission, 7 December 2006, at www.humanrights.org.fj/news/press_releases/2006/07December06.pdf (last accessed 23 October 2008).

348 Elizabeth Keenan, 'Now the good news', *Time*, 25 January 2007, at www.time.com/time/magazine/article/0,9171,1582099,00.html?imw=Y (last accessed 3 December 2008).

349 Dr Shameem, *supra* n 269.

350 *Ibid.*

351 High Commissioner Shamima Ali, 'A Response to the Fiji Human Rights Commission Director's Report on the Assumption of Executive Authority by Commodore J V Bainimarama, Commander of the Republic of Fiji Military Forces', at www.dev-zone.org/downloads/shameem%20legal%20critique.pdf (last accessed 22 January 2009).

the [Commission's] and Shameem's own standing as well as set back the cause of human rights generally in Fiji.' [352]

5.9 Amnesty International has criticised the Fiji Human Rights Commission for its report into the coup, stating:

> 'The integrity and independence of the Fiji Human Rights Commission were called into question after it released a report in January which supported the military takeover.'[353]

5.10 In 2007 Dr Shameem convened a Commission of Inquiry to assess the validity of the 2006 elections. The resulting publication, the Report of the Commission of Inquiry into the Fiji 2006 General Elections was considered by commentators to be purposefully critical of the elections, enabling the Commission to challenge the validity of the outcome and justify the later coup.[354] The SDL party criticised the Commission of Inquiry for displaying obvious bias against it, maintaining that a large number of the submissions received were from Fiji Labour Party members, who had been unsuccessful in the election.[355] The United States Department of State, in its 2007 Human Rights Report, concurred, stating that the Inquiry 'drew light participation, mostly from losing parties and candidates'.[356] Critics contended that the exercise merely 'allowed partisan people to use the inquiry to air their views for publicity and political mileage'.[357]

5.11 Further reports authored by Dr Shameem defending the military's assumption of power have been published by the Commission.[358] The Commission, through Dr Shameem, has made statements attacking any criticism of Fiji's compliance with human rights standards and democratic principles by other countries or international agencies.[359] Dr Shameem also made submissions as *amicus curiae* on behalf of the Human Rights Commission supporting the interim government in the *Qarase* case.

Current operation of the Commission

5.12 The delegation was informed that the Commission is not independent and is not fulfilling its mandate. It is unclear whether there are any legitimately appointed Commissioners and appointment mechanisms are not functioning. Shamima Ali, who was appointed as a Commissioner in February 2004 for two years, and reappointed in February 2006, has called for Dr Shameem's resignation, saying:

> 'The rather dubious actions and statements by the FHRC Director are almost unheard of within the human rights defenders community internationally. It is bringing disrepute to

352 *Ibid.*

353 'Amnesty International Report 2008 Fiji', Amnesty International, at www.amnesty.org/en/region/fiji/report-2008 (last accessed 5 January 2009).

354 'Country Reports on Human Rights Practices 2007 Fiji', US Department of State, 11 March 2008, at www.state.gov/g/drl/rls/hrrpt/2007/100520.htm (last accessed 11 January 2009).

355 'Response of the SDL party', Appendix 5 to Dr Shameem, *supra* n 269.

356 'Country Reports on Human Rights Practices 2007 Fiji', *supra* n 354.

357 Maika Bolatiki, 'A tailor made report', *Fiji Sun*, September 2007.

358 For example, see Dr Shameem, *supra* n 269; and 'Part II, Report to the UN High Commissioner for Human Rights on alleged Breaches of International Law and the 1997 Constitution of Fiji in the removal of the Prime Minister, Laisenia Qarase on December 5th 2006', Fiji Human Rights Commission, 29 August 2007, at www.humanrights.org.fj/pdf/FHRCReportPartII.pdf (last accessed 23 October 2008).

359 See for example: 'Press Statement', Fiji Human Rights Commission, 7 March 2007, at www.humanrights.org.fj/pdf/US%20Report.pdf (last accessed 23 October 2008).

our Commission, as well as discouraging Fiji's people from seeking help for human rights violations they may have suffered. If Dr Shameem is a true human rights defender, she may need to reassess her position and step down from the Ombudsmanship and Directorship to salvage the integrity and independence of the FHRC. As a fellow human rights advocate, I call on Dr Shameem to show her commitment to human rights by making this personal sacrifice – to not only save the Commission that she has worked for, but also show the world that human rights principles and good governance still hold true in Fiji.'[360]

5.13 At the time of the coup, the Commission was made up of two Commissioners, Ms Ali and Sevuloni Valenitabua. The previous Chair of the Commission (who *ex officio* also holds the position of Ombudsman) had resigned in June 2006, and the position remained vacant while the Constitutional Offices Commission deliberated on its recommendation for a new Chair. Dr Shameem was the Director of the Commission, which meant that she had responsibility for its day-to-day operation. Following the coup, Rodney Acraman was appointed as Acting Ombudsman and so stepped into the role as Chair of the Human Rights Commission.[361] The delegation was told that this appointment was made by the interim government at Dr Shameem's request, and that it was considered to be illegal by the other Commissioners. Mr Valenitabua resigned in protest on 14 December 2007[362] and Ms Ali's appointment lapsed in February 2008. The delegation was unable to determine whether any new Commissioners have been appointed. As a result, the only member of the Commission is currently the Ombudsman, who is considered a military appointment, and who is also the Director of the Commission.

The Human Rights Commission does not comply with the Paris Principles

5.14 The delegation was told that the Commission is not investigating allegations of human rights violations by the military government. A number of examples were provided to the delegation of attempts to make a complaint of a human rights abuse to the Commission that were rebuffed or went without action. The US Department of State has commented that in three separate allegations of significant human rights abuses that resulted in the deaths of uncharged detainees, the Commission has failed to make any public objection or statement.[363]

5.15 The Commission has been criticised for no longer meeting standards for an independent human rights institution set out by the Paris Principles.[364] Most recently, the United Nations Committee on Racial Discrimination, responding to the Fiji delegation's report, questioned the impartiality and independence of the Commission. One committee member suggested that the Commission 'had aligned itself with the Military coup so closely that it

360 Shamima Ali, 'Asia-Pacific Human Rights Forum to help Fiji Human Rights Commission Regain its Independence Human Rights Commissioner', 17 October 2007, at www.fijiwomen.com/index.php?id=107428 (last accessed 23 October 2008).

361 Catherine Renshaw, Andrew Byrnes and Andrea Durbach, 'Implementing human rights in the Pacific through the work of national human rights institutions: the experience of Fiji' [2008] *UNSWLRS* 66, at www.austlii.edu.au/au/journals/UNSWLRS/2008/66.html (last accessed 2 January 2009).

362 *Ibid.*

363 'Country Reports on Human Rights Practices 2007 Fiji', *supra* n 354.

364 'Principles relating to the Status of National Institutions (The Paris Principles)', adopted by General Assembly resolution 48/134 of 20 December 1993. See Part 3(e): A National Institution [shall have responsibility to]… cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights. Available at www.ohchr.org/english/law/parisprinciples.htm (last accessed 22 January 2009).

had compromised its impartial and independent stance.'[365] The Committee concluded by expressing its concern 'that the Commission may no longer fully meet the criteria set out in the Paris Principles relating to the status of national institutions for the promotion and protection of human rights'.[366]

5.16 The Commission resigned from the International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) after the ICC suspended the Commission's 'A' status, until it provided information illustrating its independence.[367] The ICC is the United Nations body tasked with coordinating the work of human rights institutions internationally.[368] The Commission has also resigned from the Asia Pacific Forum of National Human Rights Institutions, which is a member-based organisation of national human rights institutions in the Pacific. The Commission resigned from the Forum in April 2007, shortly after the Forum had commenced a formal review of the Commission's compliance with the Paris Principles.[369]

5.17 The IBAHRI is disappointed in the failure of the Fiji Human Rights Commission to remain independent following the December 2006 coup. It calls on Dr Shameem to adhere to the Paris Principles and to follow up all reports of human rights abuses.

