

# ATTACKS ON JUSTICE

THE HARASSMENT AND PERSECUTION OF  
JUDGES AND LAWYERS



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CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

The Centre for the Independence of Judges and Lawyers (CIJL), is a component of the International Commission of Jurists (ICJ). Established in 1978, the CIJL is dedicated to promoting the independence of the judiciary and the legal profession throughout the world. The CIJL bases its work on the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers, and it was instrumental in their formulation and adoption. In addition to issuing Attacks on Justice, the CIJL:

- intervenes on behalf of judges and lawyers who are harassed or persecuted;
- alerts a network of sources seeking their intervention on behalf of persecuted colleagues;
- sends observers to the trials of judges and lawyers;
- sends missions to countries to examine questions related to the independence of the judiciary and legal profession;
- works with the UN Special Rapporteur on the Independence of Judges and Lawyers;
- organises seminars to promote the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers; and
- publishes a Yearbook containing articles and documents on the independence of judges and lawyers.

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THE HARASSMENT AND PERSECUTION  
OF JUDGES AND LAWYERS

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CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

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## INTRODUCTION

**R**osemary Nelson was a 40-year-old woman. She was the mother of three young children and a capable Catholic solicitor who took up controversial cases in Northern Ireland. Her work as a defence lawyer was considered a nuisance by the police. They abused her, insulted her, and threatened her. On 15 March 1999, as this report was being prepared, a bomb exploded in her car just outside her house. This bomb not only took Rosemary Nelson's life, it has also shed doubt on the prospects for real peace and reconciliation in Northern Ireland.

The killing of Rosemary Nelson highlights the fate of many judges and lawyers throughout the world. There are 64 other lawyers in Northern Ireland alone who have been threatened. In this report, the Centre for the Independence of Judges and Lawyers (CIJL) publishes the outcome of its documentation, research, and analysis of the situation of judges and lawyers in 48 countries from March 1997 until February 1999. During this period, the CIJL found that at least 876 judges and lawyers were harassed or prosecuted for carrying out their professional functions. These attacks are perpetrated by government forces, opposition groups, or even sometimes by the business community or land owners. Of the 876 documented cases, 53 jurists were killed, 3 disappeared, 272 were prosecuted, arrested, detained or even tortured, 83 physically attacked, 111 verbally threatened and 354 professionally obstructed and/or sanctioned. The CIJL also received reports of an additional 508 jurists who suffered reprisals in 1997 and 1998 but was unable to conclusively confirm those reports.

The CIJL has been issuing reports on the attacks on judges and lawyers every year since 1989. Throughout the year, we gather information on issues related to the independence of the judiciary and legal profession around the world. The 1985 UN Basic Principles on the Independence of the Judiciary and the 1990 UN Basic Principles on the Role of Lawyers guide our work in this regard.

The CIJL presented the preliminary findings of this ninth edition of *Attacks on Justice* before the Fifty-fifth session of the UN Commission on Human Rights, which took place in Geneva from 22 March to 30 April 1999. On 11 June 1999, the CIJL sent the draft chapter to each concerned government for comments. Governments were requested to send their comments by 30 June 1999. The CIJL promised that if we received the response on time, we would print it in its entirety in this year's edition provided that it did not exceed 1000 words. Otherwise it would be included in the tenth annual report. In the event that we receive more than 1,000 words, we would publish a summarised response. By the time of publication, Argentina, Bahrain, Egypt, Japan, Morocco, Pakistan, Sudan and the United Kingdom responded to the CIJL. Their comments are incorporated in the report. Other governments, such as Australia and Ecuador expressed interest in commenting but could not do so within the time limit. The CIJL will include the other comments it may receive in next year's edition.

This ninth annual report reveals that there has been an alarming deterioration in several countries, while in others, the situation simply did not improve. In addition to the harassment of lawyers in Northern Ireland, the plight of the judges and lawyers in six countries stands out: Colombia, the Democratic Republic of Congo, Egypt, Myanmar (Burma), Pakistan and Turkey. During 1997 and 1998, at least 34 judges and lawyers were killed in Pakistan alone. In Colombia, 43 jurists were persecuted, 14 of whom were murdered. In the Democratic Republic of Congo, on 25 April 1998, 91 judges were discharged by the Kabila Government without due process and later on 7 November 1998, another 315 judges were also discharged also without due process. The Bar Association of Egypt has been dissolved since 28 January 1996. At least 51 licences of lawyers were revoked in Myanmar (Burma), and 130 lawyers were detained or tortured in Turkey alone.

In addition to describing the cases of judges and lawyers who have been subjected to harassment, the report places the performance of the judiciary within the constitutional and human rights framework of the country under consideration. As this report demonstrates, serious structural defects in the legal systems of many countries contribute both to the undermining of the independence of the judiciary and the legal profession, and to impunity. These defects include the existence of exceptional justice systems, corruption, inappropriate public denunciation by Government officials of judges who rule against them, and attacks on bar associations.

The authority of the judiciary to resolve conflicts is often impaired by the impunity granted to State officials against prosecution for human rights violations. The judiciaries of Algeria, Colombia, Egypt, Mexico, Pakistan, Peru, and Tunisia are seriously undermined in this way.

Military courts that try civilians also undermine judicial power and independence. The CIJL continues to be concerned about the system of regional courts in Colombia. There are profound problems with the rights of the defence in these tribunals in which the identity of the judge, the prosecutor, and even sometimes that of the witnesses, is concealed. In the Democratic Republic of Congo, the jurisdiction of the military courts are extended to crimes such as armed robberies. Hundreds of civilians are tried before these courts, which have the ability to issue death sentences. In the Palestinian Autonomous Areas, the Security Court tries cases involving internal and external security. Trials are concluded in short periods of time and often in secret. There is no right of appeal of the decisions of this court that issues death sentences, which are swiftly applied. In Sudan special courts composed of military officers try civilians. Sentences ranging from death to flogging are imposed for a wide variety of offences such as causing damage to the national economy, corruption, prostitution, and drunkenness.

In a positive development in Pakistan, the trial of civilians before military courts was found to be unconstitutional. Although some progress was made in Peru when the institution of faceless tribunals trying terrorism cases was made to lapse, the anti-terrorism legislation in that country still deprives

the judiciary of much of its power with regard to arrest and detention. Furthermore, defence lawyers are consistently barred from meeting with their clients, from gaining access to evidence, and from cross-examining witnesses.

The inadequate judicial guarantees for the independence of judges or the failure to respect these guarantees adversely affect the judiciaries in many countries. The lack of security of tenure for contract judges in Bahrain makes them afraid to render impartial decisions. Even in Australia, politicians and the media have publicly denounced the judiciary after it passed landmark judgements on human rights issues. The Supreme Court of Israel has been under serious attack from the religious right.

In addition, public confidence in the judiciary is undermined by corrupt practices. The judiciaries of Brazil and Russia are examples of this widespread phenomenon, which inevitably damages public trust in the institutions of justice. In Kenya, the judiciary lacks adequate resources. Corruption is widespread and executive interference with the judiciary is common. Public confidence is also affected by the inefficiency of the judiciary. In India enormous backlogs of cases exist in various courts, especially in Jammu and Kashmir. Public confidence in the judiciary and the police has seriously deteriorated in recent years in Belgium due to the inefficiency of the police and the judiciary in responding to cases of child abuse that led to murder. Upon receiving the conclusions of the Dutroux Commission, the Belgian Government approved some changes, but most are still pending.

Defence lawyers continue to be the subject of reprisals. The 1996 dismantling of the Egyptian Bar Association has been an issue of constant concern. The CIJL sent a mission to Egypt in March 1998. The mission called on the Government to create adequate conditions for bar elections to take place by October 1998. Unfortunately, the elections have yet to occur.

Lawyers are often identified with their clients' causes. In this respect, Turkey continues to be among governments that harass most human rights lawyers. Serious problems face human rights lawyers in Tunisia. They are frequently slandered, questioned, put under surveillance and their telephones are tapped. The Anwar trial in Malaysia highlights the severe obstruction to the work of defence lawyers in that country, while in Zimbabwe, more than 300 lawyers were physically attacked in January of this year when they participated in a march calling for an end to torture. Lawyers are also harassed in Algeria, Djibouti, the Democratic Republic of Congo, Belarus, Russia, India, Mexico, and Pakistan.

Even the UN Special Rapporteur on the Independence of Judges and Lawyers himself was not spared harassment, when carrying out his mandate. Two public corporations commenced a civil action against the Special Rapporteur, Dato' Param Cumaraswamy, in December 1996 in the Kuala Lumpur High Court, alleging that he had defamed them in an interview which appeared in a London-based magazine in November 1995. Although

as a Special Rapporteur, Dato' Cumaraswamy is immune from legal process in accordance with the 1946 Convention on the Privileges and Immunities of the United Nations, the Malaysian Courts did not respect his immunity. The UN Secretary-General asserted the immunity of the Special Rapporteur, but the Malaysian courts refused to heed him.

After lengthy procedures the case was heard by the International Court of Justice following a decision by the UN Economic and Social Council. On 29 April 1999, as this report was being prepared, the International Court of Justice rendered a binding advisory opinion. The Court found Malaysia in violation of its international obligations because it failed to inform its domestic courts of the UN Secretary-General's assertion that Dato' Cumaraswamy was immune from legal process in accordance with the 1946 Convention on the Privileges and Immunities of the United Nations. The Court also said that Dato' Cumaraswamy should not be held financially accountable for any costs imposed upon him by the Malaysian courts, and that the Malaysian Government is under a duty to communicate the World Court's opinion to its domestic courts so that Dato' Cumaraswamy's immunity is respected. The Court's opinion restored the integrity and authority of the UN human rights mechanisms.

These are some of the unfortunate trends revealed by this report. The inclusion of countries in *Attacks on Justice* depends not only on the measures they take, but also on the availability of accurate information. Research on some countries that we reported on in previous years, such as the United States of America, has not been completed. This is why they are not included in this year's report.

Nevertheless, this disturbing account of the fate of judges and lawyers, who are often perceived as privileged members of society, highlights the inadequacy of human rights protection in the countries we covered. The CIJL hopes that this report will contribute not only to enhancing the understanding of how the principles of the independence of the judiciary and the legal profession are applied in practice, but also the human rights and constitutional context under which judges and lawyers operate.

*Mona Rishmawi*  
*CIJL Director*

# ALGERIA

Algeria was dominated by a single party, the country's military leadership, until 1989. In response to the country's intensifying political crisis, a new Constitution was approved by referendum in 1989. The new Constitution calls for a President, to be elected to a five year term, and one 295-seat legislative house called the National People's Assembly. The elected President of the Republic appoints and dismisses the Prime Minister and the Cabinet of Ministers.

The new Constitution declares Islam to be the state religion and allows for limited political opposition for the first time since independence. It confines the role of the army to defence matters.

The new Constitution paved the way for general elections to be held in December 1991. When the Islamic Salvation Front (FIS) won a great majority of seats in the Assembly, the results were annulled. President Chadli Benjedid stepped down, and a military junta assumed control.

A state of emergency was declared. The FIS was banned, exacerbating political violence. The cancellation of the elections in 1992 escalated fighting between the security forces and armed Islamic groups seeking to overthrow the government. This has resulted in massacres of civilians.

In November 1995, Liamine Zeroual was elected President, for a five year term. Zeroual had previously served as President of a transition government established by the army in 1994. On 11 September 1998, President Zeroual announced his resignation, effective February 1999, and declared his intention to hold new presidential elections, to occur in April 1999. Abdelaziz Bouteflika, considered to be the army's choice for the presidency, was the front-runner.

In an imperfect popular referendum in November 1996, proposed changes to the Constitution were approved, including the provision of a second parliamentary chamber and a widening of presidential prerogatives.

In June 1997, Algeria held parliamentary elections. Provincial and municipal elections were also held in October. The FIS and other Islamic groups that won the 1991 elections remained banned.

Under the Constitution, the President has the authority to rule by decree in special circumstances. The President must subsequently submit to the Parliament for approval decrees issued while the Parliament was not in session.

## HUMAN RIGHTS BACKGROUND

Algeria has ratified a number of international and regional human rights treaties, including the International Covenant on Civil and Political Rights,

the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the African Charter on Human and People's Rights.

Since the declaration of the state of emergency in Algeria, the situation has continued to deteriorate. Tens of thousands of civilians have been killed since the beginning of the conflict.

The massacres of civilians in recent months have taken place on a frequent basis, and on a terrifying scale. Bombs left in cars, cafes, and markets killed and mutilated people indiscriminately. High levels of violence occurred both in Algiers and a number of other towns and villages.

The prison conditions remained poor. There are complaints about lengthy trial delays, extrajudicial executions, illegal searches, and people held in unacknowledged detention, unable to contact their lawyers or their family. These actions are widespread in Algeria and appear to be used as an alternative to arresting and prosecuting people. The Government has also restricted freedom of speech, press and assembly, and it has censored news about security incidents and armed groups.

In addition, security forces have been accused of an inability or unwillingness to defend civilians. Authorities have been arming civilian militias to join in the "anti-terrorist fight". Thousands of these groups are now operating outside the law.

The Algerian Government repeatedly fails to investigate these abuses and to bring those responsible to justice. Such impunity tends to encourage more violations.

## THE STATE OF EMERGENCY DECREE

A state of emergency was declared by Decree No. 44, pursuant to Article 86 of the Constitution, on 9 February 1992. This decree allows, *inter alia*, the President of the Republic to declare, in times of extreme necessity, a state of emergency or siege for a limited period. It grants the Minister of the Interior increased power over arrest and detention for a year. The state of emergency was renewed indefinitely by Decree No. 2 of February 1993.

Section 5 of the Decree establishes that the Minister of the Interior may "incarcerate any adult individual in a security centre at a specific location, if such individual carries out an activity that may result in disturbance of the general peace, public order or functioning of public institutions". Section 6 grants the security authorities wide powers of arrest and detention while section 9 authorises the Minister of the Interior to delegate the task of keeping the peace to the military authorities.

The state of emergency permits as well various derogations from Algerian laws, including those that protect civil liberties. The Minister of the Interior is also empowered to restrict "all public gathering that could disturb the public order and safety", order searches both day and night, and place in detention centres persons "whose activity is considered to threaten the public order, public security, or the proper functioning of public services".

Decree No. 95-10 issued on 25 November 1995 allows for 12 days in *garde à vue* detention. In practice, this decree overruled Article 51 of the Constitution which limits custody time to 48 hours, in cases of suspected terrorist or subversive acts.

Amended Article 65 of Decree No. 95-10 also establishes that if detainees are to be kept longer than twelve days, they must be brought before the state prosecutor, who can order an extension of the incommunicado detention for a period of no more than twelve days. The criminal code, in Articles 109-110, provides for penalties of up to ten years in prison for public servants who participate in acts of arbitrary or illegal detention or who violate procedures relating to detention. Moreover, perpetrators of the acts broadly defined in Article 87 of Decree No. 95-10 as terrorist activities will receive stiffer sentences than those established by the Penal Code before it was amended. Furthermore, imposition of the death penalty has replaced life sentences in terrorism cases.

Finally, on 25 February 1995, the government issued Decree No. 12 on Clemency Measures, which offered clemency to members of clandestine groups who surrendered to the authorities and who were not involved in crimes that resulted in death, permanent bodily harm, or the destruction of public property. Also included were those who surrendered their weapons and explosives to the authorities. The same decree promised reduced sentences to those who had committed crimes that involved death or severe bodily harm.

## THE JUDICIARY

Since the 1992 abolition of the Special Courts that examined terrorism cases, the role of the judicial system in Algeria has been minimised, and hundreds of individuals have been detained without trial.

The executive branch interferes in matters that properly belong to the judicial system, although Article 129 of the Constitution establishes the judiciary as an independent authority. There have been allegations of the Government dictating verdicts to judges, under the constant threat of dismissal. Moreover, recent executive branch decrees have restricted some of the judiciary's authority.

Algeria's judicial system is composed of a Supreme Court, three courts of appeal, special criminal courts for economic crimes against the state, justices of the peace and commercial courts in cities and townships throughout the country.

The judiciary consists of civil, criminal and military courts. The civil courts and the criminal courts are composed of three levels: first instance, appeal and cassation. The military courts normally have original jurisdiction only over members of the military forces; however the state of emergency granted these courts powers to try civilians accused of state security crimes.

The Supreme Court is regulated under Article 152 of the Constitution. It is the organ which regulates the activities of the courts and the tribunals. It is composed of four chambers. It reviews applications of law and serves as both the highest appellate court and as the council of state. The Supreme Court establishes a Council of State which is in charge of regulating the activities of the administrative jurisdictions. It is located in Algiers.

The Council of State (*Conseil d'Etat*) established in Article 152, is the body in charge of regulating the activities of the administrative jurisdictions. The Supreme Court and the Council of State guarantee the uniformity of the jurisprudence in the country and oversee the respect of law. A Tribunal of Conflicts has been established in order to regulate the conflicts of jurisdiction between the Supreme Court and the Council of State.

There is also a Constitutional Council which reviews the constitutionality of treaties, laws and regulations. Although the Council is not part of the judiciary, it has the authority to nullify laws found to be unconstitutional.

#### APPOINTMENTS, TRANSFERS, AND DISCIPLINE

According to the organisation of the judiciary, judges are appointed by the executive branch and their appointment may be challenged only by the High Judicial Council.

The Constitution establishes that the High Judicial Council, in accordance with the conditions established by law, decides on the appointments, dismissal and transfer of judges. The High Judicial Council comprises 17 members, of whom only six are elected.

The High Judicial Council ensures the respect for the provisions of the Statute of the Magistracy, and oversees the discipline of the judiciary.

By law, judges are responsible for their performance to the High Judicial Council, of which the President of the Republic is the chair, according to Article 154 of the Constitution.



## TENURE

Judges are not tenured, and they are banned from joining political organisations. This principle was established in a 1989 law which states that "all citizens except judges, army and security service personnel, and members of the Constitutional Council have the right to join political organisations."

## RESOURCES

Resources are scarce and delays in the judicial process are frequent. Reportedly, several hundred people are still awaiting trial on security-related charges.

## LAWYERS

According to the Constitution, defendants are presumed innocent until proven guilty. They have the right to confront their accusers and may appeal their conviction. Trials are public, and defendants have the right to legal counsel.

The Algerian Bar Association provides pro bono legal services to defendants unable to pay for their own lawyer. Lawyers are entitled to have access to their clients at all times, although only under the visual supervision of a guard. However, the authorities do not always respect the legal provisions regarding defendants' rights. Moreover, some lawyers do not accept the cases of those accused of security-related offences, due to a fear of retribution from the security forces. Defence lawyers representing members of the FIS have suffered harassment, death threats, and arrest. In addition, some of them have been held in incommunicado detention.

## CASES

**Yahya Hammouda** {lawyer}: Mr. Hammouda disappeared on 9 December 1996. He was arrested in the street in Blida by security forces in uniform. His car, a grey Peugeot 505, was found at the police station of Soumia.

**Mahmoud Khelili** {lawyer, President of the National Union of Algerian Lawyers, President of the Algerian Bar Association, human rights defender}: On 4 February 1998, Karim and Farid Khelili, sons of Mahmoud Khelili, were arrested. Mr. Khelili had been the target of repeated threats and acts of intimidation because of his professional activities.

Members of the security service severely beat Karim Khelili, who was 35 years old and mentally disabled. They threatened and insulted the members of the family who were present. They also searched the house. Karim and Farid were both taken away. Mr. Farid Khelili was released around midnight, having been subjected to threats of torture. Karim Khelili was held at an unknown location, and then was released on Saturday, 7 February 1998. The authorities denied that he was held in detention despite evidence that he was held in the commissariat "*des Cinq Maisons*" in the South of Algiers.

These actions were taken to threaten and pressure Mahmoud Khelili because of his work for human rights. It has been alleged that the motive was also to prevent him from travelling to London on 7 February 1998 to take part in an international colloquium dealing with the crisis in Algeria.

This was not the first case of harassment that Mr. Khelili suffered. In August 1994, Mr. Khelili's son Farid was detained by security forces and accused of supporting terrorism. He was eventually released without trial. During his detention, he was taunted by the police, who told him that his father was a "terrorist lawyer", because he had defended cases involving leaders of the FIS. Advocate Khelili himself has been threatened by unidentified persons in telephone calls to his office. It is presumed that these calls are related to Mr. Khelili's human rights activities .

**Tayeb Louh** {judge}: In August 1998, Mr. Louh was sanctioned by the High Council of the Magistracy on charges of refusing to implement directives given by the Ministry of Justice and the Foreign Affairs Office, and of accusing the Minister of intervention in the function of the judiciary. Judge Louh, President of the National Union of Magistrates, based his defence on his duty to obey the law and the Constitution. Many independent organisations have shown their support for Mr. Louh, and an appeal to the President of the Republic has been lodged, in his capacity as the nation's first magistrate, to repeal the sanction that deprives Mr. Louh of his rights as a professional.

**Menniche Massoud** {lawyer and lecturer in the University of Souma'a in Blida}: According to CIJL's sources, on 6 April 1996, at around 8 p.m. when he was returning home from his office, two unidentified men stopped his car near his house on Horriaya Street, Blida. Witnesses saw Mr. Massoud being taken away. Later, the two unidentified men set fire to his car. Two days later, the police found the remains of the car near the National Police Station.

It appears that the kidnapping was related to a case Mr. Massoud was handling. Ten days before the kidnapping, on 26 March 1996, Mr. Massoud wrote to the *Bâtonnier* of the Bar Association of Middle Algeria informing him about threats he had received from the opposing party in the case, Ms. Ghadrouch Jowhara. Mr. Massoud informed the *Bâtonnier* that Ms. Jowhara warned him to withdraw a complaint he had submitted against her on behalf of his clients claiming that she had forged documents and

embezzled large amounts of money. In his letter to the *Bâtonnier*, he concluded, "I am writing this report to inform you of what had happened on the one hand, and also, in case I am hurt in any way, [I would like you to know that] it is caused by Ms. Ghadrouch Jowhara..."

On 27 May 1997, Mr. Massoud's family wrote to the *Bâtonnier* of Algeria informing him of the letter of 26 March 1996, which had been discovered a week earlier.

**Rachid Mesli** {lawyer}: He was convicted by the criminal court of Tizi Ouzou on the charge of "encouraging" and "providing apologetics" for "terrorism"; these charges were introduced at the end of the trial, after he had been acquitted of all the original charges against him. He was sentenced to three years in prison on 16 July 1997, after having spent almost twelve months in detention during an unfair trial. No evidence to support the new charge was produced and the defence had no opportunity to contest it. Mr. Mesli's defence lawyers have declared that they intend to appeal the conviction on procedural grounds, arguing that under Algeria's code of penal procedure, a court cannot rule on a charge that was not the subject of argument by both the prosecution and the defence (Articles 305 and 306). Besides the improper introduction of new charges at the end of the trial, it is believed that Mr. Mesli was prosecuted at least in part due to his work in defence of human rights, and mainly because he defends suspects in security cases. His initial interrogation began with questions regarding his contacts with the international human rights organisation Amnesty International, which was mentioned in his court file and was a subject of questioning by the trial judge. Moreover, the court's judgement made no pronouncement on the formal complaints lodged by the defence concerning Mr. Mesli's illegal, abduction-like arrest on 31 July 1996. According to CIJL information, he was abducted by four armed men in civilian clothes in Rouiba district. He was held incommunicado in a secret detention centre before emerging in police custody more than a week later. By failing to respond to these complaints, the court has reinforced the impunity that prevails regarding abuses committed by the security forces against persons in their custody. Neither observers nor family members were allowed to attend the trial.

