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Maldives:
Securing an Independent Judiciary in a Time of
Transition

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I Executive Summary

The Maldives remains a country in transition. It holds the deepening promise of a constitutional democracy with institutions founded upon respect for the rule of law, fundamental rights, and the separation of powers. But the legacy of an authoritarian past, in which the President was also the supreme judicial authority, has tested the transition.

A delegation of the International Commission of Jurists (ICJ), comprised of Dr. Leandro Despouy, former UN Special Rapporteur on the independence of judges and lawyers, Roger Normand, ICJ Asia-Pacific Director, and John Tyynela, ICJ Senior Legal Adviser, visited the Maldives from 12 to 17 September 2010 in order to assess advances in establishing an independent judiciary. The ICJ is a global organization of judges and lawyers dedicated to advancing rule of law and human rights, with a network of over 60 Commissioners, 100 sections and affiliates throughout the world, and regional offices that carry out programmatic work.

The ICJ met with stakeholders involved in the justice sector from the Maldivian Government, the People's Majlis, the Judiciary, the legal community, and civil society, and was pleased to learn of a broad consensus throughout the political spectrum in favour of strengthening the judiciary as an independent institution with capacity to uphold the rule of law, human rights and democratic principles.

At the same time, the ICJ was troubled to learn about apparent breaches of the separation of powers between the executive, legislative and judicial branches from May to August 2010, as the two-year constitutional period for transitional arrangements ended on 7 August 2010. There was grave concern about reported threats to the judiciary, as well as setbacks in the promulgation of statutes, regulations, and procedures necessary to establish permanent courts with the means to carry out their functions effectively. In particular, the ICJ was concerned by two developments: the apparent failure of the Judicial Services Commission (JSC) to fulfil its constitutional mandate of properly vetting and reappointing the judges, and the apparent extra-constitutional use of the Maldives National Defence Force, the police, at times in defiance of court orders. Furthermore, decisions of the judiciary have been perceived as politicized. This "judicialization" of politics is straining nascent judicial institutions.

The JSC – constitutionally established as an independent and impartial body tasked with vetting non-Supreme Court judges and magistrates – was unable to carry out its functions in a sufficiently transparent, timely, and impartial

manner. To date, JSC decision-making has been perceived as being inappropriately influenced by a polarized political environment. Also troubling is that members of the judiciary have been subject to threats and intimidation as well as improper inducements by both governing and opposition party members.

In order to develop a strong and independent legal system, judges and magistrates must be provided with the institutional and individual support to build public confidence in the judiciary. Judicial accountability is key to cultivating such public confidence and is an integral aspect of judicial independence. Accountability must be manifest both at the institutional level, in terms of court administration and access to justice, and at the individual level. This enables judges to decide cases without fear or favour and that they strictly apply the law to the facts before them.

To protect and advance these values, the ICJ makes the following recommendations:

A. Supreme Court of Maldives

1. Support the judicial career

- Provide education and training opportunities for junior members of the Bench to improve their competency. The Supreme Court should ensure that the seven-year period granted by the Judges Act, for judges to enhance their qualifications, is used effectively to enhance the capacity of the judiciary;
- Implement the Code of Ethics in accordance with the *Bangalore Principles on Judicial Conduct* and its Commentary; and
- Conduct regular performance evaluations to ensure the fair and effective administration of justice.

2. Use DJA effectively

- Oversee and closely monitor the DJA to ensure that it facilitates the smooth administration of justice. The DJA should:
 - Require all levels of court to issue written reasons;
 - Establish a judicial database that all levels of court and the public can refer to for case precedents and legislation;
 - Develop rules of procedure to address the lack of discovery, lack of default judgments, and the weak enforcement of judgments;
 - Institute audio recordings of all criminal proceedings to ensure integrity of court records;
 - Help raise public awareness about the role and importance of an independent judiciary;
 - Optimize the courts' operational processes by transferring non-

adjudicative tasks from judges to court personnel, and upgrading the functioning of case registries, archives, recording of court proceedings, court statistics and case monitoring;

- Develop a program to reduce case delays and backlogs;
- Develop a framework for the economic management of the courts;
- Develop a plan to remedy lack of proper court facilities; and
- Utilize and strengthen the Judicial Training Centre by developing a curriculum and training program for judicial staff.

3. Invite experts to assist

- Invite a judicial expert to spend time in the Maldives over the course of the year in order to work and consult closely with the Supreme Court Chief Justice and honourable justices, and the JSC Chair and its members and to advise the Government more broadly on issues related to upholding judicial independence and accountability during the democratic transition.
- Invite an advisory group to consult regularly with the judicial mentor, also visiting the Maldives for several short trips, so that they may provide advice on key legal issues as requested by the judicial mentor and participate in high-level national and regional symposia on judicial matters.
- Expand the research and administrative capacity of Court staff to provide comprehensive support to the Supreme Court, as requested by the Chief Justice.

B. Judicial Service Commission

1. Adopt transparent regulations and procedures

- Adopt Rules of Procedure so that the JSC can operate in a transparent manner that will help avoid actual and perceived conflicts of interest. For instance, procedures should include explicit and detailed consideration of conflict of interest concerns that allow JSC members to withdraw from decision-making where such conflicts arise;
- Evaluate judges and magistrates for their aptitude and competence in applying constitutional law, ensuring equality before the law, and applying human rights norms when interpreting domestic legislation;
- Make transfer protocols public. Involuntary transfers should not be used as indirect forms of discipline and control over judges and magistrates;
- Establish a notice period that gives judges sufficient time to apply for promotions through a competitive process; and
- Develop and make public the procedures for the receipt, adjudication, and follow-up of complaints regarding the judiciary. The JSC should

ensure that due process rights of judges and magistrates are respected and that complaints are adjudicated quickly. One effective way of achieving this may be to record all JSC meetings and provide the minutes freely to the public so that an atmosphere of trust develops between the people and the judiciary.

2. Establish a technical secretariat

- Create a capable and neutral technical secretariat that reduces the workload of the JSC and permits it to focus on the high-level policy the Constitution envisages for the JSC.

3. Ensure integrity of judges

- Make certain that the standard of “high moral character” for judges is consistent with the Bangalore Principles as developed in its detailed commentary.

4. Invite an expert to assist

- Invite an experienced expert, seconded to the JSC for a period of at least six months, to assist in its operational development in accordance with international best practice.

5. Monitor and evaluate:

- Establish benchmarks for periodic evaluations of progress.

C. Government of the Maldives

1. Improve interplay between institutions

- Facilitate dialogue between the Attorney General, Prosecutor General and Maldives Police Service so that their respective roles are understood.
- Empower the Attorney General’s office to have a facilitating role in clarifying scope of powers across all government institutions.

2. Strengthen the Faculty of Law and Shari’ah

- Adequately fund and build the capacity of the Faculty of Law and Shari’ah so that it can help address the shortage of qualified legal practitioners in the Maldives.

3. Launch public awareness campaign

- Launch a public campaign that clarifies the role of distinct government offices and the meaning of respect for the separation of powers.

D. People's Majlis

1. Demonstrate collaborative leadership

- Consolidate democratic transition by exhibiting bipartisan collaborative leadership.

2. Pass important legislation

- Immediately pass required laws, such as the Penal Code, Criminal Procedure Code, Civil Procedure Code, Evidence Act, and pending Drug Bill, so that justice can be delivered swiftly, impartially and effectively.

3. Reform the JSC

- Evaluate the performance of the JSC and reform the JSC Act so that the JSC operates more transparently and a technical secretariat is created.

E. Donor Community

1. Build capacity of parliamentarians

- Provide technical assistance for mid-level political leadership to better understand Latimer House Guidelines as they pertain to judicial independence.

2. Support expert advice

- Give logistical and financial support for two international experts; one to be posted with the Supreme Court and one with the JSC.

3. Facilitate out-of-country training for judicial leadership

- Collaborate with the Supreme Court to provide effective and advanced training to judges in order to help improve their competency.

4. Provide support for civil society organizations

- Provide support to civil society organizations in their effort to raise public awareness of the new Constitution and its implications for governance.

II Background

A. Purpose of ICJ Mission

1. A delegation of the International Commission of Jurists (ICJ) visited the Maldives from 12 to 17 September 2010 in order to assess advances in establishing an independent judiciary. The ICJ team was comprised of Dr. Leandro Despouy, former UN Special Rapporteur on the independence of judges and lawyers, Roger Normand, ICJ Asia-Pacific Director, and John Tyynela, ICJ Senior Legal Adviser.

2. The ICJ is a global organization of judges and lawyers dedicated to advancing rule of law and human rights. Currently, the ICJ consists of a network of over 60 eminent Commissioners, 100 sections and affiliates throughout the world, as well as regional offices that carry out programmatic work. The ICJ has played a seminal role in developing international standards relating to upholding the independence of the judiciary.