The media

Misuse of legal processes to shut down the media

5.18 Concerns were raised with the delegation that the interim government censors publication of critical news and comment. Concerning misuse of legal processes to repress free speech and political discourse include the deportation of expatriate newspaper publishers and contempt proceedings.

Deportation of Russell Hunter and Evan Hannah

5.19 Russell Hunter, the then publisher of the *Fiji Sun*, was deported from Fiji on 26 February 2008. According to Mr Hunter, two immigration officers attended his home at 8.30 in the evening, and served him with a notice requiring him to leave the country. Discussion followed, during which he declined to go with the officers and called his lawyer. Four military officers then appeared, took him to a waiting vehicle, confiscated his mobile phone, and drove him to Nadi International Airport (approximately four hours' drive from Suva).[370] According to Mr Hunter, he 'was never given a reason, I have still not been given a reason. I'm given to understand from the staff in Suva that I was considered some kind of security threat'.[371] In the week prior to Mr Hunter's deportation, the *Fiji Sun* had run stories alleging

365 'Committee on Elimination of Racial Discrimination Considers Report of Fiji – Press Release', Committee on Elimination of Racial Discrimination, 20 February 2008, at www.unhchr.ch/huricane/huricane.nsf/NewsRoom?OpenFrameSet (last accessed 11 January 2009).

366 'Consideration of reports submitted by State Parties under Article 9 of the Convention – Concluding observations of the Committee on the Elimination of Racial Discrimination – Fiji', Committee on the Elimination of Racial Discrimination, 16 May 2008, at http://daccessdds.un.org/doc/UNDOC/GEN/G08/419/17/PDF/G0841917.pdf?OpenElement (last accessed 22 January 2009).

367 Renshaw, Byrnes and Durbach, *supra* n 361.

368 'Principles relating to the Status of National Institutions', *supra* n 364.

369 Renshaw, Byrnes and Durbach, *supra* n 361.

370 'Fiji's faltering freedoms', *supra* n 184.

371 *Ibid.*

that the finance minister had been involved in tax avoidance. Mr Hunter has said that:

> 'What's tending to happen is someone will make an outburst or issue some warning. We had the police commissioner in fact saying that he was monitoring very carefully the statements that we were making, privately and in the media, and he warned that – the word he uses is 'inciteful'… The prime minister, the day before I was abducted, had a very hard go at the press. He seemed to be referring to our coverage of the Chaudri tax affairs. He didn't say that, and he certainly didn't deny any of the allegations.'[372]

5.20 Evan Hannah, the Australian publisher of the *Fiji Times*, was deported in a similarly disturbing manner. Police and immigration officers came to Mr Hannah's home on 1 May 2008 at 6.30 in the evening with a deportation order that stated that Mr Hannah had breached his work permit.[373] Mr Hannah immediately contacted his lawyers, who arrived to object to his removal, but were ignored. Mr Hannah claims he was allowed less than a minute to say farewell to his wife and young son before being taken at high speed on the four hour drive to Nadi. Mr Hannah alleges that the speed of this car journey was due to the driver trying to lose the pursuing media.[374] Mr Hannah was allowed the use of his mobile phone to assure his wife of his physical safety, and in doing so, was informed of an order of the High Court in Suva for his release. On relaying this information to the officials, Hannah's phone and briefcase were taken from him.[375] Despite repeated requests, Hannah was not allowed consular access.[376] He was deported the following morning despite the high court order.

Misuse of contempt proceedings

5.21 Contempt proceedings have been used against people working in the media to silence debate. The law of contempt is concerned with the interference with the administration of justice. It may apply in circumstances where an act (for instance, the publication of sensitive information) may prejudice proceedings before the court – a common example being the phenomena of the 'trial by media'. Thus, when considering contempt and free speech it must be observed that two equally important principles of great public interest are concerned. Many examples of the use of the law of contempt by Fiji judges and officials against various forms of public expression can be seen as a form of illegitimate coercion rather than upholding the administration of justice.

5.22 As mentioned above, a letter critical of the High Court's ruling in the *Qarase* case, written by a person said to be living in Australia, was published in both the *Fiji Times* and the *Fiji Daily Post* in mid-October 2008. As a consequence proceedings for contempt were initiated against both newspapers. Interim Attorney-General, Mr Aiyaz Sayed-Khaiyum, commented:

> 'The sort of contempt that is currently being shown to the Courts by certain people in this country with political agendas will not be allowed to go unchallenged. Furthermore,

372 *Ibid.*

373 Evan Hannah, 'Evan Hannah Speaks: How Fiji threw rule book out', Discombobulated Bubu, 7 May 2008. at www.discombobulated-bubu.blogspot.com/2008/05/evan-hannah-speaks-how-fiji-threw-rule.html (last accessed 9 January 2009).

374 *Ibid.*

375 *Ibid.*

376 'Deportation of Evan Hannah from Fiji', Australian Minister for Foreign Affairs, 2 May 2008, at www.foreignminister.gov.au/releases/2008/fa-s066_08.html (last accessed 9 January 2009).

certain media outlets have aided and abetted these individuals. They have not adhered to their own professional standards and code of ethics. This deliberate undermining of the integrity of the judiciary by individuals and media outlets would not be tolerated in New Zealand or Australia so why should it be tolerated in this country?'[377]

The *Fiji Times* and the *Fiji Daily Post* published apologies on 5 November and 14 November respectively. The *Fiji Times* acknowledged that 'while persons may comment critically on judgments of the Court, there are reasonable limits on such criticism, and the words used by our correspondent exceeded those limits in casting doubt on the integrity and independence of Fiji's courts'.[378] Similarly, the *Fiji Daily Post* apologised for 'insufficiently editing the writer's comments to allow his concerns to be read and heard in words that were less inflammatory and which did not insult the good reputation of our nation's key political and judicial institutions'.[379] The *Fiji Times*, its editor-in-chief and its publisher admitted contempt. As considered above, the *Fiji Times* was ordered to pay US$54,000 – its editor-in-chief received a three-month suspended sentence and publisher Rex Gardener was discharged on a good behaviour bond.[380] These were considerably less than the F$1 million fine and jail sentences sought by Solicitor General Christopher Pryde.[381] Similar proceedings against the Fiji Daily Post will be heard in April 2009.[382]

Public confidence in the media

5.23 Fiji's media has traditionally been seen as free and independent. However, the military government's attempts to silence political debate has lead to a perception within the community that the media is no longer free and that few media reports critical of the interim government are published.

5.24 In 2003, Prime Minister Qarase sought to introduce the Media Council of Fiji Bill that provided for fines of up to F$2,000 in media discipline cases. This was abandoned after public campaigning against the law and strong opposition from the public.[383] However, it has been noted the interim regime appears less sensitive than the previous government to public outrage in its moves to silence political debate and curtail media freedom.[384]

5.25 In March 2007, Fiji's Media Council Chairman Daryl Tarte complained in a press release that the military had threatened and intimidated journalists and that in order to protect the identity of journalists by-lines were seldom used.[385]

5.26 A report released by the Fiji Human Rights Commission in early 2008 was heavily criticised by Fiji's media institutions. *Inter alia*, the report recommended the creation of a Media Tribunal

377 'AG granted leave to commit Fiji Times for contempt', Fiji Government Online Portal, 24 October 2008, at www.fiji.gov.fj/publish/page_13288.shtml (last accessed 9 January 2009).