**Tahri Mohamed** {lawyer}: Mr. Tahri appeared on a television programme aired in Algeria on 5 June 1997. During the programme, he spoke out against the disappearance of persons arrested under suspicion of subversive activity. The following weekend, his office was broken into. Only the files and personal documents of Mr. Tahri were taken.

Given that only files were taken, it appears that the break-in was perpetrated specifically to prevent Mr. Tahri from performing his professional functions. The CIJL believes that Mr. Tahri's clients could be in danger, given the confidential information contained in the stolen files.

**Alazhar Othmani** {lawyer}: In September 1994, Mr. Othmani, along with other lawyers, was visiting clients in Sirkaji prison. An argument

erupted between one lawyer, Advocate Abu Zakaria al Charif, and a prison guard. The lawyers present initiated a civil action against the Deputy Prison Commander of Sirkaji. The civil action was publicised in some Algerian papers.

On 18 October 1994, Mr. Othmani was again visiting clients in the same prison. Upon entering the prison, he was met with hostility and his briefcase was eventually thoroughly searched, despite his protest. The search included his case files, in violation of principle 22 of the 1990 UN Basic Principles on the Role of Lawyers, which declares that "...all communications and consultations between lawyers and their clients within their professional relationships are confidential".

Press clippings were found in one of his files. Mr. Othmani asserted that the press clippings were related to another case he was handling. The lawyer was kept in prison for two hours. He was eventually released. A criminal case was submitted against him. The authorities relied on Article 203 of the *Code de la Réforme Pénitentiaire* of 1979, which incriminates those who deliver, or attempt to hand over, sums of money, correspondence, medicine, or any other illegal matter to a prisoner. Mr. Othmani asserts that the press clippings were part of his professional defence and that he had never met this particular client before.

Mr. Othmani was referred to Bab al Wadi court. Although his case originated in 1994, it was only taken up in 1997, when he was convicted and sentenced to a one month suspended sentence and a 1000 Dinars fine.

Furthermore, the circumstances of the case reveal that Mr. Othmani was harassed because he took part in a legal action to protect the interests of another lawyer. It is understood that the matter is currently under appeal.

**Mohamed Touil** {lawyer}: Mr. Touil disappeared on 13 October 1996. He was arrested at 7:15 in the morning by a man in civilian clothing, in Houche gaid Gacem, Sidi Moussa, Ben Tahla, in front of witnesses.

**Mohamed Zerrouk** {lawyer}: He has been detained, tried and condemned in Tunisian territory by a Tunisian tribunal without jurisdiction over him. It seems that the case against him is governed by important economic interests which were affected by the exercise of his legitimate professional duties.

**Ali Zouita** {lawyer}: He was released in 1997 after being held in prison without trial for three years.

# ARGENTINA

The Republic of Argentina is a federal constitutional republic composed of 23 provinces and one Federal District. It has a presidential system. The current President, who has been in office since July 1989, is Mr. Carlos Saul Menem. He was re-elected in May 1995, and his second term ends in July 1999. The Constitution grants the President considerable power.

The Cabinet, (*Gabinete*), is appointed by the President. Federal legislative power rests in a bicameral Congress (*Congreso Nacional*). The 275 deputies are elected for four year terms and may be re-elected. Half of the Chamber of Deputies is renewed every two years. The 48 Senators are elected according to procedures established in local provincial constitutions. One-third of the Senate is renewed every two years. Governors and local authorities are elected according to the provincial constitutions. The mid-term elections of October 1997 resulted in the loss of the majority of the Lower House for President Menem's Justicialist Party (*Partido Justicialista - PJ*).

The President and Vice-President were traditionally elected indirectly by an electoral college to a single six year term. However, since the constitutional reforms of 1994, the presidential term has been reduced to four years, the electoral college abolished in favour of direct election, and a sitting President allowed to stand for re-election for only one additional term.

Articles 31 and 75(22) of the 1994 Constitution grant constitutional status to international human rights treaties, including the Covenant on Civil and Political Rights and the First Optional Protocol, and give them supremacy over national laws.

## IMPUNITY

Argentina continues to suffer the consequences of the seven years of military rule which ended in 1983. During this period, thousands of persons disappeared, were brutally tortured, kept in inhumane conditions, and ultimately killed. Among the disappeared were citizens of other countries, including at least 617 Italians and 300 Spaniards.

After military rule ended, criminal charges were filed against several perpetrators of these human rights violations, and some trials were commenced. However, the majority escaped punishment when the Alfonsín Government passed laws that hampered the investigation and trial of such cases. The 1986 Full Stop Law created a brief time limit for making criminal charges against alleged human rights violators. The 1987 Due Obedience Law stated that those soldiers and police officers who committed violations while following orders could not be punished for their crimes. The few perpetrators who remained to be tried were quickly pardoned by President Carlos Menem. In

March 1998 Congress voted to repeal both the Full Stop and the Due Obedience amnesty laws. Nevertheless, the annulment does not apply retroactively, and all human rights abuses committed during the long period of repression will remain unpunished.

A National Commission on the Disappearance of Persons (CONADEP) was established in 1983 to investigate the fate of those who disappeared during the dictatorship. The Argentinean judiciary and the Office of the Attorney General have also conducted investigations of the atrocities committed by the agents of the military government. In October 1997, Federal Prosecutor Miguel Angel Osorio raised the question of pardon when he requested that Federal Judge Gustavo Literas investigate the activities of certain military leaders pardoned in 1989.

Judges continued the investigation into the fate of the children of disappeared persons. In November 1998, retired admiral Emilio Massera was arrested and in December 1998, retired navy captain Jorge Eduardo Acosta was also arrested in connection with this investigation. By year's end, a total of nine retired officers and former members of the military junta were arrested or summoned to appear before judges in ongoing investigations of child abduction. Apparently, the amnesty laws do not cover these kinds of crimes.

In March 1997, Spanish Investigating Judge Baltazar Garzón issued an international warrant for the arrest of retired general Leopoldo Galtieri, former military President of Argentina from 1981 to 1982, for his alleged role in the murder of three Spanish nationals and the disappearance of some 350 others. Galtieri had been granted an amnesty by President Carlos Saul Menem in 1989 under the Full Stop Law. When Judge Garzón requested assistance from the Argentinean Government it was refused on the grounds of the existence of formal deficiencies. The international warrant issued by the Spanish court meant however that Galtieri could be arrested by Interpol in any other country outside Argentina.

Also in May 1997, an Italian judge ordered that the investigation continue into the cases of more than 70 Italian nationals and Argentineans of Italian origin who had disappeared in Argentina during the period of military rule.

In September 1997, the Spanish judge summoned more than 100 members of the Argentinean security forces, including members of the former military junta, to testify in the cases of 300 Spanish citizens who disappeared in Argentina between 1976 and 1983. He charged 97 former and active military and police officers in the case, and seeks to interrogate them in Spain or Argentina. A parallel investigation focuses on the alleged abduction of 54 children of Spanish citizens who remain missing.

On 11 October 1997, the Spanish High Court issued international arrest warrants against 10 former Argentinean naval officers, including retired admiral Emilio Massera, an original member of the military junta between

1976 and 1978. The officers were accused of involvement in the disappearance of Spanish nationals. Earlier, former Argentinean officer Adolfo Scilingo was taken into custody in Madrid after giving voluntary testimony about the role of the "death flights". During these flights, kidnapped political opponents were dropped to their deaths in the River Plate and the Atlantic Ocean.

The Argentinean Government announced during 1997 that it would issue three billion pesos in bonds to compensate the families of the disappeared. By September 1998 the Secretariat of Human Rights, which administers the funds, had received at least 20,000 applications.

## THE JUDICIARY

Although the Constitution of Argentina provides for an independent judiciary, in reality the judiciary is often subject to political influence.

### STRUCTURE

The judicial system is divided into federal and provincial courts, each headed by a Supreme Court with lower courts below it. Article 5 of the Constitution states that each province will enact its own "Constitution according to the Republican Representative system", according to the principles and guarantees laid down by the National Constitution. Therefore, each province appoints its own judges without interference from the federal Government.

Article 120 of the federal Constitution grants independence and autonomy to the Office of the Public Prosecutor (*Ministerio Público*). The Defender-General (*Defensor General de la Nación*) and the Prosecutor-General (*Procurador General de la Nación*) are part of a single organ, according to Law 24.946 enacted on 18 March 1998. The Defender-General provides *ex officio* legal counsel to those who do not already have representation in a legal suit or criminal proceeding. On the prosecution side, the law provides the prosecution with powers according to an adversarial model of criminal justice. However, the implementation of the new system has been very slow and there have been few resources allocated to it.

The Magisterial Council (*Consejo de la Magistratura*), envisaged in Article 114 of the federal Constitution finally came into existence at the end of 1998. Although Law 24.937 establishing the Council was enacted in December 1997, it was not until December 1998 that its members were elected. It is expected that the Council will start its work in 1999, five years after the adoption of the Constitution that established its mandate.

The Magisterial Council is composed of 20 members elected by different constituencies: the judiciary, Congress, lawyers associations, the executive branch and the academic and scientific community. They serve a period of four years, renewable only once. The Council's powers include the following: to adopt "all internal regulations so as to ensure the independence of judges and an effective administration of justice" (Article 7.2), to appoint the administrator-general of the judiciary, to initiate investigations and to accuse judges before an impeachment jury (*jurado de enjuiciamiento*), to organise and oversee the education of the judiciary and training programmes, and to select candidates for judges in the federal courts. The Council is divided into four sub-committees with four distinct foci: selection and training of magistrates, discipline, accusation, and administration.

Article 43 grants judges the power to declare unconstitutional a law upon which an act or omission constituting a violation of human rights is grounded. However, the declaration does not set precedent and lacks universal validity.

#### APPOINTMENT PROCEDURE

In accordance with Article 99 of the Federal Constitution the President has the power to appoint the Justices of the Supreme Court with the agreement of the Senate. The President also appoints judges for the lower federal courts upon the submission of a list of candidates by the Council of the Magistracy.

Article 13 of Law 24.937 elaborates a long procedure for the selection of candidates, including pre-selection by a jury composed of judges, lawyers and law professors, and a favourable vote by the whole council before the candidate is included in a list to be submitted to the President and the Senate. The pre-selection stage includes an examination of theoretical and practical skills.

Despite the creation of the Council of the Magistracy, the Government still retains a certain degree of influence over the judiciary, as the nine Supreme Court Justices are appointed by the President subject to the approval of the Senate.

#### DISCIPLINARY PROCEDURES

According to Article 110 of the Constitution, both Supreme Court Justices and lower court judges remain in their positions while on "good behaviour". Article 53 of the Constitution provides that they can be removed on the grounds of having wrongly performed their functions or having committed a crime.

Trials of Supreme Court Justices are to be instigated by the Council of the Magistracy, which also formulates the accusations. The case is then



presented by the Chamber of Deputies to the Senate, which renders an opinion. The removal of lower court judges is decided by a jury (*Jurado de Enjuiciamiento*) composed of representatives from the legislature, the judiciary and lawyers associations, upon the submission of an accusation by the Council of the Magistracy. Article 25 of Law 24.937 entitles the accused judge to an oral and public procedure in which his or her rights to a defence are fully respected. However, Article 27 limits the right to challenge the verdict of the jury to a mere request for the jury to clarify its decision (*pedido de aclaratoria*).

### RESOURCES

The Council of the Magistracy is in charge of the resources of the judiciary. The Constitution establishes that by law, judges will receive a salary as compensation for their work, which cannot be reduced while they remain in their posts. The judiciary submits a budget which is sent to Congress for final approval after having been examined by the Executive. In 1997, the budget for the judiciary was 3.5 percent of the overall state budget.

On 26 June 1997, the Minister of Justice, Mr. Elias Jassan, resigned. His resignation highlights the issue of corruption in Argentina. Mr. Jassan stepped down after press reports revealed records of his extensive telephone conversations with Alfredo Yabran, a controversial local businessman with whom he had previously denied having links. Following his resignation, the opposition demanded Mr. Jassan's impeachment before the Chamber of Deputies.

Allegations of corruption are widely reported, especially in civil cases.

The judiciary in Argentina is overloaded with cases of employment law as well as criminal and civil matters. Insufficient public access and a lack of speed in processing cases plague the justice system. Lengthy pre-trial detentions cause severe overcrowding in the prisons. Approximately 75% of prison inmates in Buenos Aires are awaiting trial.

### SITUATION OF THE JUDICIARY AND BAR ASSOCIATION IN THE PROVINCE OF SAN LUIS

San Luis is a province of Argentina. As such, it has its own constitution and laws organising its judiciary in accordance with the principles laid out in the federal Constitution. However, the independence of the judiciary and the work of lawyers there has been under serious attack in the course of the last three years. The governor of the province, Mr. Rodriguez Saa, the state assembly and the press, which is dominated by the governor's relatives, have

joined forces to pass a series of laws and regulations that severely undermine the independence of judges and restrict the free exercise of lawyers.

In 1995, a law reducing the salaries of magistrates was enacted (Law 5032), in clear violation of the constitutional provision of Article 110. Amparo petitions were lodged against this law, but a new law was passed, putting the judiciary under economic emergency. The law of economic emergency was applied retroactively, purportedly to prevent the effect of the precautionary measures created by the Amparo petitions. In December 1996, all of the members of the provincial supreme court resigned and were provisionally replaced. The temporary members granted some Amparo petitions and warned the public about the attacks on the independence of the judiciary.

During 1997, several other laws were enacted in order to subject the judiciary to political control and expel judges and functionaries that do not conform. Law 5070 modified the system of appointment of deputy judges, (*conjueces*), empowering the executive branch to appoint them directly, and allowing them to be members of the impeachment jury (*jurado de enjuiciamiento*) in order to obtain control of that body. Another law, which entered into force on 27 October 1997 (Law 5124), amended the law on impeachment processes. This law widened the grounds for the impeachment of judges and immediately ended the term of the members of the impeachment jury at that time. Subsequently, the governor and the new provincial supreme court appointed a new jury from among the deputy judges formerly appointed by the executive branch.

According to Law 5123 (October 1997), the Bar Associations of the province were dissolved and, in their place, new associations were created by order of the administration. This act was prompted by public criticism expressed by the Bar Associations toward the Government's actions undermining the independence of the provincial judiciary. The property of the dissolved Bar Associations was confiscated.

It was precisely the support of some judges and functionaries for one of the public pronouncements made by the Bar Association of Villa Mercedes that prompted the opening of impeachment proceedings against two of the judges mentioned below. These two judges had also challenged the constitutionality of some of the aforementioned laws through Amparo petitions. Impeachment proceedings are due to begin against another two judges in 1999.

## CASES

**Rodolfo Argerich** {Public Prosecutor}: Mr. Argerich was in charge of a case involving an attack against the sister of a journalist named Antonio

Fernandez Llorente. The journalist was investigating the assassination of an individual who apparently had political connections. In July 1997, an unidentified call was made to Mr. Argerich's office, saying that he should "withdraw from Antonio Fernandez Llorente's case or else suffer the consequences". The callers added that if Mr. Argerich remained on the case, he would suffer repercussions worse than those seen in the case of Pablo Lanusse (*see below*).

Rodolfo Argerich's brother also received threatening telephone calls.

**Ana María Careaga** {judge in Villa Mercedes, San Luis province}: She was dismissed on 17 December 1998, and barred from occupying a public post for 15 years, following an impeachment proceeding that violated due process. All defence motions and challenges to the members of the jury were rejected without motive, and the hearings took place 90 kilometres away from Judge Careaga's place of work. Furthermore, the impeachment jury also performed the tasks of an appeals chamber, since it ruled on whether Judge Careaga had correctly applied the law in a case involving a functionary close to the governor. Judge Careaga was accused of participating in political activities because she subscribed to one of the Bar Association's public statements criticising the attacks on the judicial system. In addition, her case was sent to a criminal judge who has initiated proceedings against her. She is in danger of incurring a prison sentence if the criminal proceedings go further.

**Gregorio Dionis** {lawyer}: In April 1997, an Argentinean newspaper published an article repeating allegations levelled against Mr Dionis and a well-known human rights organisation, Equipo Nizkor. The article, published under a pseudonym, alleged that Mr. Dionis of Nizkor collaborated with Argentinean secret agents in order to confuse Spanish Judge Garzón in his trial against members of the Argentinean military forces for the torture, murder and disappearances of Spanish citizens.

**Adriana Gallo de Elard** {judge in San Luis Province}: She was dismissed in November 1998 after an impeachment proceeding similar to that of Judge Careaga (*see above*). Judge Gallo has also been one of the more active magistrates, challenging the legality of the laws considered to undermine the independence of the judiciary in the Province.

**Silvia Gonzalez and Hugo van Schilt** {judges}: In December 1997, the building in which both judges work had to be evacuated due to a bomb threat. The two judges were dealing with cases involving the participation of policemen in tampering with official documents.

**Pedro Hooft** {judge in a Criminal and Correctional Court}: In May 1997, a plot aimed at killing Mr Hooft was uncovered. The judge had been dealing with a case involving two policemen. The case was investigated by the security secretariat and Commissar-General Adolfo Vitelli, who supported the judge. At issue was a previous case investigated by Judge

Pedro Hooft two years ago, involving weapons found in a theatre in Mar del Plata.

**Pablo Lanusse** {federal Public Prosecutor}: A man entered the house of Pablo Lanusse's sister Silvia. He obliged her to cut her hair and then, when putting it into a bag, he mentioned that Silvia's hair was going to be "his passport". A similar incident occurred in 1996 when another sister of Pablo Lanusse was forced to carve the letters O-R-O (Spanish for "gold") onto her own forehead. On 7 November, Pablo Lanusse was attacked in the street by a group of unknown people. Moments before, the men had pointed to him with a gun, telling him they were "still waiting for the order to kill him".

Pablo Lanusse was a public prosecutor in a case involving possible fraud in state subsidies for gold exports. After these incidents occurred, Pablo Lanusse decided to withdraw from the case of "the gold Mafia". (*See Attacks on Justice 1996*). Pablo Lanusse has also investigated cases of police corruption and received threats in relation to those cases as well.

**Carlos Alberto Lopez de Velba** {lawyer}: Mr. Lopez hosts a programme on a Buenos Aires radio station. In August 1997, he received an anonymous call telling him to stop broadcasting the programme; otherwise he would be killed. His programme is popular among human rights organisations in Argentina.

**Maria Alejandra Martín** and **Ruth Relly** {judges in San Luis province}: They were sanctioned with suspension in 1998 and impeachment proceedings against them are to commence in 1999. Judges Martín and Relly, along with Judges Careaga and Gallo, have filed Amparo petitions against the laws passed by the governor and the state assembly attempting to undermine the independence of the judiciary (*see above*).

**Leopoldo Schiffrin** {judge in the Federal Appeals Chamber in La Plata, Buenos Aires}: Judge Schiffrin is a well-known judge who exposed a cover-up attempt among high level Buenos Aires police officials in conjunction with the 1994 AMIA Jewish Cultural Centre bombing. The Supreme Court of Argentina is considering bringing impeachment proceedings against him, supposedly for his "slowness in passing sentences". The accusation against Judge Schiffrin originated with his colleagues in the appeals chamber, and appears to have been motivated by Schiffrin's independent stance in the treatment of certain political cases.

Criminal proceedings were instituted against Judge Schiffrin in April 1997 for having allegedly coerced two secretaries working for the appeals chamber. Judge Schiffrin had warned the secretaries not to carry out a resolution illegally adopted by his colleagues without his vote. At the end of 1998, the case was brought before an investigating judge in Buenos Aires.

## GOVERNMENT RESPONSE TO CIJL

On 5 July 1999, the Government of Argentina responded to the CIJL's request for comments. The Government stated:

Regarding the 1999 edition of *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers*, I have the honour to forward you the comments of my government on the draft chapter concerning the Argentine Republic.

Relating to the information about the Republic of Argentina in the first page, paragraph one of your report, we would like to state that the second term of President Carlos Menem ends in December 1999 and not in July 1999.

The fourth paragraph should say: "Articles 31 and 75 (22) of the 1994 Constitution grant constitutional status to 11 international human rights instruments, including the Covenant on Civil and Political Rights and the First Optional Protocol, and give all international treaties supremacy over national laws."

Relating to the topic of IMPUNITY, paragraph six, in page one, should read: "After military rule ended, criminal charges were filed against several perpetrators of these human rights violations, and nine former members of the Military Junta were brought to trial and six of them were convicted with prison sentences, other trials also resulted in prison sentences. However....".

In addition to the information provided in your report (page two, parr. two-five), and relating to the investigations ordered by Spanish courts on the enforced disappearance of Spaniards in Argentina, Government issued decree No. 111/96 stating the reasons of the refusal of assistance, namely, that those facts occurred in Argentina, for them investigations had been conducted, former military personnel had been convicted and criminal actions are extinguished because of statute of limitations.

Concerning your request about the situation of the Judiciary in the Province of San Luis (page four), we have asked [for] information [o]n that issue [from] the authorities of this province, in order to be able to provide you with more details.

# AUSTRALIA

Australia has a federal system of government and a long history as a multi-party parliamentary democracy. An independent commonwealth-appointed judiciary is guaranteed by the Constitution.

Each of the six states (New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia), and two territories (the Australian Capital Territory and the Northern Territory), has its own legislature, government and constitution or constituting documents. Some states have constitutional protection for the judiciary, for example, New South Wales' Constitution.

Article 61 of the Australian Constitution provides that the Head of State is the British Monarch, as Queen of Australia. The Queen is represented by the Australian Governor-General, Sir William Deane, but does not play a day-to-day role in the Australian Government. The Governor-General acts generally on the advice of the executive government who are members of, and responsible to, the Parliament.

## THE JUDICIARY

Australia has a long tradition of judicial independence and respect for the judiciary. Traditionally the Attorney-General, Commonwealth or state has intervened to defend any attack on the judiciary. That practice has not continued in recent years, and governments are becoming increasingly likely to criticise the judiciary. There is no evidence that this has deterred any judicial officer from the fulfilment of his or her judicial obligations, however.

Attorney-General Darryl Williams Q.C. announced that the Commonwealth Government would draw up guidelines designed to limit politicians' criticism of judges, saying there was a lack of understanding among the various arms of government about what was appropriate criticism of judges and the limits for judicial criticism of the government. He further stated that while it was appropriate to have public debate on court decisions, it was inappropriate to attack judges personally.

Justices of the High Court of Australia and judges of the Federal Court are appointed until age of 70 by the Governor-General, "with the advice of the Federal Executive Council". There is no Judicial Service Commission or Council with which the Governor-General must consult. Article 72 of the Constitution provides that judges of the High Court and other federal courts can only be removed by the Governor-General in Council, on an address from both Houses of Parliament in the same session "on the ground of proved misbehaviour or incapacity".

At the state level, courts are established by charter and by acts of the state parliaments. State judges are appointed by the state governments and are subject to the laws in force in each state.

The Australian federal and state governments and parliaments have generally respected the strong tradition of judicial independence and tenure, and appointments are usually made following consultation with the Chief Justice or presiding judge and other legal bodies, even though it is not a constitutional requirement.