3. The ICJ expresses its gratitude to members of the Maldivian Government, the People's Majlis, the Judiciary, the legal community, and civil society, for participating in meetings with the ICJ delegation and sharing their considered views concerning the status of the judiciary. In particular, the ICJ would like to thank the President, his senior advisers, ministers of state for Foreign Affairs and Home Affairs, the Chief Justice and Justices of the Supreme Court, Commissioners of the JSC and the Human Rights Commission, the Police Commissioner, the Attorney General, the Prosecutor General, members of the Judicial Oversight Committee of the Majlis and of various political parties, judges of the High Court, Criminal Court, and Civil Court, and representatives of civil society organizations. The ICJ was privileged to benefit from frank and open discussions and gained valuable insight and knowledge from these exchanges.

4. The legal framework for this assessment is the 2008 Constitution, relevant statutes and regulations, and international law and standards applicable in the Maldives, including the *International Covenant on Civil and Political Rights* (ICCPR), the *UN Basic Principles on the Independence of the Judiciary* (1985), the *Bangalore Principles of Judicial Conduct* (2001), and the *Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence* (1998).

5. This assessment is intended to support efforts by the Judiciary, the

Government, the Majlis, and civil society to work towards the common goal of an independent, impartial, and competent judiciary in the Maldives.

B. The Transitional Context

6. As head of the ICJ delegation, Dr. Despouy acknowledged the contribution of those in the current and previous government to constitutional reform, presidential and parliamentary elections, and the peaceful transfer of power to the first democratically elected government. He emphasized the historic responsibility of all stakeholders to uphold the new Constitution and rule of law, urged statutory and regulatory measures to consolidate the transition, and encouraged the parties to recommit to maintaining the consensus necessary for the consolidation of democracy.

7. The ICJ delegation was reminded that the beating death of Evan Naseem in Maafushi prison on 19 September 2003 – and the resulting civil unrest – continues to mark an historic turning point after which a series of significant reforms were possible and demonstrated the strength of the democratic movement. The Maldives Police Service was created in September 2004 under the Home Ministry, separating it from its former paramilitary role under the National Security Services. On 10 December 2004, the National Human Rights Commission was established as an independent statutory body. In July 2004, the Special Majlis was convened to reform the Constitution. In June 2005, political parties were permitted to register. In November 2005, the President announced steps towards the separation of executive and judicial power, including through the formation of a Judicial Service Commission to oversee appointments and dismissals and to act as a ‘watchdog’ in upholding a judicial code of conduct. In 2005 and 2006, the ICJ was permitted to observe the trial of MDP Chair and current President Mohammed Nasheed and the appeal of MDP member Ms. Jennifer Latheef.

8. In February 2007, in his capacity as the UN Special Rapporteur¹ on the Independence of Judges and Lawyers, Dr. Despouy visited the Maldives and issued a comprehensive report on judicial reform. Dr. Despouy’s 2007 recommendations included the creation of an independent judiciary free of executive and legislative influence over decision-making, the creation of an independent Public Prosecutor’s Office separate from the AG role, and urgent reform of drug policy that condemned mostly young consumers to lengthy criminal sentences that fail to address either trafficking or rehabilitation from addiction.²

¹ Dr. Despouy’s term as UN Special Rapporteur on the Independence of Judges and Lawyers ended in August 2009, when Ms. Gabriela Knaul succeeded him.

² During this mission, Dr. Despouy reiterated his concern for the fate of youthful drug offenders.

9. In June 2008, the Special Majlis finalized a new constitution that was ratified on 7 August 2008 by then-President Maumoon Abdul Gayoom. Subsequently, the first-ever presidential election under a multi-candidate, multi-party system was held on 8 October 2008. However, since no candidate achieved a plurality a run-off election was held on 28 October 2008 and ultimately won by President Nasheed.

10. The first parliamentary elections were held in May 2009. At this point, over one year remained in the envisioned two-year transitional period to enact laws and consolidate institutions, particularly the judiciary. The new Government faced a challenging social and economic situation exacerbated by inadequate laws, procedures, institutional norms, and a lack of sufficiently trained personnel in many areas of governance. Economic investment required a more transparent and predictable rule of law environment. Drug trafficking and consumption continued to have grave social consequences, especially on youth, and the Government struggled to prosecute trafficking while also attending to the rehabilitation needs of the victims of drug abuse.

11. The Government and the opposition-dominated People's Majlis shared a common reform agenda, but contentious issues emerged early and were manifest in the inability to enact key legislation; controversies over appointments to public office, including the Anti-Corruption Commission and the Auditor General; challenges to government economic measures, particularly related to state assets and private enterprise; and no-confidence motions brought by opposition MPs against ministers.

C. Establishment of an Independent Judiciary

12. The Constitution established for the first time in the Maldives an independent judiciary, with the Supreme Court at its apex (Article 141). The Constitution also created an "independent and impartial" Judicial Service Commission to deal with judicial appointments, promotions and transfers, and discipline (Article 157). An "independent and impartial" Prosecutor General was also established (Article 220).

13. Article 145 establishes the Supreme Court as "the final authority on the interpretation of the Constitution, the law, or any other matter dealt with by a court of law." Article 142 states:

When deciding matters on which the Constitution is silent, Judges must consider Islamic Shari'ah. In the performance of their judicial functions, Judges must apply the Constitution and the law impartially without fear, favour or prejudice.

14. The Maldives has a three-tier system for the administration of justice. First, there are the lower courts, which include at least one Magistrate's Court in each inhabited island, and the superior courts (in accordance with the Court Act) that sit in Male' (i.e. the Criminal Court, the Civil Court, the Family Court and the Juvenile Court). Second, there is the High Court that hears appeals from these lower courts but also hears cases in the first instance where prescribed by law or in exceptional circumstances. Third, there is the Supreme Court that is the final authority on the interpretation of the constitution, the law, or any other matter dealt with by a court of law.

15. The Department of Judicial Administration (DJA) was established with the responsibility to train the judiciary and staff. Other responsibilities include preparing budgets for island courts (Male' courts manage their own budgets), ensuring that the judiciary has access to legislation and jurisprudence, archiving of court files, gathering statistical information and carrying out internal audits, and providing for the security of judges. The Judicature Act, ratified on 21 October 2010, allocates significant duties to judicial support staff so that they can relieve judges and magistrates of the administrative burdens that they carry.

16. Following the parliamentary elections in May 2009, the permanent JSC was appointed by President Nasheed in accordance with Article 281(c) on 26 July 2009. The responsibilities and powers of the JSC are set out in Article 159 of the Constitution. The *Judicial Service Commission Act*, which was passed in 2008, includes a 'Members Code of Ethics' (s.17) that obliges members to reject any external influence, to act impartially "without fear, favour or prejudice", to avoid any actions or expression of views that might give the appearance of lack of independence, or to refrain from disclosing information to third parties for any reason.

17. Article 285(b) tasks the JSC with vetting judges, other than the Supreme Court bench, during the two-year transitional period. During this time the JSC would "determine whether or not the Judges in office at the said time, possess the qualification of judges specified in Article 149." Article 297 of the Constitution establishes a more general two-year period for elections or appointments to posts and, importantly, for the continuance of institutions and personnel in office until such time as permanent institutions and appointments are made.³

³ Article 297(a): Within two years of the commencement of this Constitution, excepting matters specifically provided herein, elections or appointments to posts shall be finalised in accordance with the provisions of this Constitution, and institutions specified in the Constitution shall also be created or established. (b) Until such time as elections or appointments to posts specified in this Constitution in the manner provided in this Chapter or this Constitution are finalised, **persons elected or appointed at the commencement of this Constitution shall continue in office.** (c) Until such time as creation of

D. Critical Events Prior to ICJ's Visit, May – September 2010

Political turmoil

18. By June 2010, key issues dividing the Government and opposition parties included the establishment of a new Maldives National Broadcasting Corporation and the signing of a 25-year lease to an Indian company for the management of the Male' International Airport. The opposition parties created a coalition to protest the lease (DRP, PA, JP & DQP), alleging corruption in the deal, maintaining that it had occurred in defiance of reforms proposed by opposition parties to the Public Finance Law, and claiming that the deal would negatively impact the economy.

19. On 29 June 2010 a bill was tabled to limit Government control of publicly owned media. Its opponents blocked passage of the bill. Proceedings in the Majlis were disrupted and suspended, as had occurred on other occasions. Political leaders expressed their intention to seek court ruling on a series of issues in which they claim the President has refused to allow passage of legislation, including issues related to public finance, privatization, island development committees, and public broadcasting.

20. On the same day, 29 June 2010, the President publicly announced the mass resignation of his 13-member Cabinet in protest against the Majlis "blocking and vetoing" the Government's policies.⁴ This move was designed to pre-empt the Majlis' intention to bring a no-confidence motion against the Education Minister.⁵

21. On 30 June 2010, two opposition MPs, Abdullah Yameen Gayoom (PA) and Qasim Ibrahim (JP), were summoned by the Criminal Court and thereafter detained in Dhoonidhoo Jail. Initial reports suggested that charges would be laid for sedition and bribery, but no charges appear to have ensued.⁶ The Criminal Court ordered house arrest for three days while the police investigation continued, later extended to 15 days by the High Court. Ahmed Thasmeen Ali (DRP), the leader of the main opposition party, criticized the lack of due process in this detention as the cause of the ensuing political deadlock.

institutions specified in this Constitution in the manner provided in this Chapter or this Constitution, **institutions created or established at the commencement of this Constitution shall continue** (emphasis added).