378 'We're in Contempt', *Fiji Times Online*, 5 November 2008, at www.fijitimes.com/story.aspx?id=105298 (last accessed 9 January 2009).

379 'Apology and explanation from Fiji Daily Post, its publisher, and editor', *supra* n 220.

380 'Fiji Times given hefty fine over controversial letter', *supra* n 223.

381 'Fiji newspaper contempt sentencing next year', ABC Radio Australia, 4 December 2008, available at: www.radioaustralia.net.au/programguide/stories/200812/s2438140.htm, www.radioaustralia.net.au/programguide/stories/200812/s2438140.htm (last accessed on 9 January 2009).

382 *Ibid.*

383 Shailendra Singh, 'Fiji's Resilient Media Again Face Government Censure', Pacific Island Report, August 2008, Pacific Islands Development Program/East-West Center, at http://archives.pireport.org/archive/2008/August/08-05-com.htm (last accessed 9 January 2009).

384 *Ibid.*

385 'Media body condemns abuse of Bill of Rights', *Fiji Times Online*, 8 March 2007, at www.fijitimes.com/story.aspx?id=58410 (last accessed 9 January 2009).

and the adoption of an administrative entity to enforce penal sanctions against media officers. In its executive summary it proposed:

> 'Like Singapore, Fiji should perhaps aim to be a disciplined society – or certainly, more disciplined than it is now, almost four decades after cutting its formal colonial ties to Britain.'[386]

5.27 The Media Council and representatives of Fiji's media accused the report of lacking credibility,[387] of being out of touch with modern Fiji[388] and of failing to acknowledge the conditions the media has had to endure since the December 2006 coup.[389] Although it is uncertain how far the report will go towards influencing the interim government, the interim Attorney-General announced on 18 July 2008 that new media laws were planned to establish a Tribunal with powers to impose fines and award compensation in response to complaints against the media.[390]

386 JM Anthony, 'Freedom and Independence of the Media: An Inquiry', Consultancy Report, Fiji Human Rights Commission, at www.fijitimes.com/media-report.aspx (last accessed 9 January 2009).

387 On the grounds that it was based largely on anonymous statements and that the reputation of its lead author was questionable. See ABC Radio Australia, 'FIJI: Media Council slams Human Rights Commission report', 3 March 2008, at www.radioaustralia.net.au/programguide/stories/200803/s2178453.htm (accessed 9 January 2009).

388 Anthony, *supra* n 386.

389 *Ibid.*

390 'Emergency meeting of Fiji Media Council', ABC Radio Australia, 18 July 2008, at www.radioaustralia.net.au/programguide/stories/200807/s2307533.htm (last accessed 22 January 2009).

Chapter 6: Conclusion and recommendations

Since the December 2006 coup, the rule of law in Fiji has been steadily deteriorating. The interim regime, apparently allied by some members of the judiciary, the legal profession and the Fiji Human Rights Commissioner, have attacked those members of the judiciary and the legal profession who have attempted to defend human rights and the justice system. Constitutional limitations and rights appear to have been disregarded by the interim regime, despite its efforts to convince both Fijians and the rest of the world that its actions were in Fiji's best interests. With the failure of the interim regime to progress towards elections, the rule of law in Fiji appears likely to continue to deteriorate.

Fiji's 'coup culture' is of serious concern to the international community, both for the impact it has on individuals in Fiji and its destabilising effects throughout the region. Unlike previous coups, the interim regime appears to have successfully infiltrated every aspect of the justice and political system, which will make any future attempt to restore the rule of law in Fiji extremely difficult.

Overall recommendations

The IBAHRI recommends:

(1) That elections are held at the earliest opportunity in order to restore democracy to Fiji and legitimacy to all government actions.

(2) That the interim regime refrains from any interference with the independence of the judiciary and the legal profession.

(3) That the interim regime refrains from attempting to make any changes to the Fiji Constitution or the structure of the Fiji legal and justice system more generally.

Conclusions: background to this report and the cancellations of the IBAHRI missions

Allowing access to independent, apolitical non-governmental organisations such as the IBAHRI is the responsibility of all members of the international community. International scrutiny holds governments to account for breaches of international human rights law and provides the opportunity for aid, training and capacity building needs to be identified.

The efforts of the interim regime to prevent the IBAHRI delegation from visiting Fiji were entirely unacceptable. Particularly following a military take-over, constant and continuing apolitical and independent scrutiny is necessary in order to ensure that human rights abuses are either not taking place, or that such abuses are redressed. The IBAHRI remains deeply concerned by the responses of the interim Attorney-General, and the implications that his actions have for the present and future state of Fiji's justice system.

In particular, the IBAHRI is disturbed by the inaccurate and misleading comments made

by the interim Attorney-General and at least two judges of the Fiji High Court claiming that three independent review missions had found that there was no executive interference in the judiciary, which has been shown to be false in this report.

Recommendations

The IBAHRI recommends:

(4) That the interim regime be transparent and accountable, and refrains from inhibiting access to Fiji of independent international delegations such as the IBAHRI delegation and the UN Special Rapporteur on the Independence of Judges and Lawyers.

(5) That the interim regime and the current members of the judiciary in Fiji refrain from misleading the public as to the nature of previous international reviews of the situation in Fiji.

Conclusions: the independence of the judiciary

The IBAHRI considers that the military regime's actions in suspending, charging and then settling the case with Chief Justice Fatiaki constitute extensive and unacceptable executive interference in the Fijian judiciary. The suspension of Chief Justice Fatiaki by the military regime should be condemned by all supporters of the rule of law, particularly given that all charges were eventually dropped and a large settlement payment was made by the regime.

The IBAHRI is also extremely concerned about the reports it received concerning physical threats and attacks against judges who were perceived to have been independent from the interim regime.

The IBAHRI considers that it is questionable whether the permanent appointment of Acting Chief Justice Gates as Chief Justice was constitutional. The IBAHRI also considers that there are doubts about the validity of appointments made to the bench since January 2007, and such doubts are likely to continue under the newly constituted JSC.

The IBAHRI was deeply concerned about the state of Fiji's judiciary and the personal grievances amongst the judges had had negative effects that adversely impact on the ability of the judiciary to operate independently.

The IBAHRI is concerned about some aspects of judicial conduct in Fiji, including: the failure of certain judges to recuse themselves from cases which bear directly or indirectly on their appointment; the trend in listing of constitutional cases, which appear to be allocated only to judges perceived to be friendly to the interim regime; and an increasing tendency for decisions of the High Court which are not in the interests of the interim regime to be stayed by a single judge of the Court of Appeal *ex parte* and on an urgent basis. The IBAHRI was also concerned by the 'beratement proceedings' that took place in response to published criticisms of the judiciary.

The IBAHRI considers that there is a perception that the judiciary in Fiji is not independent, based both on its concerns about judicial conduct and due to other concerns including the questionable legitimacy of both Justice Gates' acting and permanent appointments and the exodus of judges from the bench throughout 2007 and early 2008.

Recommendations

The IBAHRI recommends:

(6) That the interim Attorney-General and the interim military government respect the principle of the separation of powers and support the development of an independent judiciary.

(7) That all members of Fiji's judiciary work together to overcome personal conflict and restore collegiality across the judiciary.

(8) That until elections are held, no further appointments to the judicial bench are made in order to avoid further doubt being shed on the legitimacy of the current appointments to the judiciary in Fiji.

(9) That all members of Fiji's judiciary adhere to their oath of service by upholding the Constitution and doing right to all people in accordance with the laws of Fiji without fear or favour, affection or ill will and to conduct themselves with the utmost integrity at all times.

(10) That all judges must recuse themselves from cases where the validity of their position as judge or other appointment depends on the answer to the question they are asked to consider.

(11) That all appointments to and suspensions from the bench follow the procedures outlined in the Constitution.