There is no evidence of overt pressure by the Executive on any members of the judiciary. There has been, however, criticism, particularly in relation to the growth of doctrines described by critics as "judicial activism". The legal profession as a whole, and judicial organisations and eminent retired judges, as well as some journalists, have strongly defended the attacks on the High Court.

The High Court of Australia has established a range of innovative legal principles in recent years. These include rulings which have the effect of ensuring the provision of legal assistance to ensure a fair trial in criminal proceedings; the exclusion of uncorroborated police testimony; the removal of the doctrine of marriage as a defence to a charge of rape; and a reversal of the doctrine of *terra nullius*, which deprived Aboriginal and Torres Strait Islander people of native title to land which had not been alienated by the State. The High Court also found an implied right in the Constitution to protect free expression on political and related topics.

## ATTACKS ON FEDERAL COURT JUDGES

Relations between the federal Government and senior judges hit an all time low on 7 December 1998 following comments by two senior ministers. The row concerned comments made by the Federal Minister of Immigration and Multicultural Affairs, the Hon. Phillip Ruddock MP and the Deputy Prime Minister Tim Fischer MP, who criticised Federal Court decisions on refugees and native title respectively.

The Minister of Immigration launched an attack on the judiciary from the floor of the federal Parliament when he singled out a group of Federal Court judges - whom he declined to identify - and attacked them for going on what he called a "legal frolic" to undermine the Government's strict refugee policy.

Mr. Ruddock told Parliament that about half a dozen "creative" federal judges had made it their business to use issues of error of law to wrongly reconsider cases on their merits rather than finding whether lower tribunals had properly applied the law, saying "I am not going to name them, but a small number have determined that they are still going to get into the game

- that's what it's all about". He accused judges of helping people wealthy enough to get to Australia to then seek refugee status at the expense of genuine refugees stranded overseas.

His extraordinary comments were made while introducing the controversial Migration Legislation Amendment (Judicial Review) Bill 1998, which would significantly limit the grounds upon which individuals arriving in Australia and claiming refugee status could challenge adverse departmental decisions. The legislation was introduced in an attempt to limit access to the courts on migration matters since the government did not like the decisions being handed down in accordance with the law.

## **DECLARATION OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY**

In response to a significant number of appointments to the Supreme and County Courts of the States, the eight Chief Justices of the Supreme Courts of the States and Territories declared their opposition to the appointment of acting Federal and Supreme and county judges instead of permanent judges except for reasons of necessity, and they opposed the appointment of judges to offices or to perform functions where the appointment or the continuation of the appointment is at the discretion of the Executive Government of the State or Territory. The Commonwealth and State judges were reacting to a threat to judicial independence in the appointment of acting judges "to avoid meeting a need for permanent appointment".

## **INDUSTRIAL RELATIONS COMMISSION OF WESTERN AUSTRALIA**

The President of the Western Australian Industrial Relations Commission, which is an Industrial Tribunal and Court of Record, holds office on terms similar to those of a Justice of the Supreme Court of Western Australia.

The Western Australian Minister for Industrial Relations issued a discussion paper recommending the abolition of the status of the Commission as a Court of Record and the removal of the office of President. This proposal was opposed by the Western Australian Branch of the Australian Section of the International Commission of Jurists (ASICJ).

Perhaps the boldest response against attacks on the judiciary came from the Western Australian Chief Justice, David Malcolm AC, President of the Western Australian Branch of the ASICJ, in response to the government's proposed new sentencing laws designed to abolish parole and introduce a "matrix" or formula to limit judges' discretion in sentencing offenders. The



Western Australian Chief Justice appealed directly to Parliament to oppose the sentencing laws. Justice Malcolm accused the government of breaching convention by failing to consult judges and misleading the public. Justice Malcolm's action had the full backing of Western Australian's 16 Supreme and District Court judges.

The Chief Justice's response was prompted by a long meeting between Attorney-General Peter Foss, Justice Malcolm and District Court Chief Judge Kevin Hammond on 25 November 1998, at which the Attorney-General apparently rejected concerns about the sentencing changes and refused to delay them for public consultation. The Attorney-General had described the meeting as excellent whereas the judges were left frustrated and thereby decided to submit Justice Malcolm's report to Parliament using powers available under the 1995 Sentencing Act.

The Western Australia Law Society supported Justice Malcolm's action of using the powers given to him by Parliament to report on important sentencing issues. The report says "(s)ome of the provisions of the Bills fetter the discretion of judges in a way that is inimical to judicial independence and which raises serious constitutional issues" and the Bills appear to be in breach of constitutional arrangements in Western Australia allowing superior courts to determine their own procedures.

# BAHRAIN

**B**ahrain is a hereditary monarchy that has been governed since the late 18th century by the Al-Khalifa family. After the Treaty of Perpetual Peace and Friendship was signed by the Al-Khalifa ruler and Britain in 1861, Bahrain was placed under virtual British administration until 1971, when Bahrain gained its independence.

Following its independence, Bahrain entered a new phase in its history, witnessing the establishment of a modern State. The Constitution of 1973 declared Bahrain a constitutional hereditary monarchy, governed by the Amir and other constitutional institutions, and based on the principle of separation of powers.

The separation of powers is clearly enshrined in the Constitution. Article 32 grants legislative power to a partially elected National Assembly, executive power to the appointed Cabinet of ministers, and judicial power to the courts. Article 102(a) of the Constitution provides the legislative authority with the power to regulate the courts, including the legal determination of their kind, degrees, functions, and jurisdictions.

However, in 1975, the Government suspended, by executive decree, provisions of the 1973 Constitution concerning the function of the National Assembly. The Assembly was then dismantled; it has not yet been reconstituted. The 1975 decree violated Article 108 of the Constitution, which specifically states that no provision of the Constitution may be suspended except in circumstances where martial law is declared, a condition which had not occurred.

In addition, Article 65 of the Constitution states that in the event of the dissolution of the National Assembly, elections for a new Assembly shall be held within two months of the date of dissolution. If the elections are not held within that time period, the dissolved Assembly is to regain its constitutional authority, meet immediately, and continue functioning until a new Assembly is elected. Twenty four years later, no elections have been held, the dissolved National Assembly has never regained its authority, and the Amir has ruled solely by decree.

Due to growing pressure, and as a step towards democratisation, a consultative council, *Majlis Al Shoura*, was established in late 1992. The council was initially composed of thirty members, however the number was later increased to forty. The council does not have any legislative power and its functions are purely consultative.

In 1992 and then again in 1994, opposition to the ruling Government grew, and petitions were presented to the Amir raising issues such as the restoration of the National Assembly, the release of political prisoners, the involvement of women in the electoral process, and the return of persons forcibly exiled by the Government. Street protests and clashes between security forces and demonstrators calling for political reform, which had first

erupted in December 1994, continued to grow, intensifying in June 1997. The Government responded by cracking down on the opposition.

## HUMAN RIGHTS BACKGROUND

The Government has continued to prosecute persons on security related charges in the state security court, where procedures do not meet basic fair trial standards and verdicts are not subject to appeal (*see State Security Courts below*).

There has been little or no improvement in the Government's human rights practices. Torture, disappearances, and arbitrary detentions continue to be reported. The 1974 State Security Act continues to take precedence, in practice, over the Constitution in matters related to arrest, detention, and exile. Because local human rights organisations are totally banned, direct monitoring of daily abuses is difficult.

Although the legal system in Bahrain does not recognise political parties, there are several political organisations, as well as other groups active both inside and outside Bahrain.

## THE JUDICIARY

According to the Constitution of 1973, the judiciary is an independent and separate branch of Government. However, the highest judicial authority, the Minister of Justice and Islamic Affairs, is appointed by, and responsible to, the Prime Minister. The Amir, who retains the power of pardon, is the pinnacle of the judicial system and members of the royal family possess key positions in the judicial hierarchy. Therefore, although the separation of powers is theoretically fundamental to the Constitution of Bahrain, in practice it does not exist.

Articles 101 through 103 of the 1973 Bahraini Constitution specify the legal framework and structure of the judiciary. The courts in Bahrain are comprised of civil, Shari'a, and military courts. Civil courts adjudicate civil and criminal cases as well as personal status cases for non-Muslims. They are organised on three levels: the Supreme Civil Court of Appeal which also sits as a State Security Court, (*see below*), the High Civil Court, and the lower courts. The Shari'a courts' sole exercise of jurisdiction is over personal status issues for Muslims. Military courts deal with crimes committed by army and security forces personnel, although their jurisdiction can be constitutionally extended to civilians during a state of emergency.

The Supreme Court of Appeal is the highest appellate court in the country; it also determines the constitutionality of laws and regulations. Civil and

commercial disputes arising between citizens and the Government fall under the jurisdiction of the civil courts, due to the absence of an administrative court system in Bahrain.

Article 102(d) of the Constitution provides for the formation of a Supreme Council of the Judiciary to supervise the courts and related offices. This council has never been formed. Judges are appointed and dismissed by the Amir upon the recommendation of the Minister of Justice.

Several Egyptian, Sudanese, and other judges have been appointed in Bahrain, on a contract basis, despite the fact that Article 27 of the Judiciary Act states that foreign judges are to be appointed to Bahraini courts only in exceptional circumstances. This practice raises the issues of impartiality and security of tenure. These contract judges are cautious for fear that their contracts will not be renewed should they rule against the Government.

## STATE SECURITY COURTS

Article 1 of the decree law on State Security Measures, in force since 1974, allows for a maximum administrative detention of up to three years, with a right of appeal after an initial period of three months, and thereafter every six months. Article 5 of the decree law stipulates that "...the detained person shall be released in any case on the last day of the three years referred to in the first Article". At the end of the three year period, the detained must be released unless another arrest order is issued against him.

Prisoners charged with security offences are tried directly by the Supreme Court of Appeal, sitting as the Security Court. The procedural guarantees of the penal code do not apply. Under the State Security Act, persons may be detained for up to three years without trial for engaging in activities or making statements regarded as threats to the broadly defined concepts of "national harmony and security".

Proceedings are conducted in secret. Most of the sessions of the trials are held *in camera* and no independent observers are able to attend the trials. The State Security Law does not grant a convicted person a legitimate right to challenge his conviction or his sentence before a higher court, although cases can be referred to the Amir for clemency.

The detained are rarely permitted to contact their families. Nor are they permitted to contact their lawyers until the first day of the trial. It is impossible therefore, for the defence to be adequately prepared for trial. Furthermore, the reason for the arrest as well as the nature of the crimes are not disclosed.

Coerced confessions are routinely used as the sole basis for conviction before the State Security Court.

The scope of the State Security Act extends to any case involving arson, explosions, or any act believed by the Government to be antigovernment activities, the exercise of the right of free speech and association, membership in illegal organisations, demonstrations, preaching sermons, possessing and circulating so-called antigovernment literature, offences relating to public properties or public employees, and harbouring or associating with persons who commit such acts.

## THE DISSOLUTION OF THE BAR ASSOCIATION

Article 27 of the Constitution guarantees the freedom to form associations and trade unions on a national basis, for lawful purposes and by peaceful means. However, by Decree No. 4/1998 of the Minister of Labour and Social Affairs, the Bahraini Lawyers Society was dissolved and a new board was appointed three weeks before the board elections were due.

The alleged motivation behind the decree was a January 1998 cultural meeting organised by the Lawyers Society during the holy Ramadan feast, where many issues were raised, including the state of democracy and freedom in Bahrain. Following the meeting, state officials and security forces interrogated participants and organisers, leading to the suspension of the Lawyers Society, the appointment of a Government-friendly board and the cancellation of the forthcoming board elections.

In March 1998, close to seventy attorneys initiated a court action against the decision of the Ministry of Labour and Social Affairs to dismantle the Bar Association. The Bahraini Government has put constant pressure on the lawyers to retract their lawsuit, and to abide by the state restrictions on the Bar's activities, in exchange for the Government promise of new board elections.

These actions by the Bahraini Government are in clear violation of the United Nations 1990 Basic Principles on the Role of Lawyers, particularly Article 23 which states:

Lawyers, like other citizens, are entitled to freedom of expression, belief, association, and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national, or international organisations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organisation. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognised standards and ethics of the legal profession.

## CASES

**Sheikh Abdul Amir Al-Jamri** {former judge of the Shia religious court} (*see Attacks on Justice 1995*): Judge Al-Jamri, a democracy activist and a former member of the suspended National Assembly, was arrested on several occasions for delivering speeches calling for political reforms, and holding so-called antigovernment rallies.

Sheikh Al-Jamri was last arrested on 21 January 1996, and remains in detention without charge or trial to this date, although he suffers from severe heart problems. He is being detained under the State Security Law which empowers the Ministry of Interior to order administrative detention for up to three years without charge or trial.

**Abdallah Hashem** {lawyer}: Mr. Hashem is the attorney for many prisoners who have been prosecuted in connection with political unrest in Bahrain. He is also handling a dispute case brought against the Government by 91 workers who claim to have been arbitrarily discharged from the state-owned aluminium extrusion company BALEXCO in November of 1998.

On 7 December 1998, Mr. Hashem appeared on Al-Jazira Satellite television in Qatar to present his views as part of a panel discussing the Gulf Cooperation Council Summit. Upon his return home, he was interrogated and received intimidating phone calls. On 11 December 1998, a woman called requesting to see him urgently. When she arrived at his mother's house, a police squad broke in, breaking doors and windows, and arrested both Mr. Hashem and the woman on charges of immorality. The court found no grounds for the arrest and ordered their release after 48 hours in custody. The whole affair is alleged to have been a set-up on the part of the Bahraini Special Intelligence Service.

**Ahmed Issa Al-Shamlan** {lawyer, human rights activist}: On 30 July 1997, Mr. Al-Shamlan received a phone call from the governor of Manama province informing him that a travel restriction had been imposed on him. Mr. Al-Shamlan has not been charged or convicted of any offence that might justify this restriction. The restriction seems to have been imposed in order to deny Mr. Al-Shamlan his right to freedom of expression.

## GOVERNMENT RESPONSE TO CIJL

On 5 July 1999, the Government of Bahrain responded to the CIJL's request for comments. The Government stated:

The Government of the State of Bahrain welcomes this opportunity to respond to the above Report, noting that restricted space means that it is unable to reply in detail to

every point - omissions should not, therefore, be taken as admissions that the relevant allegations are in any way valid.

#### BACKGROUND, SOURCES AND CREDIBILITY

The Report's, introduction paints an inaccurate and distorted picture of the security and human rights situation in Bahrain. The reality is that, despite its limited size and natural resources, Bahrain has evolved into a regional banking and commercial center, where citizens enjoy free education, health-care and welfare provision, and whose achievements have been consistently recognized by international bodies such as the UNDP.

Regrettably, however, Bahrain continues to be the target of groundless allegations of human rights and other abuses, manufactured from abroad by a small number of isolated and desperate individuals and groups intimately associated with the now failed attempt to violently destabilize and forcibly overthrow the Government. The credibility of such sources must, therefore, be considered extremely dubious.

The laws and institutions referred to in the Report have been central to the failure of this campaign, and have therefore been the target of continued and groundless attacks from the above sources. Indeed, many of their claims are obviously incorrect to anyone with a basic understanding of Bahrain's laws and legal system.

#### THE JUDICIARY

Given Bahrain's limited size and resources, there are not always enough properly qualified and experienced Bahraini judges to sit at some levels of the court system. To avoid a growing backlog of unheard cases, a number of non-Bahraini judges are appointed to remedy this shortfall. Such judges are fully qualified and experienced, and of appropriate seniority for the courts in which they sit. Attacks on their impartiality are therefore entirely misconceived.

#### STATE SECURITY COURTS

The Report confuses two separate issues - the so-called "State Security Court" ("the Court") and the 1974 State Security Law. These are completely distinct subjects, the confusion of which has clearly led the Report into error.

No person may be detained under the State Security Law unless there is genuine evidence that the individual has committed serious acts against the security of the country. Detention may not exceed three years, and is subject to automatic periodic judicial review by the High Court of Appeal.

The notion that the so-called “State Security Court” is a “Special” court is entirely fallacious. This is largely attributable to the use of the term “State Security Court”, a title which does not appear in any Bahraini legal text or legislation dealing with the Court. It is, in reality, the High Court of Appeal, the highest court of trial in Bahrain.

The Report makes a fundamental error in its comments on the Court, that:

“the procedural guarantees of the Penal code do not apply”

This observation is simply wrong, and contradicted by the Court’s enabling legislation (Legislative Decree No. 7 of 1976, “the Decree”), which provides (in Article 4) that (Translation is for case of reference - the Arabic text is definitive):

“Notwithstanding the provisions laid down in this Legislative Decree regarding procedures, the court shall invoke the provisions of the Penal Trials Code of 1966 (Generally known as the Code of Criminal Procedure 1966), or any other law enacted in its place, during the course of a trial.”

Hence the Court is bound as an overriding priority by the 1966 Code. The procedures specifically applicable to the Court are to be applied in addition to, not instead of, the general procedural safeguards.

Proceedings are not held in secret, nor in camera - the Court sits in public unless it determines that the overriding interest of national security requires otherwise. Even then, neither the accused nor his lawyer may be excluded, while all judgments must be delivered in open court (Article 5(4) of the Decree). The attendance of observers at trials is a matter for the individual court concerned.

No defendant is denied the right to appoint and have access to their lawyer at any time before or during proceedings. Where a lawyer has not been retained, the Court is required to appoint one at the Government’s expense (Article 5(2) of the Decree). Lawyers are entitled by law to be present with the accused at all times prior to and during trial and to have access to all documents of the case in good time for trial.



Where defense counsel cannot confirm at trial that he is fully and properly instructed by his client, or where it appears that the defense is not adequately prepared, the Court will order an adjournment.

Any confession obtained by "inducement, threat or promise" is, under the 1966 Code, Article 128, inadmissible. The Court must weigh thoroughly any confessional evidence, and will order an investigation (including medical reports) if allegations of coercion are made.

#### "THE DISSOLUTION OF THE BAR ASSOCIATION"

Ministerial Decision No. 4 for 1998 of 4h March 1998 neither dismantled nor dissolved the Bahrain Lawyers' Society - it merely appointed an interim Board for a period of not more than one year, pending new elections.

The Decision followed serious irregularities and mismanagement by the previous Board (including grave breaches of the Society's Basic Charter), and as a result of expressions of concern by a number of the Society's members.

On 3rd March, 1999, the Society elected a new Board. The interim Board was dissolved, having fulfilled its mandate. The new Board continues to manage the Society, in accordance with its Basic Charter.

## CASES

**Abdul Amir Al-Jamri** is the spiritual leader of the campaign of violence and terror to which Bahrain has been subjected. He has been charged with criminal offenses, and is being tried strictly in accordance with the law and all the normal legal and procedural safeguards.

**Abdullah Hashim** was released on bail by the investigating judge, having been charged with adultery contrary to Article 316 of the Penal Code. The charges are unconnected with his professional activities, which he continues to conduct, and the case is currently following the proper judicial procedures. Allegations of a "set-up" are fanciful and wholly untrue.

There is no travel restriction on **Ahmed Isa Al-Shamlan**, indeed it is believed that he has been abroad for medical treatment within the last two years.

# BELARUS

**A**fter the collapse of the Soviet Union, Belarus declared its independence on 24 August 1991 and later joined the Commonwealth of Independent States (CIS). In March 1994, the Constitution dating from the Soviet era was replaced and in July Alexandr Lukashenko was elected as the first President.

In November 1996 several amendments to the 1994 Constitution were adopted after a referendum which was widely seen as unfair and illegal, as it had not been provided for by law (*see Attacks on Justice 1996*). The old Parliament, the Supreme Soviet, was replaced by a bicameral Parliament. The 110-member lower house was formed out of the membership of the existing Supreme Soviet. The 64-member upper house, the Senate, was created by a combination of presidential appointments for one-third of its members, and elections for the remaining seats. Several deputies of the Supreme Soviet, belonging to opposition parties, never accepted the new Parliament.

The amendments, adopted by a non-binding referendum, are in conflict with the 1994 Constitution, and involve numerous changes with alarming consequences. The system of checks and balances among the executive, legislative and judicial powers was distorted and now all branches are under the President's control. Furthermore, the Constitution as amended in 1996 gave the President far reaching powers as a "guarantor of the Constitution".

According to the new Constitution, the President is also allowed to issue decrees "on the basis and in agreement with the Constitution" which "are binding on the whole territory of the Republic of Belarus". The Constitution does not provide for any limitations on the scope of such decrees. The President also has broad power to declare a state of emergency.

As a result of the increasingly authoritarian rule by President Lukashenko, the Council of Europe's Parliamentary Assembly voted in January 1997 in favour of suspending the observer status of the Belarus Parliament. The special guest status was granted to Belarus in September 1992 and allowed a delegation of seven parliamentarians to attend Assembly sessions in recognition of the country's move towards democracy and respect for human rights. Belarus applied to join the Council of Europe on 12 March 1993.

In June 1998, Belarus became even more isolated internationally as several diplomatic missions were forced to leave their residences in Minsk because the President wanted to use the compound. In protest, several countries withdrew their missions from Belarus and only returned in December.

## HUMAN RIGHTS BACKGROUND

The human rights situation in Belarus has deteriorated substantially in the last two years. The main areas of concern are the curtailing of freedom of expression, the excessive power of the Executive to control the legislative power, and the judiciary. In practice, there is a total lack of checks and balances in Belarus, and the authoritarian President harshly regulates all voices of opposition.

During 1997 and 1998 freedom of expression was further curtailed, and the opposition suffered from arrests during demonstrations. The Government also targeted the media by closing independent radio and television stations. Human rights non-governmental organisations (NGOs) are targeted mainly through questionable tax audits and high rents of government-owned houses, sometimes causing the NGOs to shut down.

Human rights activists face increasing repression and are often threatened as a result of their work. One example is the human rights activist Nadezhda Zhukova, whose case was raised by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. She was threatened by the Belarus Patriotic Youth Union, an organisation allegedly created and financed by President Lukashenko.

Belarus has only slightly amended its Soviet-era law on detention. The Criminal Procedure Code provides that police authorities may detain a person suspected of a crime for three days without a warrant, which can be extended up to 10 days, pending further investigation of the crime. It has been claimed that security forces have arbitrarily arrested and detained citizens. Moreover, there have been allegations of ill-treatment and unlawful use of weapons by security and police officials during peaceful demonstrations and on arrest and detention. Impunity is almost the rule in Belarus.

The UN Human Rights Committee expressed concern that pre-trial detention may last up to 18 months, and that the competence to decide upon the continuance of pre-trial detention lies with the Procurator and not with a judge, which is incompatible with Article 9 para. 3 of the International Covenant on Civil and Political Rights, to which Belarus is a State Party.

Pre-trial conditions are difficult, with inmates living under harsh conditions, such as lack of food and overcrowded cells. Furthermore, an independent body to deal with complaints does not exist, as the Procurator's Office supervises places of detention.

Prisoners and lawyers both report restrictions on consultations, and investigators may prohibit consultations between a lawyer and a client. Some detainees reported that investigators forced them to sign statements waiving the right to an attorney during interrogation.

The number of crimes for which the death penalty is applicable under the Criminal Court is very high. Several decrees have been enacted recently defining new crimes punishable by death, such as the Presidential Decree No. 21 of 21 October 1997 on fighting terrorism and other violent crimes.

The UN Human Rights Committee expressed concern about the "secrecy surrounding the procedures relating to the death penalty at all stages".