⁴ <http://www.bbc.co.uk/news/10452297> (accessed 8 September 2010);

<http://www.thehindu.com/news/international/article493378.ece> (accessed 9 September 2010).

⁵ <http://www.bbc.co.uk/news/10551210> (accessed 3 December 2010).

⁶ http://sundaytimes.lk/100704/News/news_24.html (accessed 9 September 2010).

22. While Mr. Yameen and Mr. Qasim were still under detention, the President re-appointed the Cabinet members to their former roles on 7 July 2010. This raised an important question about whether re-appointment can legally occur in the absence of Majlis consent. The matter was brought before the Supreme Court, which decided that ministers must get Parliament's approval to remain in the cabinet; 7 ministers failed to get the required votes in the Majlis and resigned.

23. On 12 July 2010, the Supreme Court declared the arrest of both MPs unconstitutional, and they were released after 13 days in custody.

24. The ICJ was gravely concerned to learn that three days later, on 15 July 2010, Mr. Yameen was detained by the Maldives National Defence Force (MNDNF) and placed under 'protective custody' by order of the President.⁷ It was over one week later, on 23 July 2010, when Mr. Yameen was released from a detention subsequently described as unconstitutional by Chief Judge (Civil Court) Ali Sameer.⁸

25. In response to the MNDNF detention, the Prosecutor General objected in writing to the Minister of Defence. Lawyers for the detained requested and obtained a writ of *habeas corpus* but the hearing did not take place. The ICJ is concerned with credible reports that the MNDNF refused to obey a court-issued summons.

26. In this fraught political context, on 20 July 2010, an MP from the ruling MDP, Mohamed Musthafa, along with Deputy Speaker Ahmed Nazim from the opposition People's Alliance, were arrested by police under suspicion of bribery. The Chief Judge (Criminal Court) ordered them to be released on the same day, citing lack of reasonable grounds for the detention.

27. These events resulted in escalated tensions between the governing MDP and opposition parties and led to street demonstrations. Actual and potential violence led the UK government to issue a travel warning. In mid-July, parliamentary MDP members staged public rallies in which they asked President Nasheed to ignore decisions of the courts and legislature and to implement the decisions of the "people's court" against corruption.

28. ICJ was gravely concerned to receive credible reports that during this tumultuous period, direct and indirect threats were made against judges and lawyers, including attacks on the homes of judges and against their family

⁷ <http://www.thehindu.com/news/international/article518738.ece> (accessed 9 September 2010).

⁸ <http://minivannews.com/politics/yameen%E2%80%99s-protective-custody-was-unconstitutional-rules-civil-court-10673> (accessed 3 December 2010).

members. These reports were confirmed by the ICJ delegation during its meetings. The ICJ also received reliable reports that members of the Government met with High Court and Supreme Court judges during this period, giving the appearance of an attempt to influence their decisions.

Politicization of judicial vetting process

29. The priority task of the JSC was to establish a transparent and fair process for the vetting of judges. Qualifications for judges include “educational qualifications, experience and recognized competence” as well as “high moral character”, the need to be “a follower of a Sunni school of Islam”, and the provision that the candidate “has not been convicted for an offence for which a hadd is prescribed in Islam, criminal breach of trust, or bribery” (Article 149(b)(3)).⁹

30. Public disagreement emerged as to whether “high moral character” should be narrowly construed under Article 149(b)(3) or more broadly framed in accordance with the intention of the transitional vetting process established under Article 285. The JSC in May 2010 publicly adopted narrow criteria against which civil society actors, as well as some members of the JSC and the Government, objected. Among the complaints was the fact that exclusive consideration of criminal convictions would not take into account what were more typically administrative actions for serious ethical violations against judges and magistrates under the previous regime.¹⁰ On 3 June 2010, the Government raised these concerns about the appointment criteria with the current Special Rapporteur on the Independence of Judges and Lawyers, Ms. Gabriella Carine Knaul de Albuquerque e Silva.¹¹ On 26 July 2010, the JSC revised its earlier decision, including convictions under administrative law as a bar to continuance as a judge or magistrate.

31. In the midst of this uncertainty, the Supreme Court sent a letter to President Nasheed clarifying that its members would remain permanently on the bench, securing their tenure. On 1 August 2010, government supporters

⁹ Article 149(a): A person appointed as a Judge in accordance with law, must possess the educational qualifications, experience and recognized competence necessary to discharge the duties and responsibilities of a Judge, and must be of high moral character. (b) In addition to the qualifications specified in article (a), a Judge shall possess the following qualifications:- 1. be a Muslim and a follower of a Sunni school of Islam; 2. be twenty-five years of age; 3. has not been convicted of an offence for which a hadd is prescribed in Islam, criminal breach of trust, or bribery; 4. be of sound mind. (c) A person appointed to be a Judge of the Supreme Court, shall be at least thirty years of age; possess at least seven years experience as a Judge or practicing lawyer or both as a Judge and a practicing lawyer, and must be educated in Islamic Shari’ah or law. (d) The People’s Majlis shall pass a statute relating to Judges.

¹⁰ See <http://www.mvdemocracynetwork.org/article-285-%E2%80%93-an-important-opportunity-for-the-country/> (accessed 18 September 2010).

¹¹ <http://www.foreign.gov.mv/v3/?p=news&view=sep&nid=3258> (accessed 18 September 2010).

publicly castigated the JSC's Supreme Court representative for his position on appointments. On 2 August 2010 it was reported that police locked the JSC office and prohibited its members from entering as usual.¹² It was ultimately concluded by the Police Integrity Commission that the Maldives Police Service was negligent in cordoning off the JSC in this fashion.¹³

32. On 4 August 2010 the JSC re-appointed 59 judges in the midst of growing tensions and uncertainty about the procedures followed and claims of political interference. The President's appointee to the JSC stridently opposed the re-appointment, citing a failure to establish clear vetting criteria in accordance with Article 285 of the Constitution.

33. By 7 August 2010, 191 of 197 judges and magistrates had been reappointed by the JSC. Under criteria revised in late July to include administrative offences, thirty-six judges and magistrates were thereby subject to further review due to prior convictions, and six of these were ultimately disqualified. The JSC was not unanimous in the decision to reappoint, however, and complaints persist that the process lacked transparency and adequate procedures.

34. As in most jurisdictions, the Constitution of the Maldives (2008) provides separate procedures for the appointment of Supreme Court justices. The JSC role is to consult with the President in establishing a list of candidates. The President then forwards his nominees to the Majlis for approval. However, since the Judges Act had not passed by this point in time, ICJ was gravely concerned to learn that on 7 August 2010, exactly two years after the promulgation of the Constitution, the President unilaterally declared the Supreme Court bench defunct. He issued a decree appointing a four-member appellate bench to oversee administrative aspects of the Supreme Court and the Maldivian National Defence Forces (MNDF) took control of the Supreme Court premises. The Attorney General resigned effective 8 August 2010, stating that his position was void because the Majlis had "deliberately not attended to its duties" (by passing legislation and establishing a permanent Supreme Court).¹⁴

35. On 8 August 2010, the Prosecutor General requested an order from the Civil Court to return control of the Supreme Court from the MNDF to the Chief Justice of the Supreme Court. The Prosecutor General had acted once again under his constitutional responsibility to "uphold the constitutional

¹² <http://www.maldivestoday.com/2010/08/02/breaking-news-the-doors-of-judicial-service-commission-of-maldives-chained-locked-and-shut-by-the-police-force/> (accessed 18 September 2010).

¹³ <http://www.miadhu.com/2010/11/local-news/police-negligence-in-cordoning-jsc-says-pic/> (accessed 6 December 2010).

¹⁴ <http://jurist.org/paperchase/2010/08/maldives-parliament-seats-supreme-court.php> (accessed 9 September 2010).

order” (Article 223(k)). The Civil Court granted the order on the same day. The Civil Court noted the explicit provision in Article 284 of the Constitution for the continuance of the Supreme Court transitional bench “until the establishment of the Supreme Court as provided for in Article 145 of this Constitution”.¹⁵ Article 286 similarly provides that “all Courts” continue until “new Courts are established in accordance with Article 141 of this Constitution”.¹⁶ Meanwhile, the four caretaker appellate judges had already resigned on the same day as their appointment by the President.

36. On 11 August 2010, the Majlis passed the Judges Act, establishing the number of Supreme Court judges. President Nasheed immediately signed it into law. The Majlis committee appointed to study the 6 presidential nominees to the Supreme Court approved the nominations unanimously and that of Ahmed Faiz Hussain as the new Chief Justice. Ex-Chief Justice Uz Abdulla Saeed was also reappointed to the bench.

37. President Nasheed thanked opposition leader Ahmed Thasmeen Ali (DRP) for his cooperation and, in his weekly address, attributed the successful establishment of Supreme Court to the joint efforts and cooperation by the opposition DRP and the ruling MDP.