(12) That the Chief Justice and all those responsible for case management ensure that cases are listed for hearing in a transparent, fair and equitable manner.

(13) That the interim government deals with all allegations of judicial misconduct through independent tribunals set up and governed by constitutional processes free from executive interference or influence.

(14) That the FLS should take steps to further its legal challenge to the JSC as soon as possible and avoid any further delays.

(15) That the interim government desists from making political and military appointments to public service and police roles.

(16) That the Fiji judiciary respect freedom of expression amongst the media and the legal profession.

Conclusions: the independence of the legal profession

The independence of the legal profession is an important element of the rule of law and is supported in numerous international instruments.

The IBAHRI was disturbed by reports that in the immediate aftermath to the coup, the military brought certain lawyers to the barracks and physically abused and threatened them and their families. The IBAHRI is concerned by perceived restrictions on the free expression of lawyers, both through the misuse of contempt proceedings, and through travel bans and threats of physical or other consequences.

The IBAHRI recognises that there have been some problems surrounding the FLS's disciplinary proceedings. However, it considers that regardless of the current level of effectiveness of the FLS's disciplinary processes, it is inappropriate for a debate on alternative proposals to take place until democracy is restored. Unilateral action by the military government to bring the disciplining of lawyers within its own jurisdiction is unacceptable and could lead to a significant erosion of independence in the legal profession.

Recommendations

The IBAHRI:

(17) Calls on the interim regime to respect the independence of the legal profession in Fiji, and to refrain from making inappropriate criticisms of the legal profession or individual lawyers.

(18) Calls on the interim regime to investigate the allegations of physical abuses of lawyers in the aftermath of the coup, and to take action against those responsible.

(19) Calls on the interim regime to respect the independence of the FLS.

(20) Calls on the interim military regime to abandon its proposals to establish a Legal Services Commission for disciplining lawyers.

(21) Urges the FLS to review its existing disciplinary procedures and to establish more efficient procedures to ensure that complaints against lawyers are dealt with fairly and expeditiously. Further, the FLS is urged to investigate avenues for fundraising to enable it to implement these procedures as soon as possible.

(22) Counsels the interim regime to withdraw its direction that government work must not be provided to specific law firms.

(23) Insists that the interim government ceases attempting to use contempt proceedings and travel bans to influence the responsible conduct of lawyers.

(24) Requests that members of the Fiji judiciary ensure that contempt proceedings are not used to silence legitimate political debate or to influence the responsible conduct of lawyers.

Conclusions: alternative accountability mechanisms

The IBAHRI is disappointed in the Fiji Human Rights Commission as led by Dr Shaista Shameem, in protecting the rights of Fijians since the December 2006 coup. The IBAHRI considers that the Fiji Human Rights Commission is no longer independent and is failing to fulfil its mandate.

The IBAHRI is also concerned by attempts by the interim regime to silence critical news and comment. In particular, the deportation of expatriate publishers and the misuse of contempt proceedings have been particularly worrying.

Recommendations

The IBAHRI:

(25) Calls on the interim government to facilitate the independent and free operation of the Fiji Human Rights Commission and Fiji's media.

(26) Urges the Chair of the Fiji Human Rights Commission to ensure that the Commission complies with the standards for human rights commissions set out in the Paris Principles.

(27) Advises the Fiji Human Rights Commission to act independently and in compliance with its powers and mandates under the Fiji Constitution and law.

(28) Requests the Fiji Human Rights Commission to desist from making inappropriate and misleading statements regarding any legitimate criticism by other countries or international agencies of Fiji's compliance with human rights standards and democratic principles.

(29) Endorses the appointment of independent and fair-minded Commissioners to the Fiji Human Rights Commission, but only in accordance with Constitutional principles and processes.

(30) Urges the Fiji Human Rights Commission to abide by and carry out its mandate, and to avoid establishing commissions of inquiry regarding extraneous matters.

(31) Insists that the interim government desist from using contempt or deportation proceedings to attempt to control information provided to the community by the media.

Attachment A

The following is a summary of Fiji's governance arrangements under its 1997 Constitution. After the imposition of the interim military regime, a 'doctrine of necessity' has been invoked by the government, ostensibly to justify actions taken outside the Constitution. For example, Parliament has not sat in two years and the Great Council of Chiefs has been dissolved. The legitimacy of other constitutional bodies has been questioned.

Legislature

Fiji's legislative power is vested in a Parliament consisting of the President, the House of Representatives and the Senate.[391] Legislative bills are passed through both Houses and presented to the President for assent. The President cannot refuse assent.[392]

House of Representatives

Legislative proposals originate in the House of Representatives. It is made up of 71 elected members,[393] 46 elected by voters from four electoral roles (Fijians, Indians, Rotumans and other) to proportionally represent Fiji's ethnic groups and 25 elected from all communities on an open electoral role.[394] The House of Representatives is elected for five years from the date of its first meeting after a general election of members of the House.[395]

Electoral process

Fiji's electoral process is biased towards indigenous Fijians.[396] The system, which is put in place by the 1997 Constitution, effectively allows voters in identified ethnic groups to vote twice. All Fijians over the age of 21 vote in 1 of 25 open constituencies. In addition, voters who fall within identified ethnic groups (indigenous Fijians, Indo-Fijians, general electors and voters from Rotuma) vote in 1 of 46 reserved constituencies.[397] In 1997, when the provisions were included in the Constitution, the intent was to phase out the double-voting system over time, which has not happened. Commodore Bainimarama has recently suggested that he may abolish the communal voting system, in favour of one single electoral roll, in an attempt to '[take] away the race card'.[398] If the Constitution is changed to reflect a single electoral roll, it should eliminate a

391 Section 45, Fiji Constitution, *supra* n 19.

392 Section 46(2), Fiji Constitution, *ibid.*

393 Section 50, Fiji Constitution, *ibid.* Of the four electoral rolls, registered Fijians elect 23 members, registered Indians elect 19 members, registered Rotumans elect one member and otherwise registered voters elect one member.

394 Section 51, Fiji Constitution, *ibid.*

395 Section 59, Fiji Constitution, *ibid.*

396 Swastika Narayan, 'Racial Discrimination in Fiji', *Journal of South Pacific Law*, Vol 12(1), 2008, 68–75. Narayan states 'the allocation of seats in the government has always been unequal… This ethnically based allocation of seats gives priority to the larger population. This allows indigenous Fijians, who are already the numerical majority, to have a majority say in the government, whilst other races remain under represented', p 71.

397 John Fraenkel, 'A note on the Fiji electoral system', *From Election to Coup in Fiji*, at http://epress.anu.edu.au/fiji/pdf/note.pdf (last accessed 23 October 2008); 'The Alternative Vote System in Fiji: Electoral Engineering or Ballot-Rigging', Commonwealth & Comparative Politics, Vol 39(1), 2001, at 9–10; see also ibid, p 71.

398 'Rumblings of a revolution', *Sydney Morning Herald*, 27 October 2007, at www.smh.com.au/cgi-bin/common/popupPrintArticle.pl?path=/articles/2007/10/26/1192941338637.html (last accessed 23 October 2008).

political bias in favour of indigenous Fijians.[399]

The Senate

The Senate cannot initiate legislation, though it can propose amendments to bills, which must be approved or amended further by the House of Representatives. Some categories of bills (including taxation proposals) cannot be amended by the Senate.[400] Similarly, urgent bills can be passed to the President for assent without being approved by the Senate, if the Senate has not approved them within a seven-day time period.[401]

The Senate is composed of 32 members appointed by the President. Fourteen appointments are on the advice of the Bose Levu Vakaturaga (Great Council of Chiefs), nine on the advice of the Prime Minister and eight on the advice of the Leader of the Opposition. The Senate's term expires with the House of Representatives.[402]

Executive

President

The Constitution vests executive power in the President[403] who is both head of state[404] and Commander-in-Chief of the military.[405] The President is appointed for five years for a maximum of two terms.[406] The Great Council of Chiefs makes the appointment, after consultation with the Prime Minister.[407] In most circumstances, the Constitution requires the President to act only on the advice of Cabinet or of some other minister of a competent authority.[408] Circumstances where the President can act in his or her own judgment are set out in section 92 of the Constitution.