## THE JUDICIARY

Although the amended Constitution provides for an independent judiciary, consistent interference from the President has severely undermined the judiciary as it is largely unable to act as a check on the executive branch. Organised crime reportedly also has a significant impact on court decisions. The practice of executive and local authorities dictating to the courts the outcome of the trials, so-called "telephone justice", is also widely reported.

The fourth periodic report of the Republic of Belarus was reviewed by the UN Human Rights Committee in October 1997. In its concluding observations, the Human Rights Committee expressed concern about the lack of independence of the judiciary and the legal profession and urged Belarus

to take all appropriate measures, including review of the Constitution and the laws, in order to ensure that judges and lawyers are independent of any political or other external pressure.

## COURT STRUCTURE

The court system is comprised of a Supreme Court, regional courts, district courts and military courts. There are also economic courts. Although the law also permits the creation of specialised courts such as family, administrative, land, and tax, these courts have not yet been established. Constitutional issues are considered by a Constitutional Court whose powers have been extremely reduced by the amended Constitution.

## QUALIFICATIONS

Article 62 of the Law on the Judicial System and the Status of Judges establishes the requirements for becoming a judge. Any citizen of the Republic of Belarus, who has higher legal education and a good moral reputation, who is 25 years of age or older, may become a judge.

As a further requirement, potential judges must have at least two years of legal experience or two years of fieldwork and practical study, and must pass the qualifying examination. The judges of the regional, Minsk City, and

Belarusian military courts, however, are required to have at least three years of experience, and Supreme Court judges should have at least five years of experience. Candidates must also pass a qualifying examination and obtain approval from the relevant board of judges.

#### APPOINTMENT

The Ministry of Justice and the President are primarily responsible for the appointment of judges. Judges are dependent on the Ministry of Justice for sustaining the court infrastructure and on local executive branch officials for providing their personal housing.

Judges of the Supreme Court, including the Chair, are appointed by the President, upon approval by the Senate, of which one-third is appointed by the President himself. The amended Constitution fails to provide the judges with life tenure.

Six of the twelve judges from the Constitutional Court are directly appointed by the President, including the chair. The other six are elected by the Senate, one-third of which is appointed by the President. Judges do not have life tenure, but sit for eleven years.

#### DISCIPLINE

Article 73 of the Law on the Judicial System and the Status of Judges stipulates that the Regulations on Disciplinary Responsibilities of Judges shall prescribe the grounds and procedures for holding judges accountable. A judge can be removed from his position when he has committed a disgraceful act or deliberately breached the law incompatible with the status of judge. The removal decision is made by the organ which elected or appointed him.

Since the judges of the Supreme Court are appointed by the President, this means that they may also be dismissed by him. The same applies for the six judges of the Constitutional Court who are directly appointed by the President. This is a grave violation of the principle of independence of the judiciary and it has been reported that several judges of the Constitutional Court already have been dismissed because they refused to decide a case pursuant to instruction by the President.

Article 18 of the Law on the Constitutional Court regulates instances where a justice is dismissed before the end of term. A judge may be dismissed if a judge is convicted of a crime, if he committed an act against the Constitutional Court that discredits the institution, if he lost his citizenship or due to health problems.

All other judges can be dismissed on any basis determined by law, a provision which also gives the President the potential to manipulate the judiciary through his power to render decrees.

## LAWYERS

On 3 May 1997, President Lukashenko issued Decree No. 12 regarding the activities of lawyers and notaries. The decree obliges every lawyer to become a member of a Collegium of Advocates which is controlled by the Ministry of Justice. Furthermore, the power to provide a licence to practice was given to the Ministry of Justice. This violates the independence of lawyers from the Government and creates a clear risk of abuse. There were numerous reports of lawyers who defended political opponents of the President and subsequently had their licences taken away.

## CASES

**Natalya Dudareva** {lawyer}: She has been defending individuals on charges relating to demonstrations and was sued for contempt of court, allegedly because of her defence of political unpopular clients.

**Alyaksey Filipchanka** {lawyer}: He set himself on fire in protest, as a result of which he died on 31 July 1998. Mr. Filipchanka had been acting as defence lawyer for Antanina Voranava, who was threatened with unlawful eviction. Mr. Filipchanka was so frustrated with the obstruction he faced during the trial that he decided to protest against the arbitrariness of the court through self-immolation.

**Tatyana Protko** {lawyer and head of the Belarusian Helsinki Committee}: She was detained by the police for researching a case of an alleged victim of human rights violations.

**Vera Stremkovskaya** {lawyer and president of the Center for Human Rights in Belarus}: She was threatened with the loss of her license for criticising the deficiencies in legal protections in Belarus during a meeting in New York in September 1998, organised by the International League for Human Rights.

Furthermore, Ms. Stremkovskaya is allegedly being criminally prosecuted for representing a politically unpopular client. Disciplinary measures by the Collegium of Advocates have also been launched against her.

# BELGIUM

According to its Constitution, Belgium is a parliamentary democracy under a constitutional monarch. Since 1993, Albert II has been King of Belgium. In 1994, following a reform process initiated in 1970, Belgium acquired a new Constitution which transformed Belgium from a unitary state into a federal state with communities and regions. Belgium is made up of three communities: the French community, the Flemish community and the German-speaking community, as well as three regions: the Walloon region, the Flemish region and the Brussels region. Belgium has four linguistic regions: the French-speaking region, the Dutch-speaking region, the bilingual region of Brussels-Capital and the German-speaking region.

The role of the King is symbolic because although he is technically the source of all executive authority, the Council of Ministers holds actual decision-making power. Parliamentary elections are held at least every four years. There is universal suffrage, with obligatory voting and a system of proportional representation.

According to Article 35 of the Constitution, the federal authority only has powers in the matters that are formally attributed to it by the Constitution and the laws carried out in pursuance of the Constitution itself. The communities and regions, each in its own area of concern, have power for the other matters, under the conditions and in the terms stipulated by law. This law has to be adopted by a special majority vote.

For Flanders and Wallonia, regional and community assemblies are composed of the members of the House of Representatives and of the directly elected senators from each regional cultural entity. For the Brussels-Capital region, members of the regional assembly are elected directly in special elections. Regional and community councils are directly elected.

Article 36 of the Constitution stipulates that the legislative power is exerted collectively by the King, the House of Representatives and the Senate.

The violations committed by Belgian soldiers while in Somalia in 1991 and 1992 and the role of the police and the judiciary in the paedophilia case were persistent problems in Belgian politics in 1997 and 1998.

## THE JUDICIARY

The judiciary is regulated through the Constitution and the *Deuxième Partie - Livre Premier du Code Judiciaire*. The *Deuxième Partie* provides detailed regulations for such matters as the composition of all the courts, the functions of the judiciary and their appointments, together with disciplinary measurements and vacation, salary and pension entitlements.

Articles 151 and 152 of the Constitution, which regulate the nomination, appointment and discipline of judges, were at the centre of a reform debate following the findings of a parliamentary commission established after the so-called 'Dutroux affair'. Hence, the Government proposed several far reaching proposals reforming the law enforcement and judicial system (*see below*).

### COURT STRUCTURE

The judicial system is organised according to specialisation and territorial jurisdiction, with five territorial levels: canton (222), district (27), province (9), courts of appeal (5), and the whole kingdom.

The highest court is the Court of Cassation for all of Belgium; its Chief Justice is appointed by the King. The Court of Cassation is composed of a chamber for criminal and police matters, a chamber which hears cases from the labour courts and tribunals, and a chamber for civil and commercial matters.

At the lower level there are District Administrative Tribunals, Labour and Commercial Tribunals and First Instance Tribunals (with civil, criminal and juvenile chambers). The *Juge d'Instruction* within the criminal Tribunal of First Instance is in charge of investigating criminal allegations and collecting the facts and evidence both in favour and against the defendant's case. According to the evidence, the *Juge d'Instruction* can decide either to send the file to the appropriate court for prosecution or to declare that there is no need for a trial. The role of the *Juge d'Instruction* in the so-called 'Dutroux affair' was severely criticised (*see below*).

The higher courts are divided into *Cour d'Assises*, Courts of Appeal and Labour Courts. There is a *Cour d'Assise* in each province and in the administrative district of Brussels-Capital. A *Cour d'Assise* is composed of a first president, a President of each chamber and advisers. It hears mainly criminal cases referred to it by the Chamber of Accusations. There is no appeal of the decisions of the *Cour d'Assise*.

There are five Courts of Appeal in Belgium: in Brussels, Gand, Antwerp, Liège and Mons. The Courts of Appeal have civil, criminal and juvenile chambers. The Labour Courts sit in the regions of the Courts of Appeal and are composed of a president, presidents of the chambers, advisers and social advisers. The regulations of both courts are established by the King on advice of the first president of each of the courts, of the procurator general, and the chief court clerk, and the assembly of *batonniers* of the bar associations of the place where the Court of Appeal sits and the presidency of the first president of that court.

The District Administrative Tribunal is composed of the presidents of each of the Labour Tribunals, the Tribunals of First Instance and the



Commercial Tribunals. The Labour Tribunals are composed of at least two chambers, each of which is presided over by a judge and also composed of two *juges sociaux*. The Commercial Tribunals have at least one chamber and cases are heard by one judge of the tribunal and two *juges consulaires*.

Military tribunals try military personnel for common law as well as military crimes. All military tribunals consist of four officers and a civilian judge. At the appellate level the civilian judge presides. The accused has the right of appeal to a higher military court.

#### APPOINTMENT, REPLACEMENT AND DISCIPLINE

The judges of the *Cour de Cassation* are appointed for life by the King, from two lists of two candidates, one compiled by the *Cour de Cassation*, and the other alternatively by the Chamber of Representatives or the Senate. The lists are made public at least 15 days before the appointment is made.

The presidents of the *Cours d'Assises* are members of the Courts of Appeal, and the advisers are designated for each case by the president of the Court of First Instance. The judges of the Courts of Appeal are appointed for life by the King after being nominated from two lists, one prepared by the Courts of Appeal and the second one by the Provincial Council or the Council of the Brussels-Capital Region.

The president and vice-president of the Tribunals of First Instance are appointed for life in the same manner in which the judges of the Appeal Courts are appointed. They are directly nominated by the King. Before being appointed all judges need to meet certain specified qualifications and pass an examination.

A magistrate can be replaced in a case as a result of family relationship, civil protection, doubts over partiality and objectivity and after six months when the case has been considered. A judge cannot be removed or suspended because of a judgement. A judge only can be transferred with a new nomination and his approval.

Formerly, disciplinary procedures were administered in Belgium within the judiciary; all proceedings were appealable and all decisions had to be reported to the Minister of Justice through the Procurator General. Following the findings of the Dutroux Commission, the procedures were reformed (*see below*).

#### THE 'DUTROUX AFFAIR'

In August 1996, Belgium was shocked by a scandal of kidnapped, abused and murdered children. Two girls were found still alive by the investigating-magistrate, Mr. Jean-Marc Connerotte, in August 1996. They had

been kept in the house owned by Marc Dutroux who was arrested on 15 August 1996 in connection with the disappearance of another girl. The bodies of four other young girls were found later on two different locations, two in Marc Dutroux's backyard.

The handling of the investigation of this case raised widespread national protests, mainly because it was revealed that the authorities had released Marc Dutroux in 1992, after he served only three years of a 13-year sentence for the rape of several other young girls. It was also unveiled that police had been in Dutroux's house at the same time the girls were being kept there, and had failed to act.

The investigating judge, Jean Marc Connerotte, became popular in Belgium because of his efficiency in acting on these cases. The Court of Cassation ruled in October 1996, however, that he should be removed from the case on the grounds of violating his duty of remaining strictly neutral, because he had attended a fund-raising dinner for the parents of the victims. The decision to remove Mr. Connerotte from his investigation deepened the crisis of public confidence in the police and the judiciary.

#### THE DUTROUX COMMISSION

In October 1996, a parliamentary commission known as the 'Dutroux Commission' was established to examine allegations of corruption and protection in the investigations of the cases of the kidnapped, abused and murdered children, and to research the deficiencies of the law enforcement and judicial systems.

The Commission issued its interim report in February 1997, concluding that rivalry between the country's different police and judicial divisions had prevented them from working together effectively. It said that the investigators had failed to share information, that they had ignored vital leads and that the insufficient resources available had been poorly allocated. According to the report, the local police had failed to give important information concerning Marc Dutroux to officials investigating the disappearances of the girls.

It recommended, *inter alia*, the following:

- More resources should be allocated to the judicial services to work more efficiently.
- The resources for the police and police knowledge of the criminal system should be increased.
- An external audit over the judicial services should be done at the request of the Minister of Justice.

The functioning of the police should be subject to public debate in Parliament. Every year the Ministry of Justice should report to Parliament on this issue.

- The principle of control has to be introduced at all the levels of the judicial machinery. This control should be a guarantee of the quality and evaluation of judicial decisions. Internal controls have to be exercised by the judiciary, while political control has to be exercised in exceptional cases by a parliamentary investigation, and in general cases by parliamentary questions.

The new approach requires an essential basic training as well a continuing and permanent training in the criminal law system as well as in police work.

- There should be horizontal and vertical integration of the investigations. The horizontal integration is to organise meetings between the specialised magistrates. The vertical integration is to organise meetings between the magistrates and the police, in order to exchange information and to clarify the roles and the powers of each of the actors involved.
- In order to establish a better exchange of information between the prosecutors, a centralised computer system with essential information should be set up under the direction of a national magistrate, accessible not only to the prosecutors but also to the investigating judges. In addition, the databases of the police should be permanently accessible to the prosecutors and the instruction judges.
- It is important that the judicial delay and backlogs are corrected.
- The role of the *chefs de corps* should be re-defined as the judges are currently placed under their control. The role of the prosecutor should also be re-defined.
- The Commission has suggested the necessity of reasserting the role of the instruction judge as well as the establishment of the conditions of selection, training and even access to computers.
- The balance of power between the police and the magistrates should be reintroduced. A clear understanding should exist between the magistrates and the researchers. A better use of the new methods of gathering evidence by the researchers and investigators is also necessary.

There were claims of high level protection of Marc Dutroux by the authorities. The Commission expressed the need to further expand its work in order to investigate these suspicions. Accordingly, it was decided that the Commission would continue its work focusing on these issues.

The final report of the parliamentary Commission was issued in February 1998. The commission confirmed the recommendations issued in its interim report and added several others regarding anti-corruption strategies, the battle against organised crime in general, and sexual offences and paedophilia in particular. The chairman of the commission, Mr. Marc Verwilghen, expressed his bitter disappointment over the failure of the Belgian Government to follow up concretely on the recommendations of the Commission issued in its interim report.

On the issue of protection by authorities, the commission concluded that although inept police performance allowed Marc Dutroux to operate unhindered for years, he and his accomplices did not receive systematic protection from police and justice officials.

### REFORM OF THE JUDICIARY

Towards the end of 1996, several proposals were made by the Parliament and the Government in an attempt to restore public confidence in the police, the judiciary and the public administration of the country.

In November 1996, the Parliament made several proposals to change the appointment and nomination procedures of magistrates; inter alia, a College for the Nomination and Promotion of Judges was proposed (*see Attacks on Justice 1996*). The aim of the proposal was to create an objective procedure for the nomination and appointment of magistrates. The Government also proposed the creation of a High Council of Justice to supervise the judiciary (*see Attacks on Justice 1996*). Moreover, the role of the instruction judges was also re-considered.

In 1997, the rights of victims with regard to having access to information during an investigation were improved, as well as the right to appeal if a suspect is not charged. Furthermore, the Government began opening 'justice houses', which combine several legal services under one roof, such as legal aid, counselling and victims' assistance. The Minister of Justice proposed appointing 'Acting Judges' to expedite cases waiting to be heard by the Courts of Appeal, as there is a large backlog. The 'Acting Judges' are lawyers, notaries and law professors.

After the amazing escape of Marc Dutroux on 23 April 1998, which led to the resignation of the Justice Minister and the Interior Minister, eight political parties came together in May to put together an extensive proposal to reform the police and the judiciary. This accord, the so-called 'Octopus accord' led to a memorandum of the Government on 24 May and was followed by a report from a special commission of the House of Representatives. The text of the report was adopted by the House of Representatives and sent to the Senate on 22 October 1998.

As the 'Octopus accord' reforms of the police and the judiciary got underway in 1998, they resulted in proposals to amend Articles 151 and 152 of the Constitution to create a High Council of Justice to supervise and control the courts and to deal with the appointment and promotion of magistrates. The High Council of Justice will comprise 22 magistrates and 22 non-magistrates, appointed by the Senate. The High Council will not have disciplinary power. At the time of writing, Articles 151 and 152 of the Constitution had not yet been amended.

The communal police, the federal police and the investigating police, are to be merged into one police service with two levels: local and federal. The local police will deal with keeping order and investigation. The federal police will deal with specialised assignments between localities and will support the local police. Both levels will work together closely. The restructuring proposals have been voted upon, but it is expected that it will take two to three years to implement them.

The Government did not follow the proposals made by the Dutroux Commission regarding the change in tasks of the investigating judge. However, top magistrates such as the procurator-general, procurators, and presidents of higher and lower courts will no longer be appointed for life but only for seven years. The *chef de corps* will also only be appointed for seven years.

#### SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS

The Special Rapporteur on the Independence of Judges and Lawyers, Dato' Param Cumaraswamy, visited Belgium in October 1997 and November 1998. After his first visit, the Special Rapporteur concluded that

The events over the past two years in Belgium demonstrate that there is a crisis of public confidence in the administration in that country. The Special Rapporteur considers that the root cause of the deficiencies in the system is the neglect of the judicial system by successive Governments. The reform process under way should restore public confidence in the administration of justice but the process must ensure that independence and impartiality are not sacrificed for short term gains.

Although specific recommendations and conclusions were not included in the report on the Belgian mission because of the ongoing reform process, the Special Rapporteur expressed his opinion about the reform proposals. He stated that the mechanisms for the appointments, promotions, and discipline of magistrates must not only be independent but must be seen to be so; to meet this requirement, the composition of these mechanisms should have a majority of magistrates appointed and elected among themselves, and judicial accountability should not lead to an erosion of judicial independence. At the time of writing, the Special Rapporteur had not yet issued his report on the November 1998 mission.

# BRAZIL

**B**razil is a federal republic composed of 23 states, three territories, and a federal district as capital. Its federal Constitution, approved in 1988, provides for division of powers and rule of law in the country. Each state has its own constitution and legal system in accordance with basic principles set out in the federal Constitution. Each state also has its own political and administrative organisation.

The head of the executive branch is the President of the Republic. In October 1998, Fernando Enrique Cardoso was re-elected for a second four year term after the amendment of a provision in the Constitution prohibiting the acting President from running for a second term. At the same election, citizens elected deputies for the 513-seat Chamber of Deputies, and one-third of the 81-seat Senate, as well as some governors of federated states.

Article 5 of the Federal Constitution gives duly ratified human rights treaties immediate and direct applicability. However, federal authorities usually give the excuse of the lack of implementing legislation to justify their failure to respect those rights. The “federal principle”, according to which federal authorities cannot investigate or prosecute offences under the state’s jurisdiction, has also been used as an excuse for inaction.

## HUMAN RIGHTS AND IMPUNITY

There are serious structural problems in the police and criminal justice system that tend to perpetuate impunity in Brazil.

Arbitrary executions by police officers on and off duty, as well as police brutality continue to be the main human rights issues. In Rio de Janeiro alone, police officers repeatedly kill an average of 30 individuals per month. “Military” police officers are reported to be responsible for the majority of these killings, but because they are not under the jurisdiction of civilian courts, they enjoy almost total impunity from prosecution (*see below*). In many cases, these officers act as death squads that perform “social cleansing” operations in the shantytowns surrounding the biggest cities. They almost always target socially marginalised groups such as street children, blacks, prostitutes, gays, and others deemed to be “dangerous groups”. The activities of these squads and, in general, the brutality of military police officers seem to be at least tacitly accepted, if not supported, by the authorities and even by the public, who consider these methods to be a valid way to combat an increase in common crimes.

Impunity seems to be the rule not only with regard to police officers accused of human rights violations, but for crime in general. The inefficacy of the judicial authorities in tackling the growing crime rate fuels the

general feeling of insecurity and serves as a basis for the use of illegal methods to combat the rise in crime. "Military" police officers that commit human rights violations not only go unpunished, but sometimes receive rewards for bravery. An incident that was videotaped and broadcast on 5 August 1997 in Rio de Janeiro showed a policeman who, when trying to arrest two suspects following a bank robbery, shot them at close range without warning. The policeman was afterwards rewarded for bravery. This prompted the state assembly of Rio de Janeiro to pass a law abolishing the system of rewards for bravery.

The 1996 law empowering ordinary courts to try military police officers charged with intentional homicide was used for the first time in 1998, when an ordinary court convicted one of the eight officers charged with torturing and murdering persons in a shantytown in Sao Paulo in 1997. The eight officers had previously been convicted by a military court in July 1998, which had only sentenced them to prison terms of less than three years. The ordinary court that retried the case sentenced the first one of the eight to 65 years in prison and continues the trial of the rest of the officers.

During 1998 a Rio de Janeiro court sentenced two officers found responsible for the massacre of street children at the Candelaria church in 1993. In November however, another court acquitted 10 officers charged with the killing of 21 residents of the Vigario Geral neighbourhood in the same city.

Extrajudicial executions, abuses and police brutality are more usual in the countryside and small towns, where the police and civil authorities are more influenced by local landowners and other powerful people. Landless peasants who occupied private property were forcibly evicted, and their leaders detained, tortured and shot dead in many cases. These abuses generally go unpunished because the landowners who are suspected of being responsible for such acts frequently control the police and intimidate and threaten judges and lawyers.

In 1996, the Government approved a Human Rights Action Programme, to be implemented by the Ministry of Justice. In 1997, a National Secretariat in charge of monitoring this programme was appointed within the Ministry of Justice. Nevertheless, there has been very little progress in implementation and the Executive's initiatives have been crushed by unwillingness on the part of Congress and state authorities.

The Inter-American Commission on Human Rights, which had visited the country during 1996, issued its report in December 1997, severely criticising the country's human rights record. In December 1998, Brazil accepted the compulsory jurisdiction of the Inter-American Court of Human Rights, but without retroactive effect.

## THE JUDICIARY

The federal Constitution provides for the independence of the judiciary (Article 2). The basis for the organisation of the judiciary (*poder judiciário*) is set out in Chapter III of the Constitution.

### STRUCTURE

The federal judiciary is composed of the Supreme Federal Court, the High Tribunal of Justice, the regional federal tribunals and federal judges. Each state and territory, as well as the federal district, organise their own court system. The judiciary includes specialised courts for labour, family and military matters as well.

The Supreme Federal Court is the highest organ in the judiciary and the guardian of the federal Constitution. It is composed of 11 judges appointed by the President of the Republic. The High Tribunal of Justice is in charge of overseeing the federal legal system and is composed of 33 Justices. The Supreme Federal Court and the High Tribunal of Justice are both located in the federal capital and have nation-wide jurisdiction (Article 92 of the federal Constitution).

The federal court system is divided into two levels. On the first level there are federal judges acting within judicial sections (*seções judiciárias*) in each of the capitals of the states and in some of the main cities. In the case of the latter, they are called federal chambers (*varas federais*). There are 478 first level federal judges. The second level is made up of the Federal Regional Tribunals that function as appellate courts for cases already tried at the first level. The federal system of justice has jurisdiction over political crimes, and other offences against federal institutions and property.

Armed forces personnel as well as “military” police officers have their own court system (*see below*).