38. Concerns were immediately raised about certain provisions in the Judges Act, once again, regarding the standard of “high moral character.” The ICJ was concerned to learn that the Judges Act ignores convictions for some criminal offences if they occurred at least seven years prior to appointment to the bench.

E. Critical Events after ICJ’s Visit, October - December 2010

Dispute over the re-appointment of Cabinet

39. From the time that President Nasheed re-appointed his Cabinet on 7

¹⁵ Article 145: (a) The Supreme Court shall consist of the Chief Justice and such number of Judges as provided by law. The Supreme Court shall consist of an uneven number of Judges. (b) Matters shall be disposed of in the Supreme Court by an uneven number of Judges sitting together in session. (c) The Supreme Court shall be the final authority on the interpretation of the Constitution, the law, or any other matter dealt with by a court of law.

¹⁶ Article 141: (a) The judicial power is vested in the Supreme Court, the High Court, and such Trial Courts as established by law. (b) The Supreme Court shall be the highest authority for the administration of justice in the Maldives. The Chief Justice shall be the highest authority on the Supreme Court. All matters adjudicated before the Supreme Court shall be decided upon by a majority of the judges sitting together in session. (c) No officials performing public functions, or any other persons, shall interfere with and influence the functions of the courts. (d) Persons or bodies performing public functions, through legislative and other measures, must assist and protect the courts to ensure the independence, eminence, dignity, impartiality, accessibility and effectiveness of the courts.

July 2010, the issue of whether Majlis consent is required for the Cabinet's formal approval has dominated the political debate in the Maldives. In October, the confrontation between the Government and opposition parties over this matter resulted in a number of street protests and the functional shutdown of the Majlis for a number of weeks.

40. Article 129(c) states, "except for the Vice-President, the President must receive the approval of the People's Majlis for all appointments to the Cabinet". There are two main questions involved in this controversy: 1) what factors can rightly be considered when deciding approval?; and 2) what does "approval" actually mean in the context of Article 129(c)?

41. On the first issue, Article 130 of the Constitution sets out the qualifications for a Minister: i) citizen of Maldives; ii) not a citizen of a foreign country; iii) Sunni Muslim; iv) at least 25 years old; and v) is of sound mind. Opposition parties believed that Article 171(i) of Parliamentary Rules of Procedure, that allows presidential nominees to be questioned by a parliamentary committee to determine qualification, educational background and competence, was a constitutionally permissible tool that could also be used in assessing a nominee's qualification for Cabinet. The Government's position was that it would be unconstitutional to expand the list of what can be considered to assess the qualification of a Minister when Article 130 is very clear about what is required.

42. This matter was taken to the Supreme Court and on 28 October 2010 they unanimously held that although Article 171(i) of the Parliamentary Rules of Procedure does not contradict the Constitution, the authority granted under the article undermines presidential authority over appointing cabinet ministers and that it cannot be used in endorsement because it goes beyond Parliament's authority.¹⁷

43. On the second issue, opposition parties interpret Article 129(c) as requiring each appointment to be individually subject to approval. The Government's position is that approval is essentially ceremonial and that any expectation of individual endorsements would be tantamount to a series of no-confidence motions. After weeks of legislative and political gridlock in November, a vote on the matter was finally held on 22 November 2010 with Government members abstaining. The Majlis rejected the re-appointment of 7 Cabinet members, including those holding key portfolios such as Finance and Foreign Affairs, who later resigned from office after the Supreme Court decided that cabinet ministers must seek the Majlis's approval to continue in

¹⁷ <http://www.haveeru.com.mv/english/details/33124> (accessed on 6 December 2010).

office.¹⁸

44. In this context, the ICJ considers irresponsible any statement by public authorities that undermine judicial independence by suggesting the subservience of the Supreme Court to the political class. For example, one senior parliamentarian stated recently that “MPs have the power to dismiss Supreme Court judges, and the Supreme Court will understand that the panel consists of judges we appointed”¹⁹ as a reason for why the Supreme Court has no authority to dismiss Ministers from their position. These sorts of statements undermine the independence of the judiciary. As pointed out by Commonwealth Secretary General Kamallesh Sharma on a recent visit to the Maldives, “Both Parliament and the Executive need to exercise their appointed functions in governance. And an independent and effective judiciary must remain the guardian of the rule of law.”²⁰

Continued difficulties surrounding the JSC

45. Issues surrounding the JSC have not abated. On 7 October 2010, Treasure Island Limited filed a lawsuit in Civil Court against the JSC for failing to execute its responsibilities. Treasure Island alleges that the JSC neglected to investigate three complaints it had made to the body in 2009, where it accused two judges of professional misconduct, of which one was a JSC member at the time. The JSC has denied the allegations and maintains that proper procedure was followed.

46. JSC regulations, and the Constitution, require that any decision or action it takes regarding a complaint against the judiciary must have the majority support of its ten members. The regulations also require that records be kept of the members present and how they voted when the decision was taken. To date, the JSC has not been able to provide the Civil Court with any documentary evidence that it observed proper procedure.²¹

47. One JSC member sought to enter in evidence supporting Treasure Island’s claim, but was barred from doing so on the basis that any information obtained by a member of the JSC in their official capacity cannot be used for any other purpose than that of executing their official duties.

¹⁸ <http://minivannews.com/politics/supreme-court-verdict-pending-on-cabinet-endorsements-14011> (accessed 3 December 2010)

¹⁹ <http://minivannews.com/politics/supreme-court-has-no-authority-to-dismiss-ministers-claims-reeko-moosa-13789> (accessed 4 December 2010).

²⁰ <http://www.asiantribune.com/news/2010/10/22/it-maldives-resolve-political-crisis-commonwealth> (accessed 6 December 2010).

²¹ <http://minivannews.com/politics/civil-court-asks-jsc-for-documentary-proof-it-is-carrying-out-constitutional-responsibilities-14106> (accessed 7 December 2010).

48. To date, the JSC has not adopted Rules of Procedure that are required to set the rules and regulations according to which the JSC should carry out its constitutional responsibilities. According to the *Judicial Service Commission Act*, these standards were to have been adopted by 26 January 2010. The absence of standards means that when procedural questions arise or personality conflicts emerge, there is little or no opportunity for these issues to be worked out in an institutionalized manner. The failure to regularize the JSC turns predictable differences into unnecessary confrontation.

F. Social and economic considerations

49. The ICJ was able to visit Maafushi prison and speak with young people condemned to lengthy criminal sentences for drug consumption. The ICJ heard from prisoners themselves that the opportunities for low cost rehabilitation programs using the existing infrastructure were overlooked, while long delays continue pending the construction of new infrastructure. The ICJ also learned that a Drug Bill is pending that will bring significant advances to this area of social policy. The Criminal Court justices with whom the ICJ met did not favour the creation of a specialized bench to deal with drug trafficking, arguing that there was insufficient support to existing benches without creating yet another bench. These judges gave more priority to protection of judges from threats and intimidation in order to perform their role more effectively.

50. The effective administration of criminal justice depends upon strengthening an independent judiciary capable of applying new laws in this area, and ensuring compliance with constitutional and human rights principles. Efforts must include cooperation between the Criminal Court, Magistrates Courts, and the Department of Penitentiary and Rehabilitation Services, which is responsible for administering the penal system, as well as the Ministry of Health.

51. In the economic area, the ICJ delegation heard concerns that failure to modernize the judiciary, including harmonization of common law and Shari'ah law in accordance with the Constitution, would continue to discourage investment. A lack of legal certainty results from gaps and weaknesses in legislation as well as reports of inconsistent judicial decision-making at the trial and appellate levels. The ICJ heard recommendations for the formation of a specialized commercial division of the civil courts that could also offer options to mediate and arbitrate cases.

III Applicable Law and Standards

52. The Maldives continues to face the opportunities and challenges of a rapid and profound democratic transition. The transition remains fragile as nascent institutions are yet to be consolidated through laws, regulations and the inculcation of new institutional cultures that embody and promote unquestioned respect for the rule of law. Sustained support from all stakeholders and from international cooperation is critically important.

53. Indicators of a consolidated transition include the exercise of democratic power by constitutional means without resort to reserves of political authority that are unaccountable to the rule of law. The concept of the democratic rule of law is fundamental to the key findings listed below.

54. By 'rule of law', the ICJ refers to both procedural and substantive aspects. Procedurally, the rule of law means that those subject to the law are able to predict whether their actions are lawful or unlawful. Laws must be publicly promulgated by the Majlis, accessible to all, consistent with other laws, and applied equally to all. All those subject to the law must have access to competent, independent, and impartial judicial authorities for the adjudication of their rights, with full respect for due process and equality before the law. Substantively, laws must not violate the rights of individuals as established in the Constitution and in human rights law and standards applicable to the Maldives. The Supreme Court is the ultimate guardian of these rights under the new Constitution.

A. Constitution of the Maldives

55. The Constitution of the Maldives (2008) establishes equality before the law (Article 20) and the right to a determination of individual rights by an independent court or tribunal through fair, impartial, just and transparent proceedings (Article 42).