Prime Minister and Cabinet

The Prime Minister is appointed by the President, on the basis that he or she can form government in the House of Representatives. Members of Cabinet are appointed by the President on the advice of the Prime Minister.[409] Cabinet members are appointed from either the House of Representatives or the Senate, and the Cabinet must conform to proportional representation provisions under section 99 of the Constitution, which requires the Cabinet to reflect the ethnic makeup of the House of Representatives (for ethnic groups with a 10 per cent or greater representation). In 2001, following Qarase's electoral victory, Mahendra Chaudhry, who had been deposed as Prime Minister during the 2000 coup, refused an offer to join Cabinet. He later accepted a similar offer in 2006.

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399 Hamish McDonald, 'Military Chief Vows to Drop Poll Race Card', *Sydney Morning Herald*, 27 October 2007, at www.smh.com.au/news/world/military-chief-vows-to-drop-poll-race-card/2007/10/26/1192941338585.html (last accessed 23 October 2008).
400 Section 49, Fiji Constitution, *ibid.*
401 Section 48, Fiji Constitution, *ibid.*
402 Section 65, Fiji Constitution, *ibid.*
403 Section 85, Fiji Constitution, *ibid.*
404 Section 86, Fiji Constitution, *ibid.*
405 Section 87, Fiji Constitution, *ibid.*
406 Section 91, Fiji Constitution, *ibid.*
407 Section 90, Fiji Constitution, *ibid.*
408 Section 92(a), Fiji Constitution, *ibid.*
409 Section 99, Fiji Constitution, *ibid.*

Bose Levu Vakaturaga

The Great Council of Chiefs is enabled under Chapter 8 of the Constitution, and empowered by the Fijian Affairs Act.[410] Prior to its recent suspension, it had 55 members, including the President, Vice President and Prime Minister and 42 provincial councillors. Under the Constitution, the Council has power to appoint 14 of the Senate's 32 members.[411] The Council may also elect and, in certain circumstances, remove the President from office. This means that the Council appointees in the Senate effectively have veto power if they vote as a block.

The Council has been suspended since April 2007, after it refused to endorse the President's nomination for the Vice President vacancy. In response Commodore Bainimarama revoked the Great Council of Chiefs Regulation 1993. Members have instituted judicial review proceedings challenging this action.[412] In early 2008 a regulation was proclaimed that provided for the reformation of the Council, but in an amended form (three installed chiefs from each of the 14 provinces.)[413] Commodore Bainimarama has said that the Council has not been formed as there have been insufficient nominations from each of the provinces.[414]

410 *Fijian Affairs Act* 1945, at www.paclii.org/fj/legis/consol_act/faa117/ (last accessed 23 January 2009).

411 Section 49, Fiji Constitution, *supra* n 19.

412 Bainimarama stated 'It is very clear that the reasons for the GCC not endorsing H.E the President's nomination is because they do not recognise the Interim Government. They now constitute a security threat in our efforts to move the country forward. In turn we would also state that we do not recognize the GCC and as of now suspend all meetings of the Bose Levu Vakaturaga', see: 'Address by PM Bainimarama Following the Great Council of Chiefs Meeting', Fiji Government Online Portal, 13 April 2007, at: www.fiji.gov.fj/publish/page_8756.shtml (last accessed 21 October 2008).

413 'Fiji Great Council of Chiefs ready to convene', ABC Radio Australia, 5 August 2008, at www.radioaustralia.net.au/news/stories/200808/s2324046.htm?tab=latest (last accessed 27 October 2008).

414 'Press Statement on GCC Taskforce', Fiji Government Online Portal, 6 August 2008, at www.fiji.gov.fj/publish/page_12562.shtml (last accessed 27 October 2008).

Attachment B

Mr Aiyaz Sayed-Khaiyum
Attorney General, Minister for Justice, Electoral Reform and Anti-Corruption
Box 2213
Government Buildings
Suva

Fax: (679) 3302 404

Dear Minister Sayed-Khaiyum,

The International Bar Association's Human Rights Institute (IBAHRI) is sending an eminent panel of jurists to Fiji to examine the state of the rule of law and the independence of the judiciary. The delegation comprises: Mr Peter Maynard, Barrister, the Bahamas; Justice Roslyn Atkinson, Queensland Supreme Court, Australia; Mr Roger Tan, Advocate and Solicitor, Malaysia; Ms Felicia Johnston, Programme Lawyer, IBAHRI; and Ms Cecelia Burgman, Rapporteur.

The delegation will be in Fiji from 18-22 February 2008 and would very much welcome the opportunity to meet with you to discuss the current environment in Fiji with a view to gaining a better understanding of the situation.

The International Bar Association (IBA) is a dual membership organisation, comprising 30,000 individual lawyers and over 195 Bar Associations and Law Societies working to influence the development of international law and the future of the legal profession. The IBAHRI works across the Association, helping to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and the legal profession worldwide. The IBA is a global, non-political and professional association.

In accordance with usual practice, the IBAHRI will issue a report of its findings that will be a balanced and independent reflection of its meetings.

I would be grateful if a member of staff from your office could advise, by reply to the IBA (email: felicia.johnston@int-bar.org or fax +44 207 691 6544), if you would be available to meet with the delegation at some time during the week.

We very much look forward to hearing from you.

Yours sincerely,

Mark Ellis

Executive Director

Attachment C

Attorney-General and Minister for Justice, Electoral Reform, Public Enterprises and Anti-Corruption

Attorney-General's Chambers
Level 7, Suvavou House
P O Box 2213
Government Buildings
Suva
Telephone: (679) 3309866
Fax No: (679) 3310807

Ministry of Public Enterprises
Level 4, Civic Towers, Victoria Parade
P O Box 2278
Government Buildings
Suva
Telephone: (679) 3315577
Fax No.: (679) 3315035

30 January 2008

By Facsimile: 44 (0) 20 7691 6544

Mr Mark Ellis
Executive Director
10th Floor, 1 Stephen Street
London W1T 1AT
United Kingdom

Dear Mr Ellis

Proposed Visit by the International Bar Association to Fiji – February 2008

1. I refer to your facsimile letter of 14 January 2008.

2. I am surprised at the timing of your proposed visit. I have no objection to any delegation to Fiji to examine our judiciary. I assume that you have already advised the Acting Chief Justice of the purpose of your proposed visit.

3. There are a number of political and constitutional cases before the courts at the present time and individuals associated with your organization are counsel in those cases. One example is Graham Leung. He and former Vice-President Ratu Joni Madraiwiwi are partners in a law firm "Howards". This firm is currently representing political groups and the suspended Chief Justice. Mr Leung has been a vocal critic of the current Government.

4. In the present situation in Fiji when lawyers have become partisan and are using organizations such as the International Bar Association and LAWASIA to ventilate the interests of their political clients, any visit by you will be seen as one which intends to fulfill a particular lobby and political agenda. The fact that your visit is timed to coincide with the hearing of the *Qarase v Bainimarama* case, with the hearing by the Tribunal for the suspended Chief Justice, the hearing of a number of Constitutional cases and the Inquiry into the Magistracy, confirms this agenda.