### APPOINTMENT AND TENURE

According to the federal Constitution, judges enjoy life tenure only after completion of two years of service in the judiciary (Article 95). They are subject to transfer only for reasons related to public interest. All federal judges are appointed by the President of the Republic from a list prepared by the Supreme Federal Court following strict criteria set out in the Constitution (Article 93). Judges enter the judicial career by public and competitive examination, and are then promoted to higher levels in accordance with their seniority and merits.

Justices of the Supreme Federal Court are appointed by the President with the consent of the absolute majority of the Senate. The President also appoints the 33 members of the High Federal Tribunal with the consent of the Senate.



## RESOURCES

The federal Constitution guarantees the administrative and organisational autonomy of the judiciary. The judiciary is entitled to prepare its own budget (Article 99) and execute it in accordance with its own plans and programmes. Nevertheless, the budget prepared by the judiciary is not considered binding by the political organs in charge of approving the year's appropriations bill, nor is there any guarantee that the budget will be approved as originally formulated. In effect, the judiciary's resources are subjected to the priorities and ultimate financial control of other political bodies, namely the executive and legislative branches. In past years some conflict has arisen from this scheme.

The Federal Council of the Judiciary is, according to Article 105 of the federal Constitution, the body in charge of administering and overseeing the resources of the Brazilian judiciary. The 1992 law of the Federal Council of the Judiciary empowers it to co-ordinate the use of human and financial resources in the judiciary.

## "MILITARY" POLICE COURTS AND IMPUNITY

In Brazil there are two police forces: the civil police which function as an investigative unit, and the "military" police, who are in charge of normal police tasks such as public security, crime prevention, etc. The so-called "military" police are not formally a division of the military, but rather a division of the state police that have kept their name due to the special jurisdiction they enjoy. The military courts' jurisdiction over "military" police was established in 1977 through a constitutional amendment carried out by a decree-law of the military regime at that time. The provision was then maintained in the 1988 Constitution.

The military courts' jurisdiction over "military" police is grounded in the military character of police offences against civilians. Article 125, paragraph 4 of the federal Constitution grants the military courts jurisdiction over "military police...for military crimes as defined in the law". Article 9(ii)(f) of the 1969 Military Criminal Code, defines peace-time military crimes as:

the crimes included in the Military Criminal Code itself providing that they are similarly defined in the ordinary criminal law and are committed by military personnel who, even if not on-duty, use military weaponry or any other warlike material to carry out illegal acts.

In 1996 a law partially amending the Military Criminal Code was passed (Law 9.299/96). This law grants civil courts the power to try "military" police officers only for intentional homicide, leaving aside other intentional and non-intentional crimes such as torture and kidnapping. At the same time an amendment to the Military Code of Criminal Procedure was made,

granting military courts the power to decide whether an offence committed by an officer of the “military” police amounts to “intentional homicide” and is therefore subject to transferral to ordinary courts. Another law proposal widening the jurisdiction of ordinary courts over “military” police was rejected in Congress despite the support expressed by the executive branch. These provisions have been the main cause of impunity enjoyed by “military” police in military courts.

The existence of these courts as well as the broad range of their competence to try cases of offences against civilians has reportedly been one of the causes of impunity. Very few uniformed police officers have been convicted so far and the punishments are very light. In the few cases transferred to ordinary courts (cases of intentional homicide) the verdicts have been harsh (*see above*).

At the federal level the military system of justice consists of a military court of first instance (*auditoria militar*) and a High Military Tribunal. The former is composed of a hearing judge (*juiz auditor*) and four active military officers that make up the Council of Justice. Only the hearing judge has a legal background and performs the tasks of an investigating judge. The High Military Tribunal is composed of 15 members (four army officers, three navy officers and three air force officers, plus five civilian judges). All military officers are in active service and the entire bench is appointed by the President of the Republic.

In what constitutes staggering power, the High Military Tribunal can bring up under its direct jurisdiction any case at an ordinary court involving a military officer charged with any common offence.

At the state level, states of the federation can establish High Military Tribunals when there is a need for it. In practice, many states have created these kinds of courts, characterised by slow proceedings, overloading, scarce human and financial resources, and very light sentencing.

In practice, all crimes other than murder committed by the uniformed police are tried in the military justice system. A 1996 law gave civil courts jurisdiction over intentional homicide committed by uniformed police. Military courts grant impunity to “military” police. For instance, 64% of cases against the police were closed without even a hearing.

In its report on the human rights situation in Brazil, the Inter-American Commission on Human Rights recommended in paragraph 95:

- to grant the ordinary courts the power to try all crimes committed by members of the state “military” police,
- to transfer to federal courts the jurisdiction to try crimes involving human rights violations (page 50). This will allow federal jurisdiction to better protect the human rights of the Brazilian people in accordance with international obligations undertaken by the country.

## INEFFICIENCY OF THE JUDICIARY

Court proceedings in Brazil are characterised by slowness and allegations of widespread corruption. It takes an average of eight years for a case to be decided by the Supreme Federal Tribunal. Courts and judges are overloaded and the number of judges, as well as their salaries and training, are far from adequate to meet the most urgent needs.

The majority of prisoners are awaiting trial and most of them cannot afford private legal counsel, yet the courts do not provide them with free legal assistance, citing lack of resources. As a consequence, the prisons remain overcrowded and the courts overburdened.

## CASES

**Mr. Luis Renato Azevedo da Silveira** {state prosecutor} **Mr. Marcelo Denaday** {lawyer}: On 12 June 1997 Mr. Marcelo Denaday suffered an attempt on his life while he was driving with his wife and children. The main cause behind this attempted murder was reportedly the investigation of a case in which members of the police organisation *Scuderie Detective le Coq* (SDLC) were allegedly involved. Evidently the State Prosecutor, Luis Renato Azevedo da Silveira, had been investigating SDLC's activities for some time. It is believed that members of the police as well as of the judiciary are involved in the SDLC.

**Marco Antonio Colagrossi** {lawyer}: Criminal proceedings were instituted against him following a petition presented by the public prosecutor of the District of Jundiai, Sao Paulo, dated 28 April 1998. He is a member of the Sao Paulo subsection of the Brazilian Bar Association, and had made a series of denouncements of corruption against the judge specialising in children's matters in the district. The Bar Association of Sao Paulo has assumed his defence.

**Mr. Pedro Montenegro** {lawyer and member of the Permanent Forum Against Violence of Alagoas (FPCV-AL)} **Marcelo Nascimento** {lawyer and president of the Grupo Gay de Alagoas and member of FPCV-AL}: Both lawyers are reported to have received anonymous calls threatening them with death if they pursue their investigations into the murders of two homosexuals and a transvestite in June 1996.

**Gercino José da Silva Filho** {Justice and president of the Supreme Court of Acre state}: He reported death threats after he had denounced the existence of death squads operating in the state and responsible for the execution of at least 30 people during the past 10 years. Justice Da Silva was put under Federal Police protection.

# CHILE

The Chilean Constitution was approved in 1980 by a referendum and was amended in 1989 after the military junta that had ruled the country for the previous 16 years lost a plebiscite. The Constitution was drafted during the military rule and contains a series of provisions that limit civil power in conducting state affairs. The last amendments to the Constitution are dated December 1997 (Law 19541) (*see below*).

The Constitution establishes the rule of law in the country and provides for the division of powers among the institutions of the republic. The executive power is exercised by the President for a six year term, while the legislative power is allocated to a bicameral Congress. The Constitution provides for the election of the 120-seat Chamber of Deputies for a four year term, and also for that of a certain number of Senate members. Upon nomination by the armed forces, the President, the Supreme Court and the National Security Council appoint an additional nine *ex officio* senators (Article 45). In March 1998, a new group of "institutional senators" were appointed for an eight year term and took their seats. General Pinochet also took his seat as a "senator for life", after relinquishing his post as Chief of the Armed Forces in March 1998, a post he held even after his retirement. The Constitution provides that all former presidents who have served at least a six year term may take such a seat. General Pinochet's taking of his seat as a senator-for-life was challenged before the Constitutional Tribunal, which rejected the petition.

In April 1998, a majority of 62 to 52 deputies dismissed an initiative to impeach Pinochet for his behaviour as Commander-in-Chief. Later in the year, Pinochet was arrested in the UK, following a request made by Spain (*see below*).

President Eduardo Frei won the general elections of 1994 and is serving a term of six years. President Frei's party, the Christian Democrat Party, forms part of the Coalition for Democracy, which holds the majority in the Chamber of Deputies, but not in the Senate, where right-wing parties and the "institutional senators" maintain the majority and assure a practical veto of any initiative to challenge the status quo. This fact has a serious effect on the capacity of democratic institutions to bring past human rights violations to justice in an impartial and independent way.

## HUMAN RIGHTS BACKGROUND AND IMPUNITY

Chile is still living the consequences of 17 years of military rule during which serious human rights violations occurred. Thousands of summary executions, enforced disappearances, arbitrary detentions and torture are still pending investigation and are the focus of strong debate dividing the Chilean population.

An amnesty law covering the period between 1973 and 1978, the time of the most ferocious repression, was passed by the military government itself in 1978 (Decree Law 2191-78). The judiciary has applied this amnesty law repeatedly since then. In December 1998 however, following changes in its composition, the Supreme Court overturned its jurisprudence in applying the amnesty law automatically. The Court indicated that the law could only be applied after a full criminal investigation is completed and the responsible persons are identified. In the case under review, the Court ordered the military court to commence its investigations.

In March 1998 the Supreme Court quashed a previous 1996 ruling made by a martial court that applied the amnesty law, where the military court had declared investigations into the disappearance of 24 peasants in the Paine community closed. In May 1998 the same happened in another martial court decision closing investigations into the disappearances of eight members of the Movement of the Revolutionary Left (MIR) in 1975. In June 1998 the Supreme Court again overturned a previous decision applying the amnesty law in the case of Luis Ortiz Moraga who was detained and then disappeared.

A landmark decision was issued in September 1998 by the Criminal Chamber of the Supreme Court, when it revoked the application of the amnesty law to the case of MIR member Enrique Poblete Córdoba, who disappeared in 1974. The ruling applied the provisions of international humanitarian law contained in the Geneva Conventions of 1949 and additional protocols. The Court based its decision on the wording of Decree-Law 5 passed by the military junta that declared that "the state of siege should be understood as a state of war". The Court concluded that the humanitarian rules for times of internal armed conflicts would be applicable. The decision stressed that the Geneva Conventions, to which Chile is a party, impose an obligation to prosecute such grave breaches and that the amnesty law could not have had the effect of amnestying them. The decision reopened the investigations to determine the authors of Mr. Poblete's disappearance, following the standing criteria that for a case to be closed in application of the amnesty law, the authors should be made known in order to benefit from the amnesty.

Upon its return to democracy, in 1991, Chile ratified the Inter-American Convention of Human Rights, and accepted the jurisdiction of the Inter-American Court of Human Rights. On 22 March 1998, the Inter-American Commission of Human Rights declared for a second time the inconsistency of the 1978 amnesty law with the American Convention on Human Rights. The IACHR, ruling on 21 previously closed cases of enforced disappearances, said that:

- Decree-Law 2191-78 is incompatible with the provisions of the American Convention on Human Rights.

- The decisions to stay proceedings (*sobreseimientos temporales*) in each of the cases in question aggravate the situation of impunity, violate the right of the victim's relatives to justice, and to identify the authors, ascertain their responsibility and corresponding sanctions and to obtain judicial reparation.
- The Chilean state has not complied with the American Convention by not bringing its legislation on amnesty into line with the provisions of the Convention.

A total of nine cases of denial of justice involving cases of disappearances and executions previously closed are pending before the Inter-American Commission of Human Rights, according to local human rights NGOs.

#### THE PROCEEDINGS AGAINST PINOCHET

The Chilean democracy underwent one of the most difficult periods in its recent history during 1997 and 1998. The opening of judicial proceedings against the former ruler General Augusto Pinochet in Chile, as well as his detention and the request for extradition against him while in Great Britain, were the focus of major political debate in Chile.

For the first time, General Pinochet was named as a defendant in private prosecutions. The Chilean judiciary has declared admissible several petitions against Pinochet on criminal charges, and ordered investigations into the cases. On 12 January 1998, the first application was admitted by the Appeals Court of Santiago which appointed Appellate Judge Juan Guzman as investigating judge in the case. The second application was lodged on 28 January and added to the first, and on 3 March a third petition was lodged on behalf of the relatives of the disappeared, which was also added to the first. By the end of 1998, Judge Guzman had received and declared admissible for investigation a total of 12 petitions against General Pinochet, containing charges of genocide, intentional homicide, enforced disappearance and torture. Although all senators and deputies enjoy immunity from prosecution, the Court of Appeals has the power to revoke that immunity. Recent decisions on lifting this immunity have gone both ways.

At the international level, on 16 October 1998, General Pinochet was arrested in Great Britain following a request from Spain, on charges of torture, genocide and hostage-taking. General Pinochet filed a petition of *habeas corpus* alleging immunity because of his status as former Head of State and senator. The British High Court initially granted the petition on 28 October, but a House of Lords' Law Lords panel quashed that decision on 25 November. The British Home Secretary then ordered the commencement of extradition proceedings, although not on the genocide charges, but on 17 December the Law Lords reconsidered their previous decision and

annulled it on the basis that one of the panel members had not revealed his links with Amnesty International, a party to the petition. The Lords considered such a link to involve a potential conflict of interest, and re-opened the case. Later, in April 1999, a new Law Lords panel decided that Pinochet does not enjoy immunity for certain crimes, namely torture and conspiracy to commit torture, committed between 1988, when the International Convention Against Torture entered into force in Great Britain and Chile, and 1989 when Pinochet left the post of President in Chile. Extradition proceedings were thus allowed to proceed.

## THE JUDICIARY

The Chilean judiciary is organised in accordance with the Constitution, as amended in December 1997. The relevant sections are chapter VI (on the judiciary), VI(A) (on the Office of the Public Prosecutor), and VII (on the Constitutional Tribunal). Article 74 establishes that a constitutional law is to define the organisation and powers of the judiciary. This law requires the vote of four-sevenths of the Congress to be passed (Article 63 of the Constitution), and is known as the Organic Law of the Judiciary (*Código Orgánico de Tribunales*, or COT).

### STRUCTURE

The judiciary is composed of an ordinary court system and special courts (Article 73 of the Constitution). There are also military courts. (*see below*). The ordinary court system comprises the following levels: the Supreme Court, the highest jurisdictional body with jurisdiction over the entire country; the 17 Appeals Courts, which have jurisdiction over the regions; and first-level courts, (*Juzgados de Letras*), with jurisdiction over a district within a region under the primary jurisdiction of an Appeals Court.

The Chilean judiciary is characterised by its hierarchical organisation and the tight control which the Supreme Court exercises over the whole structure. This body not only exercises oversight, discipline and resource management of the entire judiciary, but also plays a central role in the nomination and the appointment of judges. There is excessive power concentrated in the Supreme Court, and it is still dominated by appointees of the military government as well as by the Senate, which is itself dominated by sympathisers of General Pinochet.

### APPOINTMENT AND SECURITY OF TENURE

Judges and prosecutors other than those of the Supreme Court are appointed by the President from a list prepared by the Supreme Court, in the

case of appointments for the Appeals Courts, or by the Appeals Courts in the case of appointments for first-level courts.

Article 77 of the Constitution establishes that judges enjoy security of tenure “during good behaviour”. The age for retirement is set at 75 for all judges, except for the president of the Supreme Court, who remains in office until the end of his term of three years.

The same constitutional provision grants the Supreme Court the power to remove judges on the grounds of “bad behaviour”. To do so, the Supreme Court may act upon the request of the President, an interested party or on its own, and declare that the judges have misbehaved. Then, following an ill-defined procedure, the Court can decide to remove the judge in question. By majority vote of its membership the Supreme Court can also decide on the transfer of a judge to a different post. Furthermore, judges and magistrates are subject to periodic evaluation by the Supreme Court or the corresponding Appeals Court, depending on the case (COT, Articles 273, 275 and 277).

The vast scope of the Supreme Court’s powers with regard to the body of judges and magistrates renders the latter’s independence and impartiality subject to significant constraint. Many judges reportedly exercise self-restraint and try to please their superiors in the hierarchy in order to avoid being removed, transferred or administratively punished.

## RESOURCES

The body in charge of the administration of the judiciary is the Administrative Corporation of the Judiciary (*Corporación Administrativa del Poder Judicial*). It depends only on the Supreme Court and does not enjoy autonomy (COT, Article 506). Among its tasks are those related to the preparation of the general budget for the judiciary and the management of the funds granted to it.

In 1997 the judiciary’s financial resources amounted to US \$128,496,936.00; in 1998 it received US \$137,049,377.00. This means that an average of US \$9.4 per capita, one of the highest in the Andean region, is spent on the judiciary each year.

## THE REFORM OF THE SUPREME COURT

In December 1997 the number and the method of appointment of Justices of the Supreme Court were changed. This was carried out through the approval of Law 19541, amending the Constitution. These reforms, one of the most long-standing causes of confrontation between the governmental coalition and the Supreme Court, were first proposed in 1992, but were not approved by Congress until 1997. The significance of the reform is all the more clear given the scope of the Supreme Court’s powers.



The changes were prompted by a crisis which began in July 1997 when the president of the Supreme Court faced an impeachment proceeding in the Senate advocated by conservative parties on suspicion of his attitude toward drug-related crimes. The Supreme Court, long criticised by human rights defenders for its lenient role during the dictatorship, also lost the support of the conservative sector.

The constitutional reforms provide for an age limit for serving judges of the Supreme Court, who must now retire once they reach the age of 75. The amendment also gives the Senate a role in the appointment of judges. According to amended Article 75, the Supreme Court is now composed of 21 Justices (four more than before). The appointment system will be as follows. In the case of the Supreme Court, the President will choose one person from a list of five prepared by the Supreme Court itself, and will submit the name to the Senate for approval. The consent of the Senate requires the vote of two-thirds of its membership. If this majority is not reached, the President will propose another name. The previous system gave the President exclusive right to choose the Supreme Court Justices from the list of five prepared by the Supreme Court itself. The new system, although it widens the group of electors, giving the Senate a role that may balance the others, is still insufficient. The system is still self-contained in the sense that it is the Supreme Court itself which has primary responsibility to prepare the list of candidates, all of whom, except the five that should come from outside the judiciary, are judges in lower courts. With regard to the role of the Senate, it is worth noting that the Senate is also subject to institutional constraints, as it has among its members nine designated senators who have great influence over the final outcome (*see above*).

The insufficiency of the new appointment system for Justices of the Supreme Court became evident immediately after the reform was approved. Four new members of the highest tribunal were elected in the Senate following a proposal by the President. Unfortunately, the political composition of this legislative body as well as its institutional constraints allowed political considerations to prevail in the designation of the new Supreme Court Justices. **Judge Milton Juica**, one of the nominees proposed by the President for designation to the Senate was vetoed by the conservative majority (*see cases below*). However, the institutional constraints did not prevent the new Supreme Court from taking landmark decisions in relation to the application of the 1978 amnesty law (*see above*).

During 1998 a debate arose over the continued presence of the Military Auditor-General (*Auditor General Militar*) at the sessions of the Supreme Court. The debate reportedly focused on the legality of his presence since the Military Auditor-General is neither elected by the Senate nor appointed by the President. The legal basis for his participation in the highest body of justice is Article 70-A of the Military Code of Justice, as amended in 1977. This Article allows the Military Auditor-General to sit on the bench in cases involving the military system of justice. Later, and without any legal

rationale, the Military Auditor-General extended his participation to all cases involving military officers as well.

The participation of the Military Auditor-General in cases of human rights abuses involving military personnel is not in line with international standards on independence and impartiality of judges. All motions lodged during the proceedings to challenge this military involvement in the civil proceedings were rejected by the bench, and this officer remains on the bench, as an extreme example of an individual who is both judge and party to a case.

### MILITARY JUSTICE

The scope of the military courts' jurisdiction is very wide in Chile. Another problem is the fact that they are far from impartial, and they have always tried to secure impunity for any military personnel being investigated. Nevertheless they can in principle be subject to judicial supervision and review by the *Corte Marcial* and the Supreme Court. According to the Military Code of Justice, military courts can try civil and criminal cases (Article 1) and persons of any nationality (Article 3). The military court system is composed of two levels; at the first level are the *fiscalías militares*, and at the second level are the *Cortes Marciales*, whose composition varies in peacetime and wartime. The Supreme Court can review the sentences of the martial courts, but in general, until 1998, our information suggests that it had never overruled a sentence on a case involving serious human rights violations.

Conflicts of jurisdiction between civilian courts and military ones are settled by the Supreme Court, in accordance with provisions of the Military Code of Justice (Article 70-A). However, as a general rule, whenever a conflict of jurisdiction arises over a case involving a military officer, the Supreme Court grants jurisdiction to military courts, even in civilian affairs.

Furthermore, military courts have jurisdiction to try civilians for offences contained in the Military Code of Justice. These offences include "defamation of military personnel" and "sedition", thus curtailing freedom of expression of civilians. Successive proposals in Congress to limit military courts' jurisdiction over civilians have faced angry opposition from the military and its political allies.

However, and partly due to the changes in the composition of the Supreme Court, the traditional predominance of military courts over civilian courts is changing. In April 1998, the criminal chamber of the Supreme Court granted jurisdiction to civilian courts in two cases: one involving the disappearance of Leopoldo Muñoz in 1974 by state security agents, and the other the murder of a private soldier within a barrack in 1973. This change may well pave the way to further strengthening of the judiciary's

independence. It is worth mentioning that in these two cases, the Military Auditor-General (*see above*) who is part of the Supreme Court, voted against.

#### REFORM OF THE SYSTEM OF CRIMINAL PROCEDURE

In the constitutional reform of December 1997 provision was made for an Office of the Public Prosecutor (*Ministerio Público*). This body was granted autonomy along with those powers proper to a prosecutor within an adversarial system of criminal law. Further, Article 80A of the Constitution sets out its powers as those necessary to investigate, formulate an indictment and to adopt measures to protect victims and witnesses, but the prosecutor "in no case shall exercise jurisdictional functions".

During 1998 Congress discussed a proposal for a new code of criminal procedure that will arguably push forward the reforms. The project, which develops an adversarial system of criminal justice, will spell out the powers of the Public Prosecutor to investigate and issue indictments. There will also be a pre-trial judge (*Juez de Control*), who will guarantee the rights of the parties, and a panel of three trial judges.

Another proposal of law, developing constitutional provisions on the Office of the Public Prosecutor, is also pending in Congress. Together with the proposal on the reform of the code of criminal procedure, it is awaiting approval in the Senate. The appointment of the Public Prosecutor-General, following the same procedure as for the Justices of the Supreme Court, has been postponed until the Organic Law on the matter is passed in Congress.

#### CASES

**Milton Juica** {judge in the Appeals Court of Santiago}: Mr. Juica was proposed to the Senate as a new Justice of the Supreme Court by the President during the first months of 1998; however his nomination was rejected. Reports indicated his rejection was motivated by Judge Juica's stance against impunity of past human rights violations. Judge Juica had convicted members of the Police Intelligence Service (*Carabineros*), of the killing of three members of the Communist Party. He also found sufficient evidence to start criminal proceedings for cover up charges against retired Police General Rodolfo Stange, Commander-in-Chief of the Police. However, Judge Juica's decision was overruled on appeal Senator Stange and other appointed senators are reportedly behind the veto of Judge Juica.