Art. 20. Every individual is equal before and under the law, and has the right to the equal protection and equal benefit of the law.

Art. 42(a) In the determination of one's civil rights and obligations or of any criminal charge, everyone is entitled to a fair and public hearing within a reasonable time by an independent court or tribunal established by law.

(b) All judicial proceedings in the Maldives shall be conducted with justice, transparency and impartiality

56. Articles 141²² and 142²³ of the Constitution establish the terms of an independent judiciary. In the performance of their functions, judges are “subject only to the Constitution and the law” and to Islamic Shari’ah when “the Constitution or the law is silent”. Judges must be free from “fear, favour or prejudice” or interference of any kind from other public authorities. A duty is established for all those carrying out public functions to “assist and protect the courts to ensure the independence, eminence, dignity, impartiality, accessibility and effectiveness of the courts.”

57. The ICJ underscores in this regard four international sources of law standards regarding the nature and role of an independent judiciary that are particularly applicable in the Maldives. These sources establish the right to equality before the law and to the adjudication of rights before a competent, independent and impartial tribunal established by law.

B. International Covenant on Civil and Political Rights

58. Since its independence, the Maldives has become party to most of the core international human rights treaties, including, in 2006, the *International Covenant on Civil and Political Rights* (ICCPR) and its Optional Protocol enabling individuals to submit petitions to the United Nations Human Rights Committee. Article 2(3) of the ICCPR obliges the State to ensure that the right to a remedy is “determined by competent judicial, legal or administrative authorities”. Article 14(1) states, in part:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]

59. The UN Human Rights Committee provides authoritative

²² (a) The judicial power is vested in the Supreme Court, the High Court, and such Trial Courts as established by law. (b) The Supreme Court shall be the highest authority for the administration of justice in the Maldives. The Chief Justice shall be the highest authority on the Supreme Court. All matters adjudicated before the Supreme Court shall be decided upon by a majority of the judges sitting together in session. (c) No officials performing public functions, or any other persons, shall interfere with and influence the functions of the courts. (d) Persons or bodies performing public functions, through legislative and other measures, must assist and protect the courts to ensure the independence, eminence, dignity, impartiality, accessibility and effectiveness of the courts.

²³ The Judges are independent, and subject only to the Constitution and the law. When deciding matters on which the Constitution or the law is silent, Judges must consider Islamic Shari’ah. In the performance of their judicial functions, Judges must apply the Constitution and the law impartially and without fear, favour or prejudice.

interpretation of the ICCPR through its consideration of State's periodic Reports, individual communications adjudicated under the First Optional Protocol, and the elaboration of General Comments to specific ICCPR provisions. General Comment No. 32 of the Committee emphasizes the obligation of States to ensure the "actual independence of the judiciary from political interference by the executive branch and legislature", through measures including procedures and qualifications for appointment, and "protection against conflicts of interest and intimidation".²⁴

C. UN Basic Principles on the Independence of the Judiciary (1985)

60. The *UN Basic Principles on the Independence of the Judiciary*,²⁵ recognizing that "judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens", sets out the principles necessary for carrying out these functions. The first two principles require:

- a. Constitutional and legal guarantees of independence, and "the duty of all governmental and other institutions to respect and observe the independence of the judiciary" (Principle 1);
- b. That the judiciary "decide matters before them impartially, on the basis of fact and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter for any reason." (Principle 2)

D. Bangalore Principles of Judicial Conduct

61. The ICJ delegation learned that the JSC has adopted a Code of Conduct for the Judiciary largely based on the *Bangalore Principles of Judicial Conduct*.²⁶ However, although formally adopted, the ICJ was told that the Code of Ethics still requires a strategy and program for effective implementation that adapts the principles to the specific context of judges and magistrates in the Maldives.

62. The *Bangalore Principles* build on the principles established in the Universal Declaration of Human Rights, the ICCPR and in the *UN Basic Principles on the Independence of the Judiciary*. While these instruments are

²⁴ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

²⁵ *United Nations Basic Principles on the Independence of the Judiciary* endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

²⁶ *The Bangalore Principles of Judicial Conduct*, 2001, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002.

addressed primarily to States, the *Bangalore Principles* are addressed to the judiciary with the intention of establishing “standards for ethical conduct of judges” and “a framework for regulating judicial conduct”. They recognize the importance of a “competent, independent and impartial tribunal” for “upholding constitutionalism and the rule of law”. They emphasize “public confidence in the judicial system and in the moral authority and integrity of the judiciary” as the basis for a “modern democratic society”.

63. The value of independence is elaborated with respect to both individual and institutional dimensions, including freedom from “inappropriate connections with, and influence by, the executive and legislative branches of government”. The judiciary “must also appear to a reasonable observer” to be free from such inappropriate interference.

64. “Impartiality”, the second value, similarly requires that a judge disqualify himself or herself from any proceedings if there is actual favour, bias or prejudice or personal knowledge of disputed facts, or “if it may appear to a reasonable observer that the judge is unable to decide the matter impartially”.

65. “Integrity”, another key value, requires that a judge should always act honorably and be free from deceit, and be virtuous in behavior and character. The importance of judicial integrity is highlighted by former vice-president of the ICJ Christopher Weeramantry in the Commentary of the *Bangalore Principles*, stating that “in the judiciary, integrity is more than a virtue; it is a necessity.” In defining the ideal of integrity, the Commentary emphasizes the need to apply standards of the community concerned, suggesting that judges should avoid conduct that may diminish their respect in the eyes of reasonable, fair-minded and informed members of the public.

66. Other values elaborated in the *Bangalore Principles* are propriety, competence, diligence and equality of treatment of all who appear before the courts. “Effective measures shall be adopted by national judiciaries” for the implementation of the *Bangalore Principles*, recognizing “the nature of judicial office” and the absence for these measures in some jurisdictions.

67. The *Commentary on the Bangalore Principles*²⁷ states:

²⁷ *Commentary on the Bangalore Principles of Judicial Conduct*, Judicial Integrity Group, March 2007. In July 2006, the United Nations Economic and Social Council adopted a resolution (ECOSOC 2006/23) upon the recommendation of an April 2006 meeting of the Commission on Crime Prevention and Criminal Justice. The resolution included a request to UNODC to convene a meeting in cooperation with the Judicial Integrity Group to develop a commentary on the *Bangalore Principles*. An intergovernmental expert group meeting was held in March 2006, leading to the adoption of this Commentary one year later by the Judicial Integrity Group. Participating judicial authorities included Judge Weeramantry of South Africa, Deputy Chief Justice Dr. Adel Omar Sherif of Egypt and Judges of the Supreme Constitutional Court of Egypt, as well judges and senior officials from Sri Lanka,

“Judicial independence is not a privilege or prerogative of the individual judge. It is the responsibility imposed on each judge to enable him or her to adjudicate a dispute honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone” [...]

68. The Commentary notes that judicial independence is “both a state of mind and a set of institutional and operational arrangements.” Impartiality, while linked to independence, is focused not on independent relations with other actors and institutions (i.e. the Executive and the legislature), but rather on “the state of mind or attitude” of the judiciary towards issues and parties to a case.

69. Conditions for independence include three important factors: security of tenure, financial security, and institutional independence (para. 26). These factors are addressed in the Maldives Constitution, which adopts the important principle of the continuity of judicial office. Judges are to be appointed “without term, but shall retire at the age of seventy years” (Article 148)). The exception to this principle is the transitional period of two years (Article 285(b)), during which vetting of judges and magistrates was to occur (excluding the Supreme Court), and the option of appointing judges for fixed terms of up to five years during the first fifteen years after the promulgation of the Constitution (Article 148(d)). Financial security depends on the People’s Majlis (Article 152), as does the power (on the basis of JSC recommendations) to remove judges due to gross incompetence or misconduct (Article 154(b)).

70. The third factor, institutional independence, must be consolidated through a range of measures under the Maldives Constitution, including:

- a. Respect and protection of constitutional principles, including the independence of the judiciary, the supremacy of Supreme Court decisions, qualifications for the bench, and the duty of judges to apply the law impartially and without fear, favour or prejudice (Article 142);
- b. The fair and efficient administration of the courts by the courts themselves (Article 156);
- c. Statutory and regulatory measures adopted by the People’s Majlis for the organization and operations of the courts (Article 149(d), 151, 152, and 155); and
- d. The regulation of recruitment, appointments, promotions,

Nepal, Indonesia, the Islamic Republic of Iran, Morocco, Algeria, and the Islamic Republic of Pakistan.

transfers, and disciplinary action (Article 159, regarding role of JSC).

E. Latimer House Guidelines

71. The *Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence* (1998)²⁸ provides guidance on how to preserve judicial independence (judicial appointments, funding, and training), develop a code of ethics and other accountability mechanisms, and delineate the appropriate relationship between the judiciary and the Executive.