5. Furthermore, I understand that the only past President of the Fiji Law Society that IBA intends to meet up with during the proposed visit is Graham Leung. You have not proposed to meet Devanesh Sharma (immediate past President), or Chen Young who was the President during the 2000 crisis. I also understand that in your letter to the Chairman of the Human Rights Commission you intend to discuss the "on-going state of emergency".

6. For your information there is no "ongoing state of emergency" in Fiji. Clearly your agenda and your apparent lack of familiarity with the current situation in Fiji indicates that you have some pre-reconceived ideas.

7. In blunt terms, I believe the IBA is being manipulated by powerful elite and political groups in Fiji to undermine the independence of our Courts, to pressurize our judges to find in their favour and manipulate the media. It should also be noted that a number of media outlets in Fiji have the same lawyers as their advisors.

8. You are welcome to visit Fiji to examine our judiciary and the independence of the Bar. But you must delay your visit so it is not seen as a ploy to influence our Courts to find in favour of the lawyers who are associated with your organization and who have asked you to visit at this time.

9 This is precisely the position that we have taken with the UN Special Rapporteur on the Independence of Judges and Lawyers. He has also agreed to delay his visit which had been proposed to be held from 14 to 18 January 2008.

10. If you had consulted me, as leader of the Bar, before planning your proposed visit, I would have informed you of these matters earlier. As it is, it is unfortunate you will be inconvenienced and will have to now reschedule your travel plans.

11. When you do come in the future, following arrangements with this Chambers, I hope that we will have fruitful, genuine and impartial discussions on the independence of the judiciary and the Bar.

Thank you.

Yours sincerely

Aiyaz Sayed-Khaiyum
Attorney General and Minister for Justice, Electoral Reform, Public Enterprises & Anti-Corruption

Attachment D

Attorney-General and Minister for Justice, Electoral Reform, Public Enterprises and Anti-Corruption

Attorney-General's Chambers
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PRESS STATEMENT

The International Bar Association Human Rights Institute has announced that it will visit Fiji from 18 to 22 of February 2008 to examine the rule of law and the independence of the judiciary in Fiji.

Indeed their visit has already been announced in the media and Fiji TV covered the story on Sunday 27 January 2008 without giving me an opportunity to express our position.

Our position is this:

1. We welcome any visit by the IBA to Fiji but not now.

2. We took the identical position when the UN Special Rapporteur on the Independence of Judges and Lawyers wanted to visit Fiji. We told the Special Rapporteur through our Mission that a visit is most welcome but not now. The Special Rapporteur agreed.

3. The reason we have taken this position is because there are a number of matters before various tribunals, including constitutional cases in the High Court and the Court of Appeal, the suspended Chief Justice's Tribunal, the litigation filed by the suspended Chief Justice in relation to the Tribunal, the Fiji Law Society challenge of the Judicial Services Commission and the Magistrate's Inquiry which will all be prejudiced by any outside visit.

4. There is a danger that the examination of IBA or any other body at this point in time will trespass into areas which are specifically before the courts and which will directly interfere with the independence of those courts. In blatant terms the presence of the IBA connected as it is to partisan lawyers will unfairly prejudice

those judges hearing the cases and will undermine their independence.

5. Our justice system must be allowed to work without interference and undue pressure.

6. The conduct by some key sections of the media in relation to any such visit by IBA will also be destructive to the independence of the judiciary. I say this because to date key sections of the media have been partisan and have failed to show any balance or fairness in relation to reporting on the judiciary. The media has already taken a position. Some examples of these are: the Fiji Sun printed the entire affidavit of the suspended Chief Justice and presented it as factual, without printing the affidavits of other parties in the litigation; the Fiji Times similarly printed extracts of the suspended Chief Justice's affidavit and although they had a copy of the Judicial Services Commission minutes, they failed to print it as would be expected of a non-partisan media outlet; similarly Fiji TV ran a story at the weekend on the visit of the IBA but without seeking my views. They have only today sought my views. Professional journalism would require hearing from both sides before airing or printing the story. The printing of affidavits from just one party goes against the grain of impartiality.

7. I believe the persons who have instigated this proposed visit of IBA are a group of lawyers some of who are also involved in the litigation before the courts. It is no coincidence that these are also legal advisors to some of the media outlets. The Fiji Law Society is also involved in pending litigation which directly affects the judiciary and is therefore not an independent party which the IBA can source independent views from.

8. I am also informed that IBA intends to only meet up with Graham Leung as the past President of the Fiji Law Society. They have not proposed to meet with Devanesh Sharma who is the immediate past President or Chen Young who was the President during the 2000 crisis. I also understand that in its letter to the Chairman of the Human Rights Commission, the IBA said that it wanted to discuss the "ongoing state of emergency" in Fiji. This agenda and the lack of familiarity with the current situation of Fiji indicates preconceived ideas on the part of IBA.

9. I am sure that most sections of the media will not report what I am saying this afternoon because they will protect these lawyers and their partisan editorial position.

10. However, the IBA visit is instigated by people who represent the elite and who want to use the IBA to influence the judiciary to produce a particular result from the judiciary. The timing of the visit is no coincidence. The Fatiaki Tribunal commences on 13 February 2008 and is set for two weeks. The IBA visit is scheduled from 18 to 22 of February 2008. The High Court has already commenced hearings concerning the Qarase trial. I have informed the IBA that they will compromise their neutrality by coming in these circumstances. It is precisely for these reasons that the UN Special Rapporteur agreed to defer his visit. I have as with the UN Special Rapporteur informed IBA that they are most welcome but not now.

11. My challenge to the media is to report precisely what I have said today. I know you will not do it or at least your editors won't allow you to do it. My challenge to you also is to find out who instigated the visit, what was their motive, to what extent they are involved in political cases before the courts and have a personal or financial agenda.

Aiyaz Sayed-Khaiyum
Attorney General and Minister for Justice, Electoral Reform, Public Enterprises & Anti-Corruption

30 January 2008

Attachment E

Mr Aiyaz Sayed-Khaiyum

Attorney General, Minister for Justice,

Electoral Reform and Anti-Corruption

Box 2213

Government Buildings

Suva

Fax: (679) 3310807

30 January 2008

Dear Attorney-General

We refer to your facsimile dated 30 January 2008.

We would like to take this opportunity to assuage your concerns regarding the impact of the International Bar Association's (IBA) visit. The independence of the judiciary is a key element in the rule of law, and is one of the highest priorities in the work of the IBA. The purpose of our visit is to assess the independence of the judiciary, not to impinge on that independence in any way through influence or pressure. In addition, in order to preserve judicial independence, the IBA has a strict policy of not commenting on cases that are before the courts. Consequently, any issues regarding those cases will not be discussed until the finalisation of all court processes concerning them.

The IBA is apolitical, objective and professional, and the delegation is coming to the country with an open mind to assess the issues using international legal standards as yardsticks. The IBA delegation wishes to meet with as wide a range of stakeholders as possible, in order to hear all viewpoints, and is not limiting its meetings in any way.

The recent events in the judiciary over the past year were the catalyst for our decision that an indepth assessment through an IBA visit was necessary. The timing for our visit was determined solely on the basis of the earliest date we could arrange the visit to Fiji, and not deliberately timed to coincide with any particular hearing.

The delegation has a meeting planned with the current President of the Fiji Law Society, and has requested referrals to others who might be interested in meeting with the delegation. The itinerary is still being arranged and we will keep additional times free for meetings identified while in-country. We would be very happy to meet with the former Presidents you mentioned in your facsimile. We are continuing to ask for referrals to additional contacts, and would welcome any other suggestions you might have.

In response to your query, the IBA delegation has already been in touch with Acting Chief Justice Gates about its visit, and has scheduled a meeting with him. We have also contacted the Court of Appeal, the High Court and the Supreme Court and are waiting to hear from them regarding appropriate times for meetings.