# CHINA, INCLUDING TIBET AND HONG KONG

The People's Republic of China is a unitary state with 22 provinces, five autonomous regions, (Guangxi, Inner Mongolia, Mingxia, Tibet, Xinjiang), and three directly governed municipalities (Beijing, Shanghai, Tianjin). Under the 1982 Constitution, legislative power is vested in the National People's Congress (NPC) which has 2,970 indirectly elected members. Executive power is exercised by the State Council which is elected by the NPC. Effective political control is in the hands of the Chinese Communist Party (CCP). On 19 February 1997, President Deng Xiaoping died at the age of 93 and was replaced by Jiang Zemin as Head of State.

China was again criticised by human rights groups for its high number of executions, which amounted to 1,876 persons in 1997. This was seen as a result of the anti-crime campaign which the Chinese government launched in April 1996. In the course of 1997 and 1998, the Muslim north-western part of China remained an area in turmoil with bomb explosions, wounding and killing people. Many people were executed for charges related to the troubles in this part of China.

In February 1998, the European Union stressed that it would not initiate a resolution during the 54th session of the UN Commission on Human Rights, and instead stressed the importance of "dialogue" with China. In addition, the US decided not to sponsor a resolution, after an announcement by China that it would sign the International Covenant on Civil and Political Rights (ICCPR) and ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR). The PRC signed the ICCPR on 5 October 1998 but has yet to ratify it.

The UN Secretary-General, Mr. Kofi Annan, visited China on 1-2 April 1998 and the High Commissioner for Human Rights, Ms. Mary Robinson, visited in September 1998.

In general, one could say that the attitude towards dissidents in the PRC in 1997 and 1998 did not change substantially, as some dissidents were released and expelled to the US, while others were arrested and convicted. Examples include the release of the well-known political dissident Wei Jingsheng in November 1998, (officially because of health problems, but more plausibly because of pressure exerted by Western countries), the arrests of numerous members of the outlawed China Democracy Party (CDP), and the case of Lin Hai, a computer entrepreneur, who was sentenced to two years imprisonment on 20 January 1999 after having provided the email addresses of Chinese computer owners to a US-based democracy magazine published by Chinese dissidents.

## THE JUDICIARY

The Chinese court system is comprised of four levels of courts: Supreme People's Court, High People's Court, Intermediate People's Court and the People's Court. There are additionally a number of Special Courts.

In practice, the selection and promotion of individual judges and the process of adjudication is strictly controlled by the party. At each geographic level, judges are appointed by the corresponding People's Congress. Court presidents appoint the chief judge of each hearing panel, or they themselves serve in that capacity. The President also chairs the 'examination and evaluation committee' that conducts an annual appraisal of the judges' performance, and upon which promotions, salaries, training opportunities, rewards and penalties are based.

The Supreme People's Court consists of over 200 magistrates. Its President is appointed for a five year term which may be renewed once and/or revoked by the NPC, while the divisional presidents, vice-presidents, judges and the adjudication committee are appointed and/or removed from office by the Standing Committee of the NPC. The Supreme People's Court is responsible to the NPC, to which it reports on its activities.

The presidents and judges of the three lower levels of courts are appointed and/or removed from office in accordance with an identical but decentralised procedure by the standing Committee of the People's Congress of the judicial district concerned, to which the courts also report (Article 9 of the Judges Act and Article 10 of the Procurators Act).

The People's Courts' jurisdiction includes criminal, civil and administrative cases together with the resolution of commercial disputes. The amended CPL continues the practice that trials of first instance shall be conducted by a collegial panel of judges, people's assessors and lay people.

There are also military tribunals, marine tribunals and rail transport tribunals. Military Courts serve as the judicial branch of the People's Liberation Army and are to adjudicate military offences and other criminal offences committed by army personnel.

People's Procurators are appointed and/or removed from office by the local congresses under the same conditions as judges. Each procuratorate has a procurators' committee which takes the most important decisions by a majority of its members. If the head of procuratorate is outvoted however, the matter is submitted to the Standing Committee of the local People's Congress.

The general mandate of the procuratorates is to monitor the application of laws. The UN Working Group on Arbitrary Detention found in its 1997 mission to China that criminal investigations are carried out by the Public

Security Office (PSO -the police) in 90% of the cases and that the People's Procuratorate investigates the remaining 10%.

The Chinese judiciary is obedient to the Communist Party. Although China's Constitution recognises the independent exercise of the power to adjudicate, and states that courts "are not subject to interference by administrative organs, public organisations or individuals," the CCP is neither an 'administrative organ' nor a 'public organisation.'

While judicial independence in China increased in the 1980s, after the Tiananmen crackdown, the CCP has since re-asserted its control. Ren Jianxin, the People's Supreme Court President, stated in 1990 that "leadership of the Party over the courts is the basic guarantee for the courts to achieve their adjudicatory tasks. ...[This] is fundamentally different from the 'judicial independence' in bourgeois countries".

China has made progress in legal reform in recent years with the passage of new legislation, but the judicial system continues to deny defendants basic legal safeguards and due process of law, because maintaining public order and suppressing political opposition remain a higher priority to the authorities.

In the past, and in practice, trials have been closed to all but a select audience. In an effort to make the whole legal system in China more transparent, the Beijing No. 1 Immediate Court was the first court to open trials to the public in June 1998. Under this new policy, journalists are allowed to report on any cases that are publicly tried. Chinese law stipulates that all trials should be held in public, except for cases involving state secrets, minors and privacy. In November 1998, it was decided that all courts in Beijing should be open to the public and the media, unless there is a risk of disorder.

One major problem remains in that there is still no unified official bulletin which publishes the laws and regulations. The National People's Congress has its own official bulletin, while administrative regulations are published in the bulletin of the State Council and some ministries have their own official bulletins.

## CRIMINAL PROCEDURES LAW AND CRIMINAL LAW

The 1996 edition of *Attacks on Justice* outlined the major features of the Criminal Procedure Law which was adopted by the NPC on 17 March 1996 and came into force on 1 January 1997. Although the amendments to the original CPL were welcomed, genuine concern remains that the tradition of a dependent judiciary will prevent actual implementation of the amendments. Furthermore, the amended PLC still falls short of international standards.

The PRC also revised its Criminal Law which came into force in October 1997. The most important amendment to this law is the elimination of crimes of 'counter-revolution'. However promising this may sound, in reality these crimes were replaced by 'endangering the state security', a term which is as broad and maybe even broader than 'counter-revolution'. Articles 102-113 of the new Criminal Law give an indication of how vague this term is. As the Working Group on Arbitrary Detention concluded in its report on its October 1997 visit:

The revised Criminal Law fails to define precisely the concept of endangering national security, yet it applies the imprecisely defined concept to a broad range of offences (see the Articles 102-113).

The Working Group furthermore concluded:

In the 1979 Criminal Law, 12 main categories were listed of counter-revolutionary crimes, including both violent and non-violent crimes. In the revised law, even though counter-revolutionary crimes has been abolished, the jurisdiction of the State has been allowed to expand, and acts of individuals in exercise of freedom of expression and of opinion may well be regarded as acts endangering national security.

Concern was specifically expressed by the Working Group and concerned non-governmental organisations that people can be charged with and convicted of endangering national security for receiving financial support from abroad to commit the crimes mentioned in Articles 102 and 105. The latter restrains the freedom of expression severely by restricting even the communication of ideas and thoughts.

## **LAWYERS**

In May 1996 the Standing Committee of the National People's Congress (NPC) adopted the Lawyers Law, which was intended to codify recent changes in the role of lawyers and organisational forms of law firms, emphasise lawyers' professional responsibilities, ensure that they are not interfered with when carrying out their duties and protect the rights and interests of the individuals and parties that they serve. Political defendants in China, however, have frequently found it difficult to find an attorney, as authorities have retaliated against lawyers representing such defendants in the past.

Although this new law was a step forward, it is still far from consistent with the UN Basic Principles on the Rights of Lawyers. The lawyers are, for example, not independent, as the Ministry of Justice has significant control over lawyers, law firms and bar associations. Lawyers also face frequent obstruction and interference from the police, the procuratorate and courts.

China's criminal process is governed by the Constitution and the Criminal Procedure Law (CPL), amended on 1 January 1997. The amendments were designed, in part, to bring China's procedure into greater conformity with international standards, and are a positive, if limited and incomplete, development. In particular, the new law provides for greater roles for defence counsel and the trial court, potentially converting trials that have essentially been sentencing hearings based on pre-determined verdicts into actual inquiries into the facts.

The appearance of the profession of lawyer only occurred in China in 1980. This can be partly explained by the fact that as there were insufficient lawyers, they had no monopoly of defence. Article 32 of the new Criminal Procedure Law provides that while the function of defence is carried out primarily by lawyers, it may also be conducted by a citizen recommended by a people's organisation, by the people's court, by the accused person's work unit, or by a close relative.

The number of lawyers has increased from 41,000 in 1990 to 82,000 in 1995 and to 110,000 in 1998. The government estimated that the objective, in order to deal with the increase in access to justice and the ongoing implementation of judicial and economic reforms, should be 150,000 in the year 2000 and 300,000 in the year 2010.

## TIBET

Central Tibet - the part of Tibet ruled from Lhasa - demonstrated from 1913 to 1950 the conditions of statehood as generally accepted under international law. In 1950, there existed there a people, a territory, and a functioning government which and conducted its own domestic affairs free from any outside authority. From 1913-1950 the foreign relations of central Tibet were conducted exclusively by the Government of Tibet. Central Tibet was thus at the very least a *de facto* independent State, when, in the face of a Chinese invasion, it signed the "17 Point Agreement" in 1951 surrendering its independence to China. Under that Agreement, China made a number of undertakings, including: promises to maintain the existing political system of Tibet, to maintain the status and functions of the Dalai Lama, to protect freedom of religion and the monasteries and to refrain from compulsory "reforms". These and other undertakings were violated by China. The Government of Tibet was therefore entitled to repudiate the Agreement, which it did in 1959.

The nominal autonomy accorded to the Tibetan Autonomous Region (TAR) and other Tibetan autonomous areas by the PRC Constitution and laws is limited, as most local powers are subject to central approval. The actual extent to which Tibetans control their own affairs is even more circumscribed, however, due to the centralised dominance of the Communist Party (CCP), and the exclusion of Tibetans from meaningful participation in



regional and local administration. When Tibetans are in positions of nominal authority, they are often overshadowed by more powerful Chinese officials. Every local organ is paralleled by a CCP committee or "leading group", which does not function in keeping with concepts of autonomy. The army and the police are dominated by the Chinese. While Tibet historically has often been divided, Tibetan self-rule is also undermined by the current partition of Tibetan territory which places most Tibetans outside the TAR and into four Chinese provinces in which Tibetans constitute small minorities.

In 1959 the United Nations General Assembly called "for respect for the fundamental human rights of the Tibetan people and for their distinctive cultural and religious life." In 1961 and 1965 the Assembly again lamented "the suppression of the distinctive cultural and religious life" of the Tibetan people. In 1991 the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights was still

[c]oncerned at the continuing reports of violations of fundamental human rights and freedoms which threaten the distinct cultural, religious and national identity of the Tibetan people.

Since the beginning of 1996, there has been further escalation of repression in Tibet, marked by an intensive re-education drive in the monasteries at which monks were told that they would be required to sign loyalty pledges or face expulsion, a clamp-down on information coming from Tibet, the sentencing of a senior religious leader, and a ban on photographs of the Dalai Lama in public places. The anti-crime campaign, launched by the PRC in April 1996, also had tremendous influence in Tibet. The eight year old boy designated by the Dalai Lama as the reincarnation of the Panchen Lama, the second-most important figure in Tibet's Buddhist hierarchy, remains in detention. At the same time, Chinese leaders have begun a campaign against certain aspects of traditional Tibetan culture identified as both obstacles to development and links to Tibetan nationalism, and in 1997 labelled Buddhism as a "foreign culture".

Peaceful political demonstrations in Tibet are typically broken up in minutes, and their participants arrested and often beaten, as part of a deliberate policy to suppress any manifestation of pro-independence sentiment. In recent years even some economic protests have been violently suppressed.

A rare opportunity to discuss the problems in Tibet emerged when a delegation of US religious leaders was allowed to visit Tibet in February 1998. In April a 49-day hunger strike by six exiled Tibetans in New Delhi was ended by the Indian police, reportedly so as not to upset China during the visit of a high level Chinese general. In May 1998, the EU adopted an emergency resolution urging the UN to appoint a Special Rapporteur on human rights violations in Tibet. The Chinese Government maintained that the issue of Tibet is an internal issue for the PRC alone to handle. On 10 November of the same year, the US outraged China by inviting the Dalai Lama to

meetings with the First Lady, the Vice-President, the Secretary of State and, informally, with the US President. The conflict deepened when in January 1999 the US Assistant Secretary of State, Julia Taft, was appointed as the new US Special Co-ordinator for Tibetan Affairs.

## THE JUDICIARY

In December 1997, the International Commission of Jurists issued a study, *Tibet: Human Rights and the Rule of Law*. The study describes Tibetans as a 'people under alien subjugation' entitled under international law to, but in practice denied, the right of self-determination. The reality for Tibetans is that there is neither democracy, nor an independent judiciary, nor any rule of law in Tibet. The autonomy which China claims Tibetans enjoy is fictitious as real power is, in effect, in Chinese hands.

As described in the ICJ report, a judiciary subservient to the Communist Party dedicates results in abuses of human rights in all of China, but in Tibet the problem is particularly severe due to China's campaign against Tibetan nationalism. Many Tibetans, particularly political detainees, are deprived of even elementary safeguards of due process. Tibetan judges must report to the Communist dominated 'adjudication committees' or the 'politics and law committees', which then advise on what they consider to be an appropriate ruling. The judge will then render his or her decision. Any judge who reversed the decision of the committees would be subject to serious repercussions. Judges are appointed and may be removed without cause by the People's Congress or one of its standing committees.

The ICJ interviewed Amdo Sangye, a former judge of the Qinghai High Court in Xining. His court consisted of three chambers with nine judges, two of whom were Tibetan and all of whom were Party members. The judge insisted that he was never assigned Tibetan political cases which, in practice, would be heard by a panel of Chinese judges. The President of the Court, who was not a judge, would assign the cases. The Court language was Chinese; Tibetan defendants were provided with an interpreter. The Judge recalled that virtually all of the judgements were based on reports of the police investigation and that judges did not possess the power to acquit on the basis of the examination which occurred in the courtroom.

According to the judge, important decisions could only be reached with the approval of the President of the Court and the adjudication committee, of which the President is chairman. The judge informed the ICJ that, although defendants were represented by lawyers, in actual practice, the lawyer could not effectively defend the accused. In the great majority of cases that came before him, defendants had been beaten by the police and had signed confessions. In addition, many Tibetans are sentenced in trials without a defence lawyer, or are even sentenced without any trial at all.

## HONG KONG

Hong Kong was acquired by Great Britain from China in the nineteenth century. The land area of Hong Kong was scheduled to revert to the People's Republic of China (PRC) in 1997. On 19 December 1984, the Prime Ministers of the United Kingdom and the PRC, Margaret Thatcher and Zhao Ziyang, signed the 'Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong', (hereafter "Joint Declaration"). On 30 June 1985 instruments of ratification were exchanged and the Agreement entered into force.

The Joint Declaration consists of a declaration and three annexes in which the basic policies of the PRC regarding Hong Kong are set out in Article 3 and elaborated in Annex I. One of the basic policies declared by the PRC in Article 3 of the Joint Declaration was that the existing social and economic system and the present lifestyle of Hong Kong will be left unaffected for a period of 50 years.

The format chosen for implementing this 'one country, two systems' principle is the Special Administrative Region under direct authority of the Central People's Government of the PRC. The status of the Hong Kong Special Administrative Region (HKSAR) is envisioned in Article 31 of the 1982 Constitution of the PRC. For Hong Kong, the concept of the HKSAR is elaborated in the Basic Law of 1990, a sort of "mini-constitution".

The Joint Declaration determines that the HKSAR is allowed to maintain control of its external and economic relations, to remain a separate customs area and to retain the status of an international financial centre, with foreign exchange markets and a convertible currency. Hong Kong is also allowed to retain a legislature and judiciary of its own. Although the Joint Declaration is called a 'declaration', it is an international treaty as defined by the Vienna Convention on the Law of the Treaties. It has been registered in accordance with Article 102 of the United Nations Charter.

In 1997, developments were dominated by the handover of Hong Kong to China on 1 July of that year. Tung Chee-hwa became Chief Executive of the HKSAR; the members of the first Executive Council of the HKSAR were sworn in on 1 July 1997; they were mainly pro-China political and business leaders. Rita Fan was elected President of the Provisional Legislative Council (PLC), which was set up under the assumed authority of the Central People's Government of the PRC before the transfer of sovereignty and which started to operate at the end of 1996 in conjunction with the Hong Kong Legislative Council. The legality of the PLC remained unrecognised by the UK and US governments. The PLC replaced the Hong Kong Legislative Council on 1 July 1997. The constitutionality of the PLC was challenged in a court case in July 1997. Ultimately, the Court of Final Appeal decided that the PLC was lawfully established, albeit not as the Legislative Council of the Special Administrative Region.

The PLC held several meetings before the handover and decided, *inter alia*, that from 1 July 1997 every demonstration in the HKSAR would require police permission.

The Standing Committee of the NPC adopted resolution in early 1997 deciding that most of Hong Kong's laws would be retained in the HKSAR; however, certain laws in contravention of the Basic Law would not be adopted as part of the laws of the HKSAR. Part of the laws not adopted were key sections of the Hong Kong Bill of Rights Ordinance and amendments introduced by the outgoing colonial Hong Kong Government to liberalise the restrictions on freedom of association contained in the Societies Ordinance and to remove the requirement to obtain police permission for demonstrations contained in the Public Order Ordinance. It was furthermore decided that most of the international treaties applicable to Hong Kong under British rule would continue to apply to the HKSAR even if the PRC was not a party to the treaties. The HKSAR was also allowed to continue to participate in the activities of international organisations.

During 1997 and 1998, the Sino-British Joint Liaison Group, composed of representatives of the UK and Chinese governments, continued to meet to discuss a broad range of subjects regarding the administration of the HKSAR.

The Legislative Council, which was elected on 24 May 1998, consists of 60 members from which 20 were directly elected from five geographical constituencies, 30 were elected from functional constituencies and the remaining 10 were elected by the election committee, which consists of 800 members divided into four sectors. This system of elections is generally judged by those who support democracy and universal and equal suffrage to be unfair because of the heavy influence which business and professional sectors have through the functional constituency system and the Election Committee. No monitors were allowed to observe the first elections after the handover.

Pro-democracy candidates dominated the directly elected seats and pro-China and business candidates dominated the remaining 40 seats. The Democratic Party of Martin Lee won a total of 13 seats (of which nine were out of the 20 directly elected seats) and became the largest party in the Legislative Council. Mr. Lee called upon the HKSAR government to speed up the process to establish direct elections by universal suffrage for all the 60 seats. The Chief Executive, Mr. Tung Chee-hwa, argued that political reform should take place according to the Basic Law which outlines a gradual increase in the number of seats to be elected directly and marks the year 2007 as the deadline for deciding on a fully directly-elected legislature.

## THE JUDICIARY

The Joint Declaration determines that the HKSAR is allowed to retain a legislature and judiciary of its own. Article 19 and 85 of the Basic Law are guarantees of independent judicial power and freedom from interference. Article 82 of the Basic Law states that the 'power of final adjudication' rests with the courts of the HKSAR. Article 89 of the Basic Law places restrictions on the removal of judges of the courts of the HKSAR. Judges may be removed for misbehaviour or inability to discharge their offices. A panel of local judges must make a recommendation to the Chief Executive who takes the decision to remove the judge.

The Court of Final Appeal, Court of Appeal, Court of First Instance, District Court, Magistrates' Court and other tribunals with judicial officers presiding are the courts that exist in the Hong Kong Special Administrative Region. The Court of Final Appeal replaced the Judicial Committee of the Privy Council, which was the highest court when Hong Kong was a Crown Colony of the UK.

The Court of Appeal and Court of Final Appeal exercise appellate jurisdiction only. There is a constitutional limitation on the powers of interpretation of the Court of Final Appeal under Article 158 of the Basic Law. Under this provision some matters are reserved for determination by the Standing Committee of the National People's Congress. These relate to the provisions of the Basic Law which concern the relationship between the Central Authorities and the HKSAR.

The tribunals only exercise civil jurisdiction in relation to matters specified by legislation. These include minor labour disputes, small civil claims, and determinations about obscene and indecent publications. They are staffed by magistrates and other lay appointees. There are other administrative boards and tribunals established by statute which are not the responsibility of the judiciary. Magistrates exercise an almost exclusive criminal jurisdiction, without a jury. The powers of punishment are limited to sentences of no more than three years imprisonment.

District courts exercise civil jurisdiction over monetary claims of not more than HK\$ 120,000,000, as well as criminal jurisdiction. In the latter, the powers of the judge are limited to imposing sentences of not more than seven years on any one occasion. The Court of First Instance has an unlimited jurisdiction. It exercises both civil and criminal jurisdiction. Criminal cases are conducted by trial by jury upon indictment.

A Judicial Officers Recommendation Commission was created to advise upon judicial appointment or promotions, conditions of judicial service and any other matters affecting judicial officers. The membership of the Commission consists of the Chief Justice and the Secretary for Justice *ex officio* and two judges, one barrister, one solicitor and three lay persons by appointment of the Chief Executive. Certain categories of persons, like

members of the legislature and other public pensionable officers, are not allowed to be members of the Commission.

According to Article 90 of the Basic Law, removals and appointments of the judges of the Court of Final Appeal, the Court of Appeal and Court of First Instance must be endorsed by the legislature and reported to the Standing Committee of the National People's Congress. Only judges of courts, starting from the level of District Court, enjoy security of tenure guaranteed by the Basic Law. Magistrates are not regarded as judges and are appointed on contract terms.

At the time of writing, fear was growing in Hong Kong that freedoms will gradually erode in the former British Crown Colony. Listed below are some examples that are cause for concern.

- In March 1998, the HKSAR government was severely criticised when it decided not to prosecute the owner of two newspapers, Ms. Sally Aw, for fraud. Ms. Aw was a member of the Chinese People's Consultative Conference and a long time friend of the Chief Executive, Tung Chee Hwa. Mr. Tung used to be a non-executive director of Ms. Aw's newspaper group before he was appointed Chief Executive. The Secretary for Justice, Ms. Elsie Leung, declined to prosecute and declared in a statement to the Legislative Council that the evidence against Ms. Aw in the fraud case was not as strong as against three others involved in the case (all of whom were Ms. Aw's subordinates). Furthermore, she also took into consideration matters of "public interest" including the alleged possibility that the newspapers owned by Ms. Aw might collapse if she were to be prosecuted. Critics stated that this was an indication of favouritism towards those with close ties to the Chinese Government or those with substantial business interests in Hong Kong. Shortly thereafter, the Legislative Council member representing the legal profession moved a motion of no-confidence against the Secretary for Justice which was defeated following intense lobbying by the Government.
- In another case the HKSAR government was criticised for not prosecuting Xinhua, the Chinese news agency, for violating the privacy law when it exceeded the time limit for responding to a request by a democracy campaigner, Emily Lau. In May, Ms. Lau was allowed to pursue a private prosecution against Xinhua.
- Two pro-democracy activists were arrested and subsequently convicted in May 1998 for carrying defaced national and HKSAR flags during a peaceful demonstration on 1 January 1998. They were eventually acquitted by the Court of Appeal which found that the flag ordinances which are enacted after the handover were in breach with the International Covenant on Civil and Political Rights. At the time of writing it was uncertain whether the HKSAR government would appeal against this decision and if the Chinese government would oppose the judgement.