72. In particular, the *Latimer House Guidelines* recommend independent mechanisms, including a judicial services commission for judicial appointments, while progressively removing gender imbalances and other discriminatory factors. The *Guidelines* also promote the accountability of judges through a Code of Ethics, while ensuring due process rights for judges who are accused of misconduct.

²⁸ The *Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence* adopted 19 June 1998 at a meeting of the representatives of the Commonwealth Parliamentary Association, the Commonwealth Lawyers' Association, and the Commonwealth Legal Education Association.

IV Findings and Observations

73. The ICJ received credible information from a wide range of stakeholders regarding threats to judicial independence. These concerns are shared and transcend partisan interests, as does the consensus that strengthening judicial independence should include collaborative leadership and action in four principal areas:

- i. *Protection*: the need to protect judges from threats and intimidation;
- ii. *Consolidating institutional independence*: regulation and support for the judicial career, including measures to address the lack of adequate education, in-service training, and day-to-day administrative support for judges and magistrates (including absence of necessary statutory and regulatory regime and a severe lack of access to existing laws and judicial precedents).
- iii. *Accountability and the Role of the JSC*: establishing a transparent and fair process for appointments, promotions, transfers and discipline, raising and implementing acceptable standards of competence and integrity.
- iv. *Role of Civil Society*: to raise public awareness, monitor and report on judicial sector performance, and advocate for the independence and accountability of the judiciary.

A. Protection – threats to judges

74. The ICJ received credible reports of direct and indirect threats and other acts of intimidation against members of the judiciary, including death threats against judges and their family members. The intention in most cases appears to have been to influence a pending decision or in response to a decision with political implications. In addition to threats, there were credible reports of offers of favour to individual judges by members of the Executive and legislature in return for their political allegiance.

75. Judges also complained more generally about the tendency of political actors on all sides to undermine public confidence in the judiciary when

publicly criticizing judges or calling for decisions based on partisan motives. The ICJ heard reliable reports that some political leaders had orchestrated public demonstrations against members of the judiciary.

76. The Commentary on the *Bangalore Principles on Judicial Conduct* notes that judges have an obligation to reject all attempts to influence their decisions outside of proceedings that occur publicly in the courtroom. Repeated attempts must be reported to the proper authorities.

77. Importantly, the Commentary also notes that it may be difficult to determine what constitutes “undue” influence. A balance must be struck between “the need to protect the judicial process against distortion and pressure” and “the interests of open discussion of matters of public interest in public life and in a free press” (para. 30). The Commentary advises that:

“[...] a judge must accept that he or she is a public figure and must not be of too susceptible or of too fragile a disposition. Criticism of public office holders is common in a democracy. Within limits fixed by law, judges should not expect immunity from criticism of their decisions, reasons, and conduct of a case.” (para. 30)

78. Similarly, the *Latimer House Guidelines* recognize the legitimate role of public criticism of judicial performance, noting that “criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts” (VI.1.b(2)). The ICJ delegation received credible reports that fear of contempt proceedings in the Maldives has created an environment of self-censorship and limited public debate and discussion vital to a democracy.

79. The ICJ is gravely concerned, however, about credible reports of attempts to influence the judiciary that go well beyond the public interest in open discussion. This can never be justification for threats, intimidation or offers of favour perpetrated directly or indirectly through proxies by members of the People’s Majlis or the Executive. Such actions are reprehensible and egregious violations of judicial independence.

80. A related concern is that judges and magistrates are made more vulnerable to such interference when there is a lack of sufficient individual and institutional independence related to appointments criteria, lack of sufficient education and in-service training opportunities, weak administration of the courts including security provisions for judges, and the absence of accountability mechanisms.

B. Consolidating judicial independence

Regulating and Supporting the Judicial Career

81. The challenge of strengthening the competence of judges and magistrates and improving the efficiency of the courts falls directly within the leadership role of the Supreme Court, through the Department of Judicial Administration and the Judicial Council. There are three priority needs in this regard.

82. First, it is important to comprehensively regulate the judicial career in accordance with international best practice and standards. The Maldives combines common law with Shari'ah and, like most common law systems, permits the appointment of judges from the pool of capable practicing lawyers at any stage in their career.

83. Second, the Supreme Court has an important and leading role to play in expanding and improving opportunities for preparatory education in law as well as pre-service and in-service training to develop the aptitude and abilities specific to the judicial career under the new and transformative Constitution (2008). Legal education and judicial training, before and during the judicial career, are fundamental pillars of a competent judiciary able to interpret and apply substantive and procedural law in accordance with constitutional principles and applicable international norms.

84. There is no disagreement among stakeholders, including judges, that the majority of magistrates and some higher-level judges lack the education and in-service training opportunities that would enable them to respond to new demands under the 2008 Constitution. The vast majority of trial judges, particularly those posted to island magistrate courts, have only a certificate of judicial training, a minority have a two-year diploma, while there are a negligible number of four-year law graduates.

85. Until 2008, the qualifications for judges and magistrates were adapted to a legal system in which the President was the ultimate judicial authority. In addition to the profound constitutional changes brought in 2008, the rapid expansion of the tourist industry and other sources of investment, as well as the growing challenge to the criminal justice system posed by drug trafficking and consumption, are relatively recent and new demands on the judiciary. Breaking with the authoritarian past and establishing a judiciary able to cope with the demands of a modern democracy requires a sustained investment in education for new judges and in-service training for existing members of the judiciary.

86. The ICJ was pleased to learn that the Supreme Court was taking a leading role in this regard and following the recommendation in the *Commentary on the Bangalore Principles of Judicial Conduct* which states that “the same authority should not be directly responsible for both training and other duties including appointments, promotions and discipline” (para. 205).

87. The ICJ delegation was able to visit members of the Faculty of Law and Shari’ah and learn of promising and steady improvements in its curriculum, faculty, and student body, expanding from four graduates when it began in 2001, to over 70 in 2010. The Faculty offers advanced certificates in justice studies for magistrates, but the demand is greater than capacity. Those directly and indirectly associated with the Faculty recommended strengthening teaching of common law and Shari’ah in general, with particular attention to constitutional and human rights principles and building the capacity to advance magistrates from certificates to diplomas and degrees.

88. The Commentary of the Bangalore Principles underscores the importance for the judiciary to not ignore principles of international law, including human rights as recognized in modern democratic societies (para. 206). Training should therefore include “the practical application” of human rights law “to the full extent that domestic law permits” (para. 206).

89. The ICJ was pleased to note the significant participation of women in the faculty, and encouraged their increased representation in the judiciary more broadly (four women judges at present, of a total of approximately 200 judges and magistrates). However, the complete absence of female judges in the criminal courts and the opposition within the judiciary to the appointment of women judges in general remains a serious concern.

90. The ICJ learned that a Judicial Training Centre has been constructed under the DJA, but remains unused. It will be essential to focus on developing an adequate curriculum and program of training, including for judicial staff.

91. Third, the ICJ became acutely aware of the need for a broad campaign to raise public awareness about the role of an independent judiciary and the mechanisms through which judicial competence and integrity are being protected and strengthened. Although the UNDP-Maldives has started a “Did you Know” campaign that seeks to address the lack of knowledge on how the judicial system works,²⁹ it is also important for the Supreme Court, through the DJA, to have a role in raising public awareness about the value of an

²⁹ <http://minivannews.com/politics/did-you-know-campaign-aims-to-educate-public-on-legal-system-13408> (accessed 6 December 2010)

independent judiciary, including the importance of judicial accountability, competence and integrity.

Enabling Statutes and Regulations

The ICJ found that while some key enabling statutes and regulations have been passed, many more have not. The ICJ was concerned to learn of a pattern of engagement between governing and opposition parties in which any proposals by the opposing party are automatically blocked. This has exacerbated the already existing challenge of passing a series of laws that are fundamental to the daily operations of the courts. The still pending Drug Bill is a key example. Laws not actively blocked by the opposition parties also suffer delays in enactment because of slow follow-up in their respective committees; some of these laws include the Penal Code, a Criminal Procedure Code, a Civil Procedure Code, and an Evidence Act.

92. The failure of the Executive and opposition parties to agree in a timely way on the Judges Bill and Judicature Bill contributed to the politicization that ensued. Although both bills have now been passed, the tremendous delay in having this statutory framework in place exacerbated uncertainty and opened the door to direct political confrontation.

93. Leaving aside the lack of required statutes and regulations, the ICJ also learned that judges and magistrates routinely lack access both to updated copies of relevant laws and to judicial precedents of higher courts. There is no integrated filing system of cases or an accessible database of written decisions. Most decisions are given without written reasons. These limitations affect the ability of judges and magistrates to reach consistent decisions, creating legal uncertainty and, with it, a cascade of negative social, economic and political consequences. These are areas of Supreme Court leadership within the mandate of the DJA. At stake is the ability of judges and magistrates to uphold the principle of legality and the rule of law, by applying the law consistently and equally across the Maldives' two hundred inhabited islands.

Inter-institutional relations in justice and security sector

94. An independent judiciary also functions within a broader justice system that includes the Attorney General, the Prosecutor General, the Home Ministry, Police, and other institutions. The ICJ confirmed significant confusion about the scope of powers and the relationships not only among the branches of Government but also within each branch. This confusion creates conditions for disputes, political interference, and delay and paralysis in developing and implementing urgent policy.