I emphasise that the IBA seeks to present a balanced view of the situations in-country and does not limit its recommendations to governments, but extends them to bar associations and other stakeholders as appropriate. The high-level delegates involved in the mission are experts in their field, and are not susceptible to manipulation or influence by any groups or individuals in Fiji.

The information we have on Fiji is necessarily restricted to our research in-house, which is why we are keen to send a delegation to gather all the information.

As an independent organisation, the IBA does not consult with governments as to the timing of its visits, although we strongly urge governments to meet with our delegations so a fulsome understanding of the situation can be attained.

We urge you to reconsider meeting with the delegation during its visit so that all the different perspectives in Fiji will be able to be considered by the IBA.

Yours sincerely,

Mark Ellis

Executive Director

Attachment F

3 February 2008

By Facsimile: 44 (0) 20 7691 6544

Mr Mark Ellis
Executive Director
10th Floor, 1 Stephen Street
London W1T 1AT
United Kingdom

Dear Mr Ellis

Proposed Visit by the International Bar Association to Fiji – February 2008

1. I refer to your letter dated 30 January 2008. It demonstrates a lack of objectivity in the methodology of your inquiry and is regrettably patronizing.

2. IBA itself identified Graham Leung as the only past President that it wished to see. You now in your response are asking me to suggest other names. Surely a proper and unbiased inquiry would identify the range of people from a wide spectrum who would provide you with their views and opinions. It is only then that any credible inquiry would be able to reach any independent and valid conclusion. This is a fundamental requirement of natural justice. LawAsia very competently was able to do this

3. Your suggestion that you will meet other people who may be interested in meeting IBA, is with respect, irrelevant. Those other people are not conducting the inquiry, IBA is. The onus is on you. It is IBA which should take the time and make the effort to ensure that its consultations are balanced and truly representative. Graham Leung is well known in Fiji for his partisanship and openly critical views of the Government and the Judiciary. Why is he the only past President that IBA identified to see? Who will "refer" you to other people that you state in your letter? Graham Leung? Or the current Law Society which is bringing an action against the Judicial Services Commission and members of the Judiciary?

4. Who are the complainants who have prompted your inquiry? Who are the accusers and what is the charge?

5. You have not mentioned in your response which judges you have arranged to see or have you hand picked them as you have with the past Presidents of the Law society? In any case most of the judges won't be able to meet you as they are parties to pending litigation. I am not sure what the Acting Chief Justice has said to you but even he would be constrained from speaking freely to you because you naturally would be meeting the suspended Chief Justice who has brought proceedings against him.

6. You have not explained your timing. You have waited for nearly 15 months since December 5, 2006 and you can wait until the relevant pending litigation is over. The question of course is where were you over the past 15 months? LawAsia was here last year when there was no litigation on foot and the tribunal had not met and/or set hearing dates. LawAsia carried out a thorough analysis and their independence at the onset led them to meet a wide spectrum of people, including the Prime Minister. I suggest you read their report.

7. My position is unchanged and you are not welcome in Fiji at this time.

Thank you.

Yours sincerely

Aiyaz Sayed-Khaiyum
Attorney General, Minister for Justice, Electoral Reform,
Public Enterprises & Anti-Corruption

Encl: Press Statement 30 January 2008

Attachment G

the global voice of
the legal profession

Mr Aiyaz Sayed-Khaiyum
Attorney General, Minister for Justice,
Electoral Reform and Anti-Corruption
Box 2213
Government Buildings
Suva
Fax: (679) 3310807

4 February 2008

Dear Attorney-General

I refer to your facsimile dated 3 February 2008.

The IBA delegation is meeting with a wide range of stakeholders from the judiciary, the legal profession and the non-government community, and has sent numerous requests to government officials. Members of the judiciary, the legal community and the non-governmental community have all expressed their willingness to meet with the delegation. The invitation to you to meet with the IBA delegation remains in place, and I would hope you will to do so in order to present your views.

In response to your comments in paragraph 3 of your letter, the IBA delegation's willingness to meet with all interested persons ensures that all diverse views are heard. The IBA does not limit its enquiries to government and judicial officials; it believes that all interested stakeholders should express their opinions. As I stated my letter dated 30 January 2008, we have sought meetings with stakeholders representing all perspectives, and will continue to do so while in Fiji.

Furthermore, your allegations about Graeme Leung's purported influence over the IBA are entirely unfounded. Whilst the IBA delegation will meet with Mr Leung, he was not involved in any way with the decision of the IBA to send a delegation, nor had he any influence over its timing. Mr Leung, as any interested party in Fiji, is welcome to meet with the IBA delegation to share his views. We also have meetings with other members of the legal community. The IBA delegation continues to seek meetings with other stakeholders, and has already obtained a meeting with Mr Chen Young.

As I stated in my letter dated 30 January 2008, we have been monitoring the situation in Fiji for a significant period of time, and our decision to visit is based on our own objective analysis and review. As I explained, the visit was initiated because of our concerns about the independence of the judiciary. The departure of six Court of Appeal judges in December 2007 was the final catalyst for our decision to send a delegation to investigate our concerns.

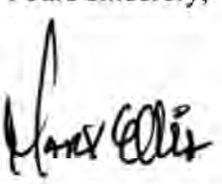
We have contacted the head judges and registrars in the primary courts in Fiji through the official Fiji Government information available online. All of those we have contacted have agreed to our request to meet. In the interests of frank and open discussions and the right to privacy, I am not at liberty to provide you with a full list of those the delegation will meet, nor am I able to respond to your queries about which parties in Fiji may have concerns about the status of the rule of law. The IBA delegation will hear from all perspectives and will make its own objective analysis of the situation.

I am familiar with LawAsia's mission and report. LawAsia's mandate and the terms of reference for its visit differ from the IBA's in many ways. The situation in Fiji has changed significantly since their mission and an IBA visit is now warranted.

As I stated in my last letter, the IBA is apolitical, objective and professional. In recent months, IBA delegations have visited numerous countries including Iran, Uganda, Poland and Pakistan. In each case, government officials agreed to meet with the visiting delegation.

I hope you will reconsider your position and decide to meet with the delegation. We would welcome your views and insights.

Yours sincerely,



Mark Ellis
Executive Director

Attachment H

Mr Aiyaz Sayed-Khaiyum

Attorney General, Minister for Justice,

Electoral Reform and Anti-Corruption

Box 2213

Government Buildings

Suva

Fax: (679) 3302 404

Dear Minister Sayed-Khaiyum, 6 November 2008

The International Bar Association's Human Rights Institute (IBAHRI) has now rescheduled its visit to Fiji. The delegation comprises: Justice Roslyn Atkinson, Queensland Supreme Court, Australia; Mr Roger Tan, Advocate and Solicitor, Malaysia; Ms Felicia Johnston, Programme Lawyer, IBAHRI; and Mr Daniel Woods, Rapporteur.

The delegation will be in Fiji from 8-12 December 2008 and would welcome the opportunity to meet with you to improve our understanding of the current legal and judicial climate in Fiji.

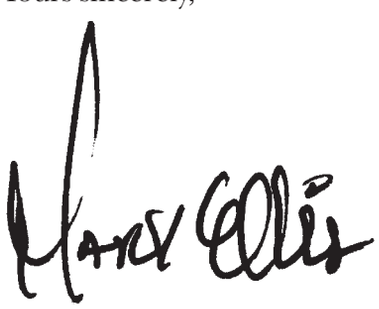
The International Bar Association (IBA) is a dual membership organisation, comprising 30,000 individual lawyers and over 195 Bar Associations and Law Societies working to influence the development of international law and the future of the legal profession. The IBAHRI works across the Association, helping to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and the legal profession worldwide. The IBA is a global, non-political and professional association.

In accordance with usual practice, the IBAHRI will issue a report of its findings that will be a balanced and independent reflection of its meetings.