- At the end of the year, the convictions of two men in mainland China for crimes alleged to have been committed in Hong Kong caused widespread concern in Hong Kong. Both were believed to have committed crimes in Hong Kong and were arrested and tried in China. Cheung Tsi Keung, who was a Hong Kong Chinese and kidnapped two businessmen, was arrested in China and sentenced to death. Had he been tried in Hong Kong he would not have been given the death penalty as it was abolished in Hong Kong. The second case involved a Chinese who was wanted for murder in Hong Kong and was arrested and tried in China. The two convictions in China for crimes in Hong Kong are seen by many as a violation of the principle of 'one country, two systems'. The HKSAR government refused in both cases to ask the Chinese government for extradition of the prisoners.
- After a pro-democracy demonstration in January 1999 during which a protester was arrested for tearing a Chinese flag, the Secretary for Security, Ms. Regina Ip warned that in the future all demonstrations had to be carefully considered because of the threat they posed to public order.
- A Hong Kong Court of Final Appeal decision in the case *Ng Ka Ling v. Director of Immigration* on 29 January, regarding the right of children living in mainland China but born to Hong Kong parents to permanent residence in Hong Kong also caused concern. In July 1997, the PLC approved legislation to tighten control over the immigration of children from mainland China. The Court of Final Appeal decided that the children's right to live in Hong Kong was guaranteed by the Basic Law and it furthermore held the opinion that it was the court's right to interpret the Basic Law.

This decision of the Court of Final Appeal was widely seen as a positive sign that the Hong Kong courts could rule independently. However, on 7 February 1999, four Chinese law experts in China heavily criticised the court's asserting supremacy over the acts of the Standing Committee of the National People's Congress. They took the view that its decision was contrary to the Basic Law.

Mr. Zhao Qizheng, the head of the State Council's Information Office endorsed the legal opinions of the four experts. He indicated that the decision must be changed. At the same time, Mr. Tung Chee-hwa, the Chief Executive, responded and said that the government was 'concerned about and placed much importance' on these experts' views. Three weeks after the judgement, the Secretary for Justice, Ms. Elsie Leung, applied to the Court of Final Appeal to 'clarify' its remarks concerning its power to review the acts of the NPC. Subsequently, the Court of Final Appeal made a statement that it acknowledged that the NPC was the supreme legal authority. This statement did not reconcile with the claim that it had previously made that the Court of Final Appeal could examine acts of the NPC for consistency with the Basic Law.

Many lawyers in Hong Kong regarded the statement as compromising the independence of the court even though it was phrased in such a way as to avoid the impression of back-tracking. Since then, it has become apparent that the HKSAR Government's application for "clarification" was paving the way for the HKSAR Government to seek a reinterpretation from the Standing Committee of the NPC of the very articles of the Basic Law which had been the subject matter of the Court of Final Appeal's judgment and interpretation. The HKSAR Government had to be assured that the Court of Final Appeal would be prepared to follow any interpretation by the Standing Committee. It now has that assurance. Moreover, while the HKSAR Government had only asked the Court of Final Appeal in the course of hearing the case to seek an interpretation of one article of the Basic Law, the Court of Final Appeal is now said to have been wrong in failing to refer both articles including one which the HKSAR Government never sought to have referred to the Standing Committee for interpretation.

#### APPLICABILITY OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The ICCPR was ratified by the United Kingdom on 20 May 1976 and extended to Hong Kong with several reservations. Because the United Kingdom did not ratify the Optional Protocol, neither the UK nor Hong Kong citizens had the right of individual petition. When the PRC resumed sovereignty over Hong Kong on 1 July 1997, the change in Hong Kong's legal status had implications for the extension of the ICCPR to the HKSAR. Because only states are allowed to be a party to the Covenant, the transformation from Crown Colony to Special Administrative Region would mean that the ICCPR would no longer apply to the HKSAR because the PRC was not a state party and the HKSAR was not a state.

However, this problem was negotiated, and consequently section XIII of Annex I to the Joint Declaration stipulates, *inter alia*, that

...the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force.

Through Article 39 of the Basic Law, these provisions apply in the HKSAR. As noted above, however, key provisions of the Hong Kong Bill of Rights Ordinance were considered by the Standing Committee of the NPC and the PLC to be in contravention of the Basic Law and ceased to have effect on 1 July 1997. These included the provision which required that all pre-existing (Hong Kong) legislation which could not be construed consistently with the Ordinance be repealed to the extent of such inconsistency.

The obligation of reporting to the Human Rights Committee, the monitoring body of the ICCPR, was accepted by the Chinese Government and



the Fifth periodic report was submitted on 13 December 1998. At the time of writing, the document had not yet been officially issued by the UN.

## CASES

Mr. Justice Godfrey {Judge of the Court of Appeal}: He was severely attacked in the press, far beyond what could be construed as legitimate criticism, after he refused to grant leave to appeal to the Court of Final Appeal sought by the Oriental Daily Newspapers in a cases of infringement of copyright over some photos of a Hong Kong celebrity. In his reasoning, Mr. Justice Godfrey branded the journalists as paparazzi. This was followed by a series of articles in the newspapers setting out the manner in which they had been allegedly unfairly treated in the course of the legal proceedings. Their criticisms were full of disparaging and racial remarks against the judges involved in the case, as well as members of the Obscene Articles Tribunal involved in another case of indecent publication in relation to the same photos. Mr. Justice Godfrey was accused of being 'ignorant, unreasonable, ridiculous, arbitrary, prejudicial and arrogant'.

Mr. Justice Godfrey and Mr. Justice Rogers, another judge on the same appeal court, were described by the papers as 'British white ghosts', and 'white-skinned judges' or 'pigs'. The members of the tribunal were called 'Canine yellow-skinned Tribunal'. Both the judges and the members of the tribunal were threatened that they would be 'wiped out'.

Subsequently, a team of *paparazzi* stalked Mr. Justice Godfrey for three days. As a result the director and the chief editor were indicted on two counts of contempt of court at the court of first instance. The chief editor was found guilty of all counts at trial. He was sentenced to four months imprisonment. An appeal to the Court of Appeal was dismissed, and an appeal to the Court of Final Appeal has been dismissed.

Since the judgement of the Court of Final Appeal, there have been unprecedented attacks on the judgement and attacks of a personal nature on the Judges themselves often couched in deliberately insulting terms. Lawyers who have expressed views in support of the judgement at a public forum have been physically threatened. Subsequent decisions by the Court of Appeal and the Court of First Instance on cases concerning the right of abode have been subjected to similar though less vituperative attacks.

The Secretary for Justice has branded as "arrogant" members of the legal profession who oppose the reinterpretation by the Standing Committee of the NPC. In such a climate, the Government of the HKSAR is at the very least acquiescing in, if not positively encouraging, attacks on judges who do not decide cases in the way that the Government wants and on lawyers who do not agree with the Government's trampling on the rights of those whom the Court of Final Appeal has declared to be permanent residents.

# COLOMBIA

**G**eneralised political violence exercised by the security forces, paramilitary, drug-trafficking and guerrilla groups, is the permanent background against which the work of the judiciary is accomplished in Colombia. Although the country has one of the most comprehensive systems for the protection of human rights, a lack of political will on the part of the Government and other political actors has made it ineffective.

Two sets of events marked the period under report. On the one hand, elections were held to elect authorities for local municipalities, representatives for Parliament, as well as a new President. On the other hand, renewed initiatives for a peaceful settlement of the internal conflict were instigated. Municipal elections took place in October 1997, and elections for the bicameral Congress were held in March 1998, followed by a two-round presidential election in May and June 1998. All three elections were reputedly fair and transparent but low voter participation as well as threats and attacks on the candidates overshadowed the outcome. The Liberal Party maintained its majority in Congress but the leader of the Social Conservative Party, Andres Pastrana, narrowly won the presidential election.

Mr. Pastrana took office in August 1998 and immediately launched a new peace initiative to end the internal conflict with guerrilla and paramilitary groups. As a sign of goodwill to commence serious negotiations, President Pastrana ordered the demilitarisation of some municipalities in the south. By year's end, talks between the Government and guerrillas were still pending.

Colombia is a unitary republic. The Constitution, which was approved in 1991, provides for a division of powers among the executive, legislative and judiciary branches of Government. The executive branch is headed by the President of the Republic, who is aided by a Council of Ministers, the members of which he appoints and dismisses at will.

## HUMAN RIGHTS BACKGROUND

Permanent political violence is the main cause of human rights abuses in Colombia. However, not all abuses are committed within this context. Very often, the different groups taking part in the political conflict commit crimes for private benefit without any political motivation. Most of the abuses are committed by paramilitary groups that reportedly act with the acquiescence, and even collaboration, of security forces. According to Colombian NGOs, an average of nine persons per day were victims of the armed conflict during the period under report. Of those violations, 12% were attributed to security forces, 74% to paramilitary groups and 13% to guerrillas.

Actors taking part in political conflict were responsible not only for violations of human rights, but also for violations of basic rules of humanitarian

law applicable in non-international armed conflicts. Political killings, hostage-taking and abduction, forced disappearances, and massive exoduses of people occurred regularly. Most of the victims were non-combatants, among them some human rights defenders. Political and social leaders have also been targets of violence. Union leaders and social activists were accused of collaborating with rebels, and were subsequently detained, tortured or imprisoned without due process of law.

One of the characteristics of the Colombian conflict is the growing presence of paramilitary groups. Paramilitary groups reportedly do the dirty work that security forces cannot legally do. Some of these groups are officially recognised by the Government, which has converted the so-called CONVIVIR groups into a "co-operative of security services". An important ruling by the Constitutional Court in November 1997 prohibited these groups from performing security forces' duties and from carrying weapons restricted to army use. As a result, the Government issued orders cancelling the legal existence of some of these groups, but many others continued working without governmental control.

The presence of drug-traffickers further complicated the picture. They not only organised private armies but also threatened and killed judiciary officers. Reports have indicated that many paramilitary, guerrilla and security forces personnel have had links with and received funding from drug-traffickers.

Human rights defenders have been a preferred target of the paramilitary, guerrillas and security forces. During the period under review, lawyers, judges and prosecutors were harassed and attacked while trying to perform their duty in an impartial and independent way. On 3 October 1997, in the department of Meta, 11 members of a judicial commission (*Comisión Judicial*) were killed by members of the paramilitary group *Autodefensas Unidas de Colombia*. The Commission, originally composed of 54 persons from various public institutions, including prosecutors, was ambushed by a large paramilitary group that allegedly had the support of drug-traffickers. The Commission was carrying out a judicial inspection of properties belonging to a powerful drug-trafficker based in the area for purposes of expropriating them. On 11 August 1997, another judicial commission was attacked by guerrillas in the department of Cundinamarca, while it was investigating the kidnapping of a cattleman by the Revolutionary Armed Forces of Colombia (FARC).

During the last elections, guerrilla and paramilitary groups threatened and even killed local and congressional candidates.

The Colombian Government made significant efforts to counteract the activities of armed groups, and to better ensure the security of civilians and the protection of human rights. However, these efforts have so far failed to stop the increase in violence, and the abuses committed by different groups both inside and outside the context of the political violence.

## THE JUDICIARY

### STRUCTURE

The judiciary in Colombia is composed of the ordinary court system, the Constitutional Court, the High Council of the Judicature (*Consejo Superior de la Judicatura*), and the Office of the Public Prosecutor (*Fiscalía General de la Nación*). Additionally, some other institutions perform tasks closely related to those of the judiciary: the Office of the Procurator General, and the Human Rights Ombudsman, both part of the Public Ministry (*Ministerio Público*).

Within the ordinary court system, the Supreme Court is the court of highest instance, followed by the High Tribunals in each of the 30 judicial districts, the mixed or specialised courts and finally, the justices of the peace. The composition and powers of each of these instances are defined in the Constitution and in the Statutory Law of the Judiciary approved in 1996. The military courts have, according to the Constitution, a jurisdiction limited to offences committed by members of the armed forces while on duty, or when acting in relation to it (Article 221). The system of regional courts is supposed to be a part of the ordinary court system, but in fact, is separate and distinct from it (*see below*).

Cause for special concern is the Prosecutor's power to issue arrest warrants in the investigative stage of a presumed offence (Article 250.1 of the Constitution). Although this measure can be challenged before a judge, in most cases the judge simply confirms the measure taken by the prosecutor. This power constitutes a deprivation of the judge's natural and exclusive power to decide on an individual's freedom.

### APPOINTMENT

Article 231 of the Constitution provides that Supreme Court judges are to be appointed by the Supreme Court itself from a select list prepared by the High Council of the Judiciary. The number and the location of the High Tribunals are decided by the High Council of the Judiciary as well as the judges who are members of those tribunals. The judges of the mixed and specialised courts are appointed by the High Tribunal in the judicial district where those courts are located, from a list prepared by the High Council of the Judiciary. Members of the military courts are neither selected nor appointed by the High Council, but by the active command of the army.

The High Council of the Judiciary is in charge of disciplinary processes and the application of sanctions in the judiciary (Article 256.3 of the Constitution and Article 111 of the Statutory Law of the Judiciary).

## RESOURCES

The High Council of the Judiciary is in charge of preparing a budget proposal which is then presented to the Congress. This organ administers the budget and allocates resources accordingly. Even though the total amount of resources allocated to the judiciary was slightly less in 1998 than in 1997, Colombia still had one of the highest rates of per capita expenditure on the judiciary within the Andean region: 35.7 US dollars.

### THE SYSTEM OF REGIONAL COURTS (*see Attacks on Justice 1996*)

Despite the UN Human Rights Committee's recommendations in 1996 to abolish the regional judicial system and to "ensure that all trials are conducted with full respect for the safeguards of a fair trial", the Colombian Government has maintained its system of regional courts. Although some resolutions and directives were issued to avoid or minimise the adverse effects on the rights of defence caused by the use of faceless judges, prosecutors and witnesses, none of these measures has resulted in a substantive modification of the operation of these courts.

In its report to the UN Human Rights Commission in 1998, the office of the High Commissioner of Human Rights in Colombia reported serious violations of the rights of defence in these tribunals, where the identity of the judge is concealed as well as that of the prosecutor and the witnesses. Some fundamental rights of the accused, such as the right to a public hearing, to challenge the impartiality of judges, to cross-examine witnesses and to challenge the evidence handed over by the police, are severely restricted.

The system of regional justice violates basic principles of justice and undermines also the ordinary system of justice. The system of regional courts is an outstanding example of an institution meant to be exceptional that has been transformed over time into a permanent and ordinary one. These courts were established in order to protect the security and integrity of judges, prosecutors and witnesses in proceedings regarding security related offences, such as terrorism, rebellion, and drug-trafficking. Although the concealment of their identity, as has been noted by multiple internal communications, is supposed to be exceptional and decided upon a case-by-case basis, the actual functioning of these courts has proved anonymity to be the rule, and a public trial the exception.

Due to the vague and imprecise wording in the definition of crimes subject to the regional justice system, such as terrorism and rebellion, many people, mostly peasants and workers participating in social protest, have been accused of having committed one of the loosely defined offences under the jurisdiction of the regional courts. This represents a deviation from the ordinary courts' natural jurisdiction to the exceptional courts. Ordinary jurisdiction is in this way affected and so is the independence and impartiality of the judge.

Other individual rights and freedoms are also affected by the way this regional system works. The prosecutor, in accordance with the Constitution, can issue arrest warrants and seize the property of the accused. However, in the context of the regional system of justice, this power is even more open to abuse. Because the prosecutor is anonymous and the process is not public, the possibility of challenging the measure is simply theoretical. The use of military personnel as witnesses and for policing tasks has also been reported as a common practice. Although an internal norm provides that no one shall be condemned only on the basis of an anonymous witness' declaration, the fact that the accused's declaration before the police, often taken when counsel for the accused is absent, is considered as valid evidence, makes it possible for a person to be condemned on the basis of an anonymous witness' declaration together with the police declaration.

The 1996 Statutory Law of the Judiciary has reduced the term of these courts until June of 1999. A proposal has already been submitted to Congress outlining a system to replace the regional courts. It provides for the establishment of district courts with jurisdiction over the same crimes that the regional courts hear. It also provides for an effective prosecutor at this level. However, the new system would maintain some of the controversial features of the old one, including witnesses' anonymity. The power to grant witnesses anonymity is given to the prosecutor and is subject to appeal before the judge. All anonymous testimony would be in writing and the defence would be allowed to "cross-examine" the witness. In this way, the new system will basically reproduce the problems of the old one.

### MILITARY COURTS AND IMPUNITY

Impunity is one of the most formidable obstacles in the struggle for the rule of law in Colombia. Most common crimes go unpunished and there is a widespread mistrust of the effectiveness of the judiciary in protecting people's rights. In the context of the internal conflict, the extent of impunity within military courts is remarkable. In his 1998 report on his visit to Colombia in 1996, the UN Special Rapporteur on the Independence of Judges and Lawyers stated that impunity, especially in military courts, is the most serious cause of concern with regard to the judiciary in Colombia (chapter V paragraph 1). In the same vein, the Inter-American Commission of Human Rights noted that "law enforcement agents who commit violations of human rights generally go unpunished", and that this can be attributed to the application to these cases of military jurisdiction, which lacks the independence and impartiality required by international standards.

In August 1997 the Constitutional Court issued a landmark decision limiting the jurisdiction of military courts (Sentence C-358/97). The Court established three criteria for an offence to be tried by a military tribunal. The first specifies that military courts' jurisdiction is restricted to offences originating in legitimate on-duty acts. If the offender's intention is criminal from the very beginning then it cannot be considered an offence originating from

legitimate on-duty activities. The second rule establishes that certain acts cannot be considered in any way offences originating while on-duty, as "the link between the offence and legitimate on-duty activities is broken when it comes to especially serious crimes". In the Court's opinion there is no link whatsoever between serious violations of human rights and humanitarian law and the constitutionally assigned duties of the armed forces. Thirdly, the proof and evidence have to demonstrate fully the existing link between the offence and the constitutionally assigned functions of the security personnel. That would mean that in cases where such a link has not been demonstrated beyond reasonable doubt, the jurisdiction of an ordinary court should be maintained.

This decision of the highest tribunal, which has authority to interpret the Constitution, removes from military jurisdiction offences such as serious violations of human rights and humanitarian law, and orders that such cases be transferred to ordinary courts.

Unfortunately, the Constitutional Court's decision has not been fully implemented by the ordinary and military courts. In December 1997, the disciplinary chamber of the High Council of the Judicature, the organ that decides on jurisdictional conflicts, issued a decision that openly contradicts that of the Constitutional Court. In its decision, the High Council determined that the Constitutional Court's decision shall not be applicable to cases where the conflict of competence has already been decided on. That is to say, all cases where the conflict of competence has already been decided in favour of military courts shall remain under their jurisdiction. In reaction to this decision, many national and international organisations have expressed concern regarding the consequences of failing to comply with the jurisprudence of the highest tribunal in the country.

A special commission that includes a representative of the Procurator-General has been created to be in charge of evaluating the cases to be transferred to ordinary courts in compliance with the Constitutional Court's decision. According to the Colombian Commission of Jurists, out of 272 cases requested for transferral from the military courts in February 1998, only 141 had been accepted, 33 were denied and 98 were still under study.

This situation tends to perpetuate the impunity that military officers, especially those of high rank, enjoy in military courts. In November 1997, the case of General Faruk Yanine Diaz, accused of organising and conducting paramilitary activities resulting in serious human rights abuses in the Magdalena Medio region, was transferred to military jurisdiction by a decision of the High Council of the Judiciary. In August 1998, the High Military Court acquitted General Yanine. A similar decision was taken in November 1998 in the case of General Millán, accused of supporting paramilitary activity and extortion and abuses committed jointly with paramilitary; his case was also transferred to military jurisdiction. Both of

these cases were sent to military courts in open defiance of the Constitutional Court's decision of August 1997.

### PROPOSALS TO REFORM THE MILITARY CRIMINAL CODE

In September 1997 a project to reform the Military Criminal Code was presented to Congress where it was approved at the first stage. This project is aimed at modernising the military code and overcoming serious limitations leading to human rights abuses, bringing the code into line with the Constitutional Court's jurisprudence. Although the proposal was discussed with a broad range of NGOs and other institutions, it nevertheless presents some serious shortcomings that are cause for concern. The proposal does not expressly discard the defence of due obedience as legitimate in cases where human rights violations were committed while carrying out orders. Neither does it fully develop the impartiality of judges in military courts since they are to be assessed by operational command officers. Another shortcoming is that high-rank military officers are to be tried by the Supreme Court, violating in this way the right to challenge the verdict.

However, the proposal does also present some improvements. It prohibits the consideration of torture, genocide, forced disappearance, and any other serious offence against human rights as service-related offences (Article 3). It also provides for a separation of judicial and military functions, establishing that the military judges shall not be the unit commanders. However in Article 16, the proposal reasserts a general rule that all offences committed by security forces' active members shall be investigated and tried generally according to military justice. This assertion undermines the well recognised principle of the natural judge and treats as a general rule what is otherwise an exception to the natural jurisdiction of the ordinary system of courts.

This bill proposal was supposed to be approved in 1998, but political events in Colombia during that year, among them the national elections, prevented Congress from passing the bill into law.

### CASES

A **personero municipal** {lawyer working for the Office of the Prosecutor at community level}: He was threatened on 27 May 1997 and obliged to leave the region. It was reported that the authors of the threats are members of the paramilitary group "*Autodefensas Campesinas de Córdoba y Urabá*".

A **lawyer** working as a community delegate for the Public Prosecutor's office of Tib was threatened by guerrillas on 29 October 1997. He was obliged to leave the city within 24 hours, and resign from his post.



A **prosecutor** with hidden identity had to leave the country after receiving death threats on 13 November 1998. He had been investigating the murder of another lawyer in 1995 and had ordered the arrest of military officers as suspects.

**Alexander Ahumada Carbonell** {lawyer working in Barranquilla city}: Mr. Carbonell received death threats in April 1997 from unknown people who warned him that "his name was on the list". The threats are allegedly prompted by Mr. Ahumada's support of a committee for solidarity with political prisoners.

**José Estanislao Amaya Páez** {lawyer working for the Public Prosecutor's office as a community delegate}: Mr. Amaya Páez was shot on 16 December 1997 when police and guerrillas crossed fire in Calixto City, in the north of Santander.

**Ernesto Amézquita** {lawyer and President of the Bogotá-based National Association of Litigant Lawyers}: Mr. Amézquita denounced anonymous death threats he had received by phone on 22 April 1998.

**Victor H. Araujo Liñan and Martin Isela Daza** {prosecutors}: Mr. Araujo Liñan and Mr. Isela Daza were kidnapped by guerrillas on 20 August 1998 in the municipality of La Juaga de Ibirico.

**Marcelino Cabezas Angulo** {lawyer working in Bogota}: Mr. Cabezas Angulo was kidnapped in June 1997, and one day later was found dead with signs of torture.