95. Within the judiciary, for example, the ICJ was told of uncertainty and lack of clarity in the respective roles of the JSC, the Supreme Court, and the Department of Judicial Affairs, between the Attorney General's office and the Prosecutor General's office, or between the Criminal Court and the Home Ministry.

96. The ICJ was concerned to learn of tensions between the Police and the Criminal Court, particularly related to the suspension of two police lawyers due to ethical concerns by the Court that the police publicly criticized certain criminal court judges.

C. Judicial accountability and the role of the JSC

Perceptions regarding judicial independence and accountability

97. No individual judge, magistrate or judicial institution is an island unto itself, nor is independence an end in itself. As the *Bangalore Principles* make clear, independence is, rather, a responsibility and a means to ensure that judges are able to decide cases based only on the law and facts of the case before them without fear or favour.

98. As noted earlier, independence is a responsibility requiring accountability at three levels, each of which is addressed in the Constitution of the Maldives:

- a. Institutional: transparent budgets and spending, as well as jurisdictional and administrative issues affecting access to justice. This is the role of the Supreme Court and other courts with regard to their own administration, and laws of People's Majlis in determining jurisdiction, organization and operations of courts (i.e. the Judges Act and the Judicature Act).
- b. Individual competence and integrity by judges in their proceedings: including issues of actual or perceived bias, prejudice, or conflicts of interest; and ethical behaviour outside of office, requiring continuous responsibility to demonstrate high moral character; not accepting gifts, for example, or engaging in private practice that can interfere with their judicial function. This relates to the role of the JSC in appointments, promotions, transfers and discipline; and of the Supreme Court to lead in building judicial capacity.
- c. Judicial decision-making: accountability is ensured through the right of appeal.

99. While recognizing the importance of an independent judiciary to uphold the rule of law, some expressed concern that the concept of judicial independence was still new and often misunderstood by members of the judiciary and, more broadly, by the general public. The ICJ was told, for instance, that some judges and magistrates incorrectly interpret their independence as freeing them from any concern that their interpretation of the law is consistent with established constitutional principles and judicial precedents. This interpretation directly contradicts the democratic purpose of judicial independence.

100. Some viewed calls for judicial accountability at any level as a threat to independence. The ICJ emphasized that accountability at the individual level has two dimensions that are, in fact, the very foundation of public confidence in the significant powers of an independent judiciary. These two dimensions are competence and integrity, and both are enshrined as values in the 2008 Constitution. The Constitution empowers the Judicial Service Commission as an independent guardian of these values. Public confidence in the exercise of independent judicial power depends upon this guarantee of competence and integrity. The *Bangalore Principles* and its Commentary provide detailed guidelines for protecting and promoting judicial independence through accountability mechanisms.

101. Confusion regarding judicial accountability is often a result of the misunderstanding that accountability implies administrative scrutiny by non-judges of judicial decision-making. In fact, under the Maldives Constitution, superior judges through the right of appeal can only properly review the decisions of judges. Judges are constitutionally protected to decide their cases based only on the law and facts before them, without fear or favour, including independence from any influence by other members of the bench. This is consistent with accepted international standards. Beyond the right of appeal, a judicial decision could only otherwise be questioned if there is evidence, separate from the decision, itself, that indicates unethical behaviour. In such cases, the Judicial Service Commission plays a key role in receiving and adjudicating complaints, and the criminal justice system is similarly available in the most serious cases of criminal behaviour, whether or not particular decisions are affected.

102. This does not, however imply that non-judicial actors have no role whatsoever in ensuring judicial accountability. The Constitution is a document representing the collective interests of the political community of a country and therefore, its safeguard cannot simply be confined to the judiciary. In this regard, the Parliament has a definite role in ensuring accountability of the Judiciary, a role that it has so far been reluctant to play.

The ICJ delegation also found out that the JSC has often confused judicial independence with absolute non-interference by the executive or the parliament, a position that can have negative repercussions for the goal of developing a transparent judicial system. Furthermore, there is no recognition of the potentially beneficial role that advocacy groups, NGO's and other civil society organizations can play as watchdogs of the judiciary.

103. These areas of confusion are also indicative of the challenge of breaking with the very recent past, when the President was the supreme executive and judicial authority. In general, misinterpretations or abuses of judicial independence are more likely to prevail where there is a lack of access by judges and lawyers to applicable laws and judicial precedents, serious statutory and regulatory gaps, weak education and training opportunities for judges and administrative staff, weak mechanisms of accountability to the public, and a legacy of political influence. The ICJ delegation found that all of these conditions prevail in the Maldives. Breaking with the past requires the inculcation of a new institutional culture in which respect for the independence of the judiciary and the rule of law is made routine, not subject to the arbitrary influence of personal, political or institutional affiliation.

104. While gravely concerned about these matters, the ICJ also found indications of the strength and resilience of justice sector institutions. In particular, the Prosecutor General and Civil Court played a key role in upholding the constitutional order and the rule of law during the period of escalating tensions and politicization of the judiciary from May to August 2010. In spite of political pressure and threats, the Supreme Court and the Criminal Court were also able to make important rulings that guaranteed and protected due process rights.

The Role of the JSC

105. The JSC has the responsibility and authority under Article 159 of the Constitution "to make rules" regarding its core responsibilities (appointments, transfers, promotions, and discipline) and regarding the "discharge of the duties and responsibilities" of the JSC, itself. Particularly in light of the challenges posed by the structural composition of the JSC the ICJ emphasized the importance of transparency in JSC decision-making not only to mitigate the risk of politicization, which has been a common feature in the past, but more importantly to help boost public confidence in the judiciary and improve its image in the eyes of the people, which is crucial in enabling it to act independently and in line with Constitutional principles.

106. In this regard, most observers shared a disappointment that the constitutional task of vetting and appointing judges and magistrates during

the two-year transitional period had become politicized, protracted, and eventually carried out precipitously under a cloud of public controversy. A common perception was that the JSC had lost credibility as a neutral guarantor of judicial competence and integrity. The list of complaints included minor allegations, such as the JSC's cancellation of meetings without reason, to more grave charges such as protecting its members from serious criminal charges like abuse of power and sexual offences.

107. Some expressed the view that these problems were insurmountable due to the structural composition of the JSC as established in the Constitution, and recommended constitutional reform. The idea that the current composition of the JSC is based on a conflict of interest which leads to decisions that are in contradiction with the very purpose of the commission, is something quite pervasive in the discourse around the JSC. According to the Constitution, the nine-member commission must comprise of the speaker of parliament; an MP and a member of the public both appointed by Parliament; three judges, one from the Supreme Court, High Court and the trial courts; a private lawyer elected among licensed lawyers; the Chair of the Civil Service Commission (CSC); a person appointed by the President; and the Attorney General. In this light, some commentators have argued that the current composition must be replaced with a 'broad-cross section of the people of the country, who are educated and have an understanding of democracy'.³⁰

108. Perception is as important as reality, particularly as the judiciary is in the process of transition from a subordinate role. Public confidence depends in large measure on bolstering that faith through transparent and fair procedures. Unfortunately, the current perception surrounding the JSC is not particularly encouraging; there are widespread allegations that the JSC has failed to prioritize the issue of the rules of procedures, preferring to concentrate on less important matters such as benefits for judges as well as the reinstatement of disqualified judges. This has provided further support to the views of those observers who believe that the JSC is more interested in protecting the privileged position of its existing judges than establishing viable criteria for ensuring judicial accountability and independence. In the midst of all this, the decision by the JSC to declare Article 285 as merely 'symbolic' has not helped in shaking this image, especially since many of the sitting judges have been found guilty of such serious crimes as sexual offences, negligence, and abuse of power.

109. In contrast to this prevailing view, some members of the JSC affirmed without any hesitation that, despite the highly politicized external environment, the reappointments had been transparently carried out in

³⁰ <http://maldives.world-countries.net/archives/1365> (accessed on 5 January 2011).

accordance with an agreed 12-point legal framework that was lawful. The ICJ notes that these efforts are welcome and positive steps, but the overwhelming weight of opinion was that judges and magistrates subject to the vetting process were denied the opportunity to demonstrate their competence and integrity in a timely, fair and transparent manner, particularly because of partisan influence exerted directly on and through the JSC.

110. The ICJ noted that, in principle, decisions regarding appointments, promotions, and discipline should not be taken at too great a distance from the judiciary. However, comparative experience also demonstrates that where the composition is largely politically determined, measures to enhance transparency of commission deliberations and decision-making can have a significant and beneficial impact, significantly mitigating the problem of politicization and deadlock. Such measures also can be combined with the role of a technical support secretariat that can relieve part of the burden of JSC members, most of whom are already fully occupied with other public responsibilities.

111. The ICJ was informed by members of the JSC that it is precisely with regard to internal JSC procedures, as well as other demanding areas of technical competence related to appointments, promotions, transfers, and discipline, that the JSC has felt most vulnerable and in need of assistance. The preponderance of opinion was that these weaknesses made JSC members and the institution as a whole vulnerable to external and other undue influences.