I would be grateful if a member of staff from your office could advise, by reply to the IBAHRI (email: felicia.johnston@int-bar.org or fax +44 207 691 6544), if you would be available to meet with the delegation on Wednesday 10 December or Thursday 11 December. If you are available, I propose 10.30-11.30am on Wednesday 10 December.

I look forward to hearing from you.

Yours sincerely,



Mark Ellis

Executive Director

Attachment I

Attorney-General and Minister for Justice, Electoral Reform, Public Enterprises and Anti-Corruption

Attorney-General's Chambers
Level 7, Suvavou House
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Ministry of Public Enterprises
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Suva
Telephone: (679) 3315 577
Fax No.: (679) 3315 035

24 November 2008

By Facsimile: +44 (0)20 7691 6544

Mr Mark Ellis
Executive Director
International Bar Association
10th Floor, 1 Stephen Street
London W1T 1AT
United Kingdom

Dear Mr Ellis

Visit by IBA'S Human Rights Institute

1. I refer to your facsimile of 6 November 2008.

2. Again the IBA has unilaterally decided to schedule its visit to Fiji. IBA should have first consulted and obtained the approval of the Government of Fiji and discussed the matter with the Judiciary before scheduling any visit to Fiji.

3. To date also, IBA has not given a full explanation in respect of the prejudiced position it held prior to its previous scheduled visit.

4. Furthermore, there have already been three international independent reviews of Fiji's legal and judicial position. These reports have firmly established that the judiciary in Fiji operates in an independent manner, without any interference from the Executive.

5. The Government of Fiji does not welcome nor approve this proposed unilateral visit by the IBA and accordingly appropriate steps will be taken. A mutually agreed time in the future could be arranged for your visit.

Thank you.

Yours sincerely

Aiyaz Sayed-Khaiyum
Attorney-General and Minister for Justice, Electoral Reform,
Public Enterprises and Anti-Corruption & Acting Minister for Industry,
Tourism, Trade and Communication

Attachment J

NEWS RELEASE

INTERNATIONAL BAR ASSOCIATION
the global voice of the legal profession

[For immediate release: Tuesday, 25 November 2008]

IBA condemns Fiji Government's threat against high-level delegation

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The **International Bar Association** (IBA) condemns the threat made by Fiji's Attorney General, Aiyaz Sayed-Khaiyum, against a high level IBA-delegation scheduled to conduct an in-country review of the rule of law in Fiji. In a letter received by the IBA 24 November 2008, the Attorney-General of Fiji declared that 'the Government of Fiji does not welcome or approve' the delegation's visit and would take 'appropriate steps' if the IBA attempts to visit Fiji. The letter was issued despite reports in the Fijian and Australian media that the Attorney General would now 'most welcome' a visit from the IBA.

The barred delegation included senior jurists from Australia and Malaysia who were scheduled to meet with judges and members of the legal profession for five days between 8 and 12 December 2008. The same delegation was prevented from entering the country in February of this year when the Fiji government issued an immigration stop order.

The IBA is disappointed that the Fijian Government is not supportive of independent reviews of the rule of law and independence of the judiciary. The IBA is also troubled by this latest attempt to thwart the efforts of a non-political professional association to assess the situation. The IBA is not deterred, however, in carrying out its review. Using other avenues available, the IBA will continue its work to provide an independent assessment of the rule of law and independence of the judiciary in Fiji. A report will be issued in the near future.

The IBA regrets that the Fiji government will not meet with the delegation to present its own views on the rule of law in Fiji.

'The Fijian Government has again indicated its lack of support for an independent review of the situation in Fiji. The threat made by the Attorney-General against the delegation is unacceptable in a free and democratic society and reflects badly on the state of affairs in Fiji', said Mark Ellis, IBA Executive Director.

Fernando Pombo, President of the IBA, stated: *'The rescheduled visit had attracted the support of a variety of stakeholders including judges, lawyers and non-government organisations. It is deeply saddening to see that the Fijian Government wishes to prevent this visit from taking place in light of the manner in which it has been welcomed by the rest of the community.'*

ENDS

For further information please contact:

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About the International Bar Association

the global voice of the legal profession

The **International Bar Association** (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of over 30,000 individual lawyers and more than 195 bar associations and law societies spanning all continents.

The IBA's main administrative office is in London with regional offices in São Paulo, Brazil; and in Dubai, United Arab Emirates.

Grouped into two divisions – the **Legal Practice Division** and the **Public and Professional Interest Division** – the IBA covers all practice areas and professional interests, providing members with access to leading experts and up-to-date information. Through the various committees of the divisions, the IBA enables an interchange of information and views as to

laws, practices and professional responsibilities relating to the practice of law around the globe. Additionally, the IBA's high-quality publications and world-class conferences provide unrivalled professional development and network-building opportunities for international legal practitioners and professional associates.

The IBA's **Bar Issues Commission** provides an invaluable forum for the IBA's member bar associations and law societies to discuss all matters relating to law at an international level.

The IBA's **Human Rights Institute** promotes, protects and enforces human rights under a just Rule of Law, and works to preserve the independence of the judiciary and the legal profession worldwide.

In partnership with the **Open Society Initiative for Southern Africa**, the IBA created the **Southern Africa Litigation Centre**, based in Johannesburg, South Africa, which promotes human rights and the Rule of Law and operates in the following Southern African countries: Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia and Zimbabwe.;

The **International Legal Assistance Consortium,** based in Stockholm, Sweden, is the worldwide consortium of non-governmental organisations providing technical legal assistance to post-conflict countries which the IBA was instrumental in establishing. In addition through a funded grant, the IBA has staff stationed in the Peace Palace in The Hague, the Netherlands, who manage the **IBA's International Criminal Court (ICC) Monitoring and Outreach Programme**. This team follows the work and the proceedings of the ICC, focusing in particularly on issues affecting the fair trial rights of the accused; the implementation of the 1998 Rome Statute; the Rules of Procedure and Evidence; and related ICC documents, in the context of relevant international standards.

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Attachment K

Mr Aiyaz Sayed-Khaiyum

Attorney General, Minister for Justice,

Electoral Reform and Anti-Corruption

Box 2213

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Fax: (679) 3302 404

Dear Minister Sayed-Khaiyum, 25 November 2008

I refer to your letter dated 24 November 2008.

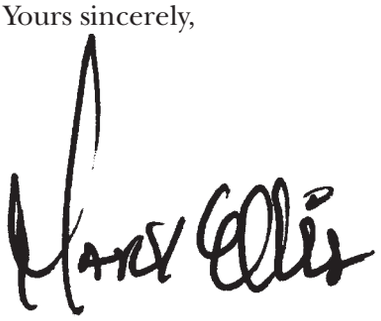
As I explained to you in my letter dated 30 January 2008, the International Bar Association (IBA) is an independent, non-political organisation; we do not consult with governments as to the timing of our visits. However, we take extensive steps to ensure that we meet with representatives of governments in all our visits to ensure an objective view is obtained. It is regrettable that, despite our efforts to seek your views, you have refused to meet with the delegation and are actively hindering its attempts to meet with other stakeholders.

The IBA has scheduled numerous meetings with the judiciary, lawyers and non-government organisations based in Fiji in preparation for this visit. All of these stakeholders are supportive of the delegation's visit. Thus, it is of deep concern that you have decided to oppose the visit.

As announced in our recent press statement, the IBA will conduct its review of Fiji remotely, and will seek all views in reaching its objective and unbiased assessment of the situation. Any persons wishing to submit their views on the situation in Fiji will be welcome to do so.

In accordance with usual practice, the IBA will issue a report of its findings that will be a balanced and independent reflection of the situation.

Yours sincerely,



Mark Ellis

Executive Director