**Adriana Maria Casa** {lawyer working for the public prosecutor as a community delegate in Anori, department of Antioquia}: Ms. Casa was reportedly killed by paramilitaries on 21 October 1998.

**Wilson Cely Silva** {lawyer}: Mr. Cely Silva was killed by a paramilitary group in Sabana de Torres, department of Santander, on 17 March 1997.

**Oscar A. Cobaleda Roldán and Jairo Cobaleda Roldán** {lawyers working in the municipality of Dabeiba, department of Antioquia}: These lawyers were kidnapped by an unidentified armed group on 21 April 1998.

**Alvaro Felipe Delgado and Mario Sansón** {prosecutors}: These prosecutors were transferred due to threats received from paramilitary groups on 3 March 1998, in the municipality of Puerto Asis.

**Oswaldo Emigdio Espitia Berrocal** {lawyer working for ANUC, an organisation dealing with land problems in the locality of Planeta Rica}: Mr. Espitia Berrocal was kidnapped on 3 June 1997 by unknown persons.

**Alvaro Forero** {prosecutor assigned to oversee the work of the courts in the province of Ocaña}: Mr. Forero was kidnapped by guerrillas on 27 July 1998.

**William Garcia Cartagena** {lawyer working for the Human Rights Committee of the municipality of Segovia}: Mr. Garcia Cartagena was reportedly detained in a military base and questioned about his activities in December 1997. After 15 days he was released and the charges against him dismissed by the prosecutor, but he was still investigated under other charges. All the charges were based on anonymous witnesses or informants and related to his professional activities as an attorney.

**Alberto Gil** {lawyer}: Mr. Gil was kidnapped by FARC guerrillas on 4 March 1998, in the municipality of Entrerrios.

**Aura Gallego** {judge of a mixed court in the department of Antioquia}: Ms. Gallego was kidnapped by guerrillas on 7 March 1998.

**Juan Guillermo Gallego Posada** {human rights defender and legal representative of political prisoners}: Mr. Gallego Posada was abducted by a paramilitary group that confirmed afterwards his abduction and his death on 26 September 1997, in Antioquia. He had been travelling with two relatives of one of his defendants, who were also abducted and apparently killed later.

**Alfonso Gómez Méndez** {Prosecutor-General working mainly in Bogotá}: An attempt on his life was uncovered on 22 March 1998. The authors were reportedly members of drug-trafficking cartels.

**Bayron Ricardo Gongora Arango** {lawyer working for the *Corporación Jurídica Libertad*, one of the constituent organisations of Seeds of Liberty Human Rights Collective}: In March 1998 a regional court prosecutor instituted criminal proceedings against Mr. Gongora Arango on charges of rebellion. The prosecutor's case was entirely based on anonymous witnesses' declarations.

**Giovanny Carlo Guassi Espinosa** {lawyer working with the Public Prosecutor's Office}: Mr. Guassi Espinosa was killed by an armed group on 26 September 1997, in Antioquia.

**Luis E. Gutiérrez** {prosecutor in the Municipality of San Vicente del Caguán}: He and his technical assistant were kidnapped by guerrillas on 27 April 1998.

**Jose Luis Marulanda Acosta** and **Augusto Zapata Rojas** {lawyers}: Reports of the intelligence branch of the Colombian army said that both lawyers were active members of the National Liberation Army (ENL). The accusation was based on the fact that Mr. Marulanda's defendant has been accused as a member of guerrilla groups; the accusation was issued with the aim to intimidate the lawyers and to prevent Mr. Marulanda from performing his defence tasks.

**Josué D. Molina Vergel** {prosecutor in the municipality of Roncesvalles, department of Tolima}: Mr. Molina Vergel was kidnapped by guerrillas on 27 May 1998 and released two days later.

**Miguel F. Narvaez** {lawyer and co-ordinator of the lawyers association within the Office of the Human Rights Ombudsman in Bucaramanga city}: Mr. Narvaez was kidnapped by guerrillas on 13 June 1998.

**Martha M. Ortega Betancur** {prosecutor in Medellin city}: Ms. Ortega Betancur was threatened by paramilitary groups because of her investigations into a murder. She denounced the threats on 15 March 1998.

**Wilson Patio Agudelo** {human rights lawyer}: Mr. Patio Agudelo received threats on 20 March 1997. The reasons for the threats were his reports of serious human rights violations committed by a policeman in the department of Antioquia.

**Miguel Puerto Barrera** and **Alirio Uribe** {lawyers working for the Bogotá-based Lawyers Collective Jose Alvear Restrepo (*Corporacion Colectivo de Abogados Jose Alvear Restrepo*)}: The Collective often represents individuals accused of insurgency-related offences, and many of its clients are grassroots activists. It also represents victims in cases against military personnel. In December 1997, Mr. Uribe was mentioned in a military intelligence report as a person involved in insurgent activities and relatives of Mr. Puerto were told that he had been declared a "military target" because of his work investigating human rights violations.

**Cristobal Quintana Moya** {prosecutor working in Medellin}: He was killed by hired gunmen on 19 October 1998.

**Luz A. Reyes** {lawyer conducting a radio programme}: Ms. Reyes received death threats by telephone. Apparently, the anonymous callers did not approve of her interviews with community delegates working for the Public Prosecutor's office in the town of Teorama. The delegates also received threats, while participating in a radio interview broadcast on 16 July 1997.

**Argemiro Reyes Gómez** {lawyer and Mayor of the town of Concepcion, department of Santander}: He was reportedly killed by guerrillas on 20 September 1998, after being held hostage for a week.

**José Romero** {municipal delegate}: He was kidnapped by guerrillas on 31 March 1998 and released five days afterwards.

**Jesus Romero Perez** {lawyer}: Mr. Romero Perez was shot by a group of paramilitary while he was travelling to Barranquilla to see his family, in July 1997. He had received numerous death threats because of his work for human rights and in May his offices had been broken into. His files with documents of cases and evidence were destroyed or taken away. This event prompted him to go to the authorities to seek protection, but he was denied.

**Monica Sanchez Arrieta** {human rights lawyer}: Ms. Sanchez Arrieta received death threats in April 1997 because of her work as legal representative of victims and political prisoners.

**José del Carmen Soriano** {community delegate in the municipality of Mesetas}: He was kidnapped by guerrillas on 23 March 1998.

**Antonio Suarez Nioo** {lawyer and president of Asonal Judicial Association}: Mr. Suarez Nioo received death threats in June 1997 from unknown persons. As a consequence, he left the country.

**Jesús Maria Valle Jaramillo** {lawyer and professor of law}: Mr. Valle was killed by paramilitary on 27 February 1998. In September, four persons were arrested and charged with his murder.

**José E. Umaña Mendoza** {lawyer and human rights defender}: Mr. Umaña Mendoza was killed on 18 April 1998 in Bogotá, presumably by paramilitary. Four suspects were detained afterwards.

**Fernando Vargas Torres** {prosecutor in the town of Ibagué, department of Tolima}: He was killed by unknown persons on 17 June 1998 in the municipality of La Jagua de Ibirico.

# CONGO, DEMOCRATIC REPUBLIC OF

**D**uring 1997, this country saw the collapse of a 32-year authoritarian Government headed by President Mobutu Sese Seko and the emergence of a new Government with the promise of democratic elections. After seven months of violence and civil war with external interventions, the rebel Alliance of Democratic Forces for the Liberation of Congo, (ADFL), succeeded in mid-May 1997 in ending almost thirty years of President Mobutu's corrupt and dictatorial rule over what was then called Zaire. On 17 May, ADFL troops led by Laurent Kabila entered Kinshasa. Kabila renamed the country the Democratic Republic of Congo, (DRC), and declared himself President. He announced the dissolution of all previous government institutions, the formation of a constituent assembly which would be charged with drafting a new Constitution, the formation of a Government of "national salvation" within 72 hours, and the holding of general elections within two years. Throughout 1997 and 1998, the country remained engulfed in tension, repression, and violence.

On 26 May 1997, the newly formed Government, citing a need to ensure security, ordered the suspension, "until further notice", of the activities of all political parties and a ban on all political demonstrations.

On 25 May 1998, President Kabila promulgated a decree establishing a 300 member constituent and legislative assembly which would examine the draft Constitution, exercise legislative power during the interim period, regulate political parties, and oversee the activities of the Government.

A rebellion against Kabila's Government broke out in eastern Kivu in early August 1998. The rebels were primarily Banyamulenge Tutsis from the east of the country; they were supported by members of other ethnic groups disappointed with the Kabila regime, as well as supporters of former President Mobutu. The principal causes of the rebellion appeared to be the recent marginalisation of the Banyamulenge by Kabila, and the ensuing lack of security in eastern border regions. Regional and international involvement in the conflict had widened but peace efforts to mediate between the parties were underway.

Torture is a common practice in Congo, both on the side of the Government and the rebels. In his 1998 report, the United Nations Special Rapporteur on Congo concluded that, in the case of human rights violation attributable to the Government, there have been cases in which torture has led to the death of victims. In the case of human rights violation attributable to the rebel forces, the Special Rapporteur found that the rebels have set up many clandestine prisons. Some are genuine torture centres and many are extermination centres.

## CONSTITUTIONAL DECREE NO. 97-003

On 28 May 1997, one day before stepping into his new function as Head of State, Kabila signed Constitutional Decree No. 97-003, which provides for the organisation and exercise of power until a new Constitution is adopted by the constituent assembly. The decree entered into force on the same day.

The decree bestows sweeping legislative and executive powers on the President, as well as giving him a dominant role in the judicial branch.

The decree does not contain any provisions explaining by whom the President is to be elected or for how long he is to hold office. Nor is there any mention of a body that can carry out the functions of Government.

The decree states that the legislative authority is vested in the Head of State, who exercises it by decree, i.e., laws discussed in the Council of Ministers; ministers are appointed and dismissed by the Head of State, to whom they are accountable.

On 23 October 1997, a presidential decree established the Constitutional Commission and charged it with drafting a Constitution for the DRC. The Commission was given a deadline of March 1998 to submit its draft. Although the draft was finished on time, only portions of it had been published by year's end. A final version was to be submitted to the population for referendum. However no prior consultation took place to ensure representative membership of civil society groups and political parties.

## POLITICAL PARTIES

Upon taking office, the Kabila Government extended the ban on all political activities and public demonstrations. On 26 May, the Government reiterated its ban in a five point communiqué reminding the restive population that "all political parties in the territory of Kinshasa are suspended until further notice".

The ADFL claimed that the ban would be a temporary measure until the post-war period had stabilised, and that "only political activities" were prohibited, not the political parties themselves.

The suspension of political parties raised doubts about the Government's real aim. It was reported that those who violated the ban were imprisoned, banished, and even tortured. Moreover, some political leaders were tried by the military tribunal.

In late 1998, President Kabila declared that he would lift the suspension on the activities of the political parties in January 1999. On 31 January

1999, a presidential decree lifted the sanction on political gathering and the Government's ban on the formation of political parties, but imposed very strict regulations on their formation and conduct. One of the regulations imposes a minimum one year residency requirement on party members. Another demands that they not be accused of a political crime since independence. (This regulation allows the Executive a great deal of room to manoeuvre and to limit the formation of new parties, since the regulation pertains to the accusation, and not to an actual indictment.) Furthermore, the parties are required to be initially formed by at least 100 to 150 individuals, from all 11 provinces; a prohibitive requirement, when one considers the geopolitical map of the DRC. In addition, a comparatively huge amount, the equivalent of 10,000 US dollars, is required by the Government for the formation of a party, yet another practical restriction on the people's legitimate right to form political parties.

## DISSOLUTION OF THE AZADHO

NGOs and human rights activists have been harassed, threatened, suspended and detained; their activities have been banned, and their leaders arrested.

On 3 April 1998, the dissolution of the Association for the Defence of Human Rights in Congo-Kinshasa (AZADHO), a leading human rights organisation in Congo and an affiliate of the International Commission of Jurists, was ordered by the Minister of Justice as a further step in a crack-down on local human rights activists. AZADHO was accused of receiving money from outside the country, hence preventing the Government from receiving aid from abroad, and for leading so-called anti-government campaigns. Members of AZADHO were summoned and interrogated by security officers. AZADHO's offices were sealed, preventing members from access to their documents. This ban was issued while AZADHO's vice president, Pascal Kambale, was attending the United Nations Human Rights Commission session in Geneva, where a resolution critical of the Kabila Government's human rights record was under consideration. In March 1998, the Government confiscated more than 1,500 copies of AZADHO's annual report on human rights. After AZADHO was shut down, its staff formed a substantially similar organisation called *Association Africaine de Défense des Droits de L'homme* (ASADHO), which continued AZADHO's work with the same staff, operating out of the office of the organisation's vice president.

## THE JUDICIARY

Despite provisions for the independence of the judiciary stated in the Transitional Act, the judiciary in the country is manipulated by the Executive; the lack of resources is evident and inefficiency and corruption are widespread.

The Supreme Court was cited specifically as an independent institution in Kabila's inaugural decree, Decree Law No. 3. Nevertheless, the Kabila administration had not yet implemented legal instruments to ensure the independence of the judiciary by year's end. A judicial reform decree is still awaiting presidential approval.

Civil and criminal codes are based on Belgian and customary law. The presumption of innocence, the right to legal counsel, and the right to a speedy trial are provided for in the codes.

Congo's judiciary is composed of lower courts, appellate courts, the Supreme Court, and the Court of State Security. The Kabila Government announced the creation of a new military tribunal in August 1997.

Meanwhile, an informal judicial authority has developed on the side; it is applied by various security services, the ADFL militias, the local notables and war lords, the rebels and other factions of the fragmented Congolese society.

The Kabila Government acknowledged that the judiciary is dysfunctional, but had not yet taken steps to improve the situation by the year's end. The independence of the judiciary has not been achieved in the country due to the following long-standing obstacles: lack of financial autonomy of judicial institutions, the tendency of executive and legislative leaders to exert pressure on the judiciary in the context of generalised corruption, and the widespread corruption of judges and magistrates as a consequence of their extremely low salaries or indeed, lack of salary altogether.

### TENURE

The President of the Republic can replace judges where appropriate, and can dismiss them at the recommendation of the Supreme Council of the Judiciary, which is charged with the nomination, promotion, and removal of judges. However, the Council is currently not functional, and in reality, its responsibilities are being discharged by the Alliance (*see Massive Judicial Dismissals below*).

### RESOURCES

Article 97 of the Constitution provides for the independence of judges. However, judges in Congo are subject to desperate financial conditions. Salaries are extremely low and it has been reported that some of the judges



have been unpaid for long periods of time. As of the end of 1998, monthly salaries ranged between US \$20 and US \$30. Generally speaking, judges are still working without proper facilities or offices, and law libraries are not always available. As a consequence, the lack of financial autonomy of judicial institutions has led to far-reaching corruption within the judiciary.

Furthermore, the straitened circumstances affect all other judicial staff as well, e.g., court clerks, duty officers, and other judicial personnel.

Thousands of people are awaiting trial in an overloaded judicial system that does not have the financial or logistical means to act promptly. Only 10 to 15 full-time judges sit on the courts; the others are non-professionals, requisitioned by the Executive to fill the gap.

### MILITARY COURT

The Military Court was created by decree (*Decret-loi n. 019*) on 23 August 1997. Its jurisdiction is currently limited to the provinces of Bas-Congo and Bandundu, as well as the city of Kinshasa, but this mandate could be extended to other regions if necessary. The jurisdiction of these courts is not limited to military personnel and police officers; it has been extended to civilians who commit such crimes as armed robberies, or activities which are perceived as a threat to state security.

The court's decisions are subject neither to appeal, nor to review. Since its creation, the Military Court has condemned more than 100 people to death, mainly in Bukava, Goma and Kinshasa. In his 1999 report, the United Nations Special Rapporteur on Congo found that "the Military Court has continued, after conducting irregular trials, to impose the death penalty with chilling frequency".

The Military Court is heavily influenced by the Executive. It systematically violates the rules of procedure, which constitute the very core of the right to legal counsel, on the grounds that the DRC is still in a state of war, and that accordingly, the existing legal procedures cannot be respected. The military court has curtailed the authority of the ordinary and legal tribunals and usurped their jurisdiction, by trying all types of cases, including those that fall under the mandate of regular courts.

### CASES

**Nkala Biayi** (judge): In April 1998, Mr. Biayi had ordered the arrest of two local agents of the *Agence Nationale des Renseignements* (ANR), on charges of misappropriation of funds. Mr. Biayi was then himself arrested, upon orders of the ANR second-in-command, in the province of Tshilenge. Judge Nkala was stripped of his clothes, beaten, and humiliated by the same men he had ordered arrested. He was then thrown in the trunk of their car and

taken to a cell in Mbuji Mayi. The Mbuji Mayi Bar was the only group that dared to express its outrage at the incident.

**Alamba Charles** {member of the Military Court of Kinshasa}: In November 1997, Mr. Charles was threatened with kidnapping by the soldiers of the *Détection Militaire des Actions anti-Patrie*. The threats occurred after the Military Court pressed charges against several soldiers of the DEMIAP.

**John Kalala, Benoît M'bala and Raymond Ngoie** {lawyers working at the Centre of Human Rights and Humanitarian Law}: In June 1997 the Centre of Human Rights and Humanitarian Law stated that John Kalala, Benoît M'bala and Raymond Ngoie, lawyers representing Révérend Père Courbon of Likasi, were threatened with torture and the bombing of their office, while working on a case where the other party happened to be the soldiers of the AFDL .

**Mikobi Kalaam** {judge and president of the First Instance Tribunal of haut-Uélé}: On 3 July 1997, in the Eastern Province, Mr. Kalaam was detained following orders of an AFDL commandant for having lawfully ordered the seizure of four vehicles of the SAPLAST Society. Mr. Kalaam was released on 17 July after being detained for 14 days.

**Bonioma Kalokola** {lawyer, member of the Brussels Bar Association}: On 22 July 1997, in Kinshasa, Mr. Kalokola was arrested while in the office of the Minister of Justice, Mr. Célestin Luanghy. He was later charged with fraud, (*escroquerie*). It was alleged that he had received money on behalf of the Ministry from prisoners who were notables of the former Zaire. During the procedure, his legal rights were ignored.

**Kwebe Wassis Lamin** {lawyer}: On 15 August 1997, Mr. Lamin was kidnapped around 2:00 p.m. after a hearing at the First Instance Tribunal of Matete. The kidnapping took place in front of a club called *La Ruzizi*; Mr. Lamin was picked up along with a client and a colleague, and thrown into a car with armed soldiers. The reason for his arrest was never officially disclosed, but according to internal files, the charge was illegal possession of firearms. No legal procedures were instituted against him and he was released the following day.

**Mr. Mabeka** {lawyer}: In April 1998, Mr. Mabeka and 17 agents of the ATC, a public company that handles transport on the Congo river, were arrested and detained for three days by security officers. Mr. Mabeka and his party were investigating the presence of stolen boats on the premises of the Congo DRC soldiers. They were set free after the intervention of the Republic of Congo.

**Kachama Mangalo** {judge}: On 8 July 1997, in Kinshasa, Mr. Mangalo was arrested at 7:30, while working in his office. No disciplinary charges were brought against him. His case was handled by the Attorney General, who later became General Prosecutor of the Republic. Mr. Mangalo

was detained for a period exceeding two months; during his detention no charges were ever brought against him. He was later accused of corrupt practices.

**Mr. Masheke** {judge}: In April 1998, Mr. Masheke ordered the autopsy of a female victim murdered by her husband. The adjunct director of the ANR was opposed to this autopsy, and ordered his agents to intimidate the judge, who finally gave up on the investigation.

**Mwanza Mbiye** {lawyer, member of the Kinshasa Bar Association}: On 2 February 1998, Mr. Mbiye pressed charges against Officer Nawej in the military court; Nawej had verbally issued death threats against the lawyer. As yet, the military court has not followed up on the charges.

**Kalenga Ka Ngoy** {lawyer}: In October 1998, Mr. Ka Ngoy and his secretary were arrested and detained by the Group Litho Moboti, and accused of being rebel spies through association with Mr. Tambwe Mwamba of the *Rassemblement Congolais Pour La Democratie*. Mr. Ka Ngoy's office was sealed, and the lawyers were denied access to their clients' files. Both the attorney and his secretary were released in November, but the law offices are still occupied by a presidential agency.

**Mr. Selemani** {judge}: On 18 February 1998, Mr. Selemani was arrested, subjected to harassment by security forces, and detained for a period of two days, following his condemnation of Mr. Songo Titi Lambert, president of the AFDL section in Kimbanseke, on charges of contempt of court and corrupt practices. Judge Selemani was released only after the Justice Minister applied pressure in the case.

**Mongulu T'Apangane** {General Prosecutor of the Republic}: On 21 August 1997, a decision of the Minister of Justice, Mr. Célestin Luanghy, suspended Mr. T'Apangane of his duties, by a blatantly illegal procedure. It seems that this suspension was a direct consequence of remarks made by the Prosecutor concerning the illegality of certain previous ministerial decisions.

## MASSIVE JUDICIAL DISMISSALS

On 25 April 1998, 91 judges were discharged; and later, on 7 November, another 315 judges were also discharged (*see names below*). On both occasions, the charges stemmed from presidential decrees issued without consultation of the Supreme Council of the Judiciary, thus effectively curtailing its powers and activities. The charges were vague and ambiguous, consisting of such accusations as "doubtful morality", "corruption", and "negligence". Many of the dismissed judges came from other countries such as Equator or Kasai. Those dismissed were never allowed a hearing with a competent

authority; their right of appeal and their right to defence counsel were not respected.

1	Kazadi Malu Abi	31	Kamaya Mapombo Boy
2	Nígumbala Adiale	32	Cishimbi Cia Bukasa
3	Djelo Adubanga	33	Karenzi Bukera
4	Mongapa Alabozama	34	Shindano Bulenge
5	Kulumbuka Aluka	35	Lazumuken Bwalwel
6	Masudi Balimuacha	36	Chokwe Cembo
7	Lushule Bashomeka	37	Mayinga Cidebi
8	Bongolo Basiya	38	Mugeyo Disengi
9	Ndateba Bigege	39	Ibanda Dudu
10	Nkweyi Bisengo Asinga	40	Wangondola Elumbu
11	Habimana Bahozi	41	Mayema Embem
12	Nkata Bayoto	42	Ntshayikolo Essosa
13	Makonga Bikuri	43	Kayomo Essuel
14	Booto Balikobe	44	Etebwabens
15	Kipata Basilimu	45	Shomari Fundi
16	Yaato Bassosila	46	Magellan Motata Gbando
17	Kwangeyi Bazeyi	47	Gunumana Gabundu
18	Kongolo Biata	48	Malewula Galeng
19	Selemani Bilali	49	Mumba Gama
20	Nseleki Billempeti	50	Kikoka Toni Gayton
21	Zozo Bisenga	51	Miza Gere
22	Mukenge Bisumbule	52	Sebatunzi Gishinge
23	Kashama Ndi Tshienda Biteku	53	Bwishe Habari
24	Kabanga Bitoka	54	Ikina Iba
25	Mboyu Heddo Bola	55	Badibanga Ilunga
26	Mputu Bolenge	56	Biya Ilunga
27	Bompaka Boloumba	57	Kalumba Ilunga
28	Kiwobo Boma	58	Mapangu Ishaku
29	Minsay Booka	59	Mosempo Issemanzay
30	Lisalisi Booto	60	Makekera Iyara

61	Mavila Mandina Jean P	95	Kahuma Kessa
62	Sindani