112. Although the ICJ did not examine the qualifications or integrity of any individual judge or magistrate, the overwhelming finding is that the independence of judges and magistrates was not well served by the vetting process that took place in August 2010. This must be addressed on an urgent basis so that it does not happen again.

D. Role of Civil Society

113. The ICJ delegation was able to meet with civil society actors who shared a clear analysis of the root issues and a commitment to monitoring and advocating for the rule of law as a basis for human rights protections.

114. The ICJ emphasizes the constructive role that civil society actors, particularly human rights defenders, are playing in safeguarding the rights of the population and raising public awareness of the fundamental importance of the judiciary in a democratic society.

115. Civil society groups also play a crucial role in monitoring the maintenance of core judicial values of independence, impartiality, competence, and integrity. The ICJ recognizes that Maldivian civil society groups and human rights defenders are carrying out important and courageous efforts in these areas, complementing and enhancing efforts undertaken by the Government and the judiciary itself.

V Recommendations

A. Supreme Court of Maldives

Support the judicial career: The Supreme Court should lead the process of regularizing and supporting the judicial career. The Supreme Court should:

- Provide education and training opportunities for junior members of the Bench to improve their competency and better equip them to apply the Constitution and interpret an increasingly sophisticated legislative framework. The qualifications for a judge in a system subordinate to the Executive will be very different from the qualifications expected of a judge in an independent judiciary. Thus, the criterion for judgeship must change with democratic transition. The Judges Act provides judges with a seven-year period for them to enhance their qualifications and competence, subject to periodic review and evaluation. This time should not be wasted;
- Embark on an effective program to implement the Code of Ethics in accordance with the *Bangalore Principles on Judicial Conduct* and its Commentary;
- Conduct regular performance evaluations that are focused on ensuring the fair and efficient administration of justice. Such evaluations in other countries tend to be used to evaluate court management and would not be used to scrutinize decisions, which remains exclusively a matter of judicial review;

Use DJA effectively: The Supreme Court should oversee and closely monitor the DJA to ensure that it performs its stated objective, which is to facilitate the smooth administration of justice in the Maldives. To that end, the DJA should do the following:

- Increase the fairness and transparency of the justice system by:
 - Requiring, for the purposes of administrative fairness, all levels of court to issue written reasons;
 - Establishing a judicial database that all levels of court and the public can refer to for case precedents and legislation;
 - Developing rules of procedure to address inefficiencies and unfairness that result in a lack of discovery, lack of default judgments, and the weak enforcement of judgments;
 - Instituting audio recordings of all criminal proceedings to

- ensure integrity of court records; and
- Helping raise public awareness about the role and importance of an independent judiciary through publication and dissemination of educational material and promotion of judicial independence as part of a human rights education program.
- Improve the administrative efficiency and infrastructure of the system by:
 - Optimizing the courts' operational processes, including transfer of non-adjudicative tasks from judges to court personnel, and upgrading the functioning of case registries, archives, recording of court proceedings, court statistics and case monitoring;
 - Developing and implementing a program to reduce case delays and backlogs;
 - Developing a framework for the economic management of the courts; and
 - Developing a plan to remedy lack of proper court facilities.
- Help facilitate training and in-service education by:
 - Utilizing and strengthening the Judicial Training Centre and developing an adequate curriculum and program of training for judicial staff.

Invite an expert to assist: Consider inviting an experienced expert, seconded to the Supreme Court for a period of at least six months, to assist in its operational development in accordance with international best practice.

B. Judicial Service Commission

Adopt transparent regulations and procedures: The JSC should strengthen its internal processes by adopting rigorous and transparent rules of procedure. Whether it is in the realm of appointments, transfers and promotions, or discipline, it is absolutely essential that the JSC conduct itself in a transparent manner. A good starting point would be to allow civil society group's access to records of its meetings. Doing so will help avoid actual and perceived conflicts of interest and it will give the public and judiciary confidence in the fairness of the JSC's independent authority. Specifically, it is critical that the JSC adopt transparent policies in the following regard:

- *Internal Conflicts of Interest:* Ensure that procedures include explicit and detailed consideration of conflict of interest concerns that allow JSC members to withdraw from decision-making where

- such conflicts arise;
- *Judicial Competence*: Make sure that judges and magistrates are evaluated for their competence in being able to:
 - Apply constitutional law;
 - Ensure equality before the law through the use of accepted principles of interpretation that takes into account judicial precedent and the use of Shari’ah in accordance with the Constitution; and
 - Apply human rights norms when interpreting domestic legislation;
 - *Transfers*: Ensure that regulations and procedures for determining transfers are public and accessible and carried out with transparency and fairness. Involuntary transfers should not be used as indirect forms of discipline and control over judges and magistrates;
 - *Promotions*: Transparent criteria and procedures should be applied for promotions. Fairness requires a notice period (through bulletins to judges) that gives sufficient time to apply for promotions through a competitive process.
 - *Discipline*: Develop and make public the procedures for the receipt, adjudication, and follow-up of complaints regarding the judiciary. With respect to disciplinary matters, the JSC should ensure that:
 - Due process rights of judges and magistrates are respected and that judicial independence is not otherwise compromised;
 - Complaints are adjudicated quickly and effectively in order to address the right of complainants to a remedy and the right of judges to not be adversely affected by prolonged and uncertain proceedings;
 - Disciplinary proceedings are clearly distinguished from criminal prosecutions and routine monitoring of judicial performance.

Establish a technical secretariat: Ideally, the JSC should view itself as a high-level body responsible for policy direction that meets relatively infrequently. The creation of a capable and neutral technical secretariat would make the JSC’s workload much more manageable and help facilitate transparent decision-making with respect to appointments, promotions, transfers, and discipline.

Ensure integrity of judges: Make certain that the standard of “high moral character” for judges is consistent with the Bangalore Principles as developed in its detailed commentary.

Invite experts to assist: Consider inviting an experienced expert, seconded to the JSC for a period of at least six months, to assist in its operational development in accordance with international best practice.

Monitor and evaluate: The best laws and regulations can prove inadequate if implementation measures are absent. The JSC should establish benchmarks for periodic evaluations of progress.

C. Government of the Maldives

Improve interplay between institutions: Facilitate dialogue between the Attorney General, Prosecutor General and Maldives Police Service so that their respective roles are understood. This includes respect for independence of the Prosecutor General regarding specific cases, as distinct from “general policy directives” that are the constitutional responsibility of the Attorney General. In this regard, the Attorney General’s office should have a coordinating role in addressing the significant confusion that exists, both within and across the various branches of Government, about the scope of powers of each department. This confusion creates conditions for disputes, political interference, and delay in developing urgent policy.

Strengthen the Faculty of Law and Shari’ah: Given that there is a shortage of qualified legal practitioners in the Maldives, and that a legal education is fundamental to the development of a judicial career, it is important that the Faculty of Law and Shari’ah is adequately funded and that its institutional capacity is improved. There is also a pressing need to modernize the criminal and commercial law curriculum, especially in light of emerging human rights norms.

Launch public awareness campaign: To address the lack of public awareness of the new Constitution and its implications for governance and the rights of citizens, the Government should consider a public campaign that clarifies the role of distinct government offices and the meaning of respect for the separation of powers.

D. People’s Majlis

Demonstrate collaborative leadership: The People’s Majlis is called at this moment to play an historic role in support of an independent judiciary. In the name of consolidating the democratic transition, collaborative leadership that reaches across the partisan divide is required. To date, this collaborative leadership from the Majlis has been largely absent.

Pass important legislation: The People's Majlis carries the increasingly urgent burden and responsibility to enact pending legislation, without which judges and magistrates are unable to deliver justice fairly, consistently and efficiently. Urgently required laws include a Penal Code, Criminal Procedure Code, Civil Procedure Code, Evidence Act, and passage of the pending Drug Bill.

Reform the JSC: Deliberate at the appropriate legislative committee level, including the Judicial Oversight Committee, regarding the performance of the JSC. Consider reforms to the JSC Act that increases transparency, fairness, and efficiency in its operations, reduces conflicts of interest and undue political interference with JSC deliberations, and creates a technical secretariat for the JSC's day-to-day functioning.

E. Donor Community

Build capacity of parliamentarians: Provide technical assistance for mid-level political leadership to better understand Latimer House Guidelines as they pertain to judicial independence.

Support expert advice: Give logistical and financial support for two international experts; one to be posted with the Supreme Court who will provide assistance regarding judicial training assessments and curricula and another to be posted with the JSC to provide guidance on how that body can best perform its duties.

Facilitate out-of-country training for judicial leadership: Collaborate with the Supreme Court to provide effective and advanced training to judges in order to help improve their competency.

Provide support for civil society organizations: Raising public awareness of the new Constitution and its implications for governance is something that civil society organizations can have a role in doing. With support from international donors, civil society organizations can encourage regular interaction between the judiciary and members of the public. These interactions can serve as a basis for raising awareness and monitoring progress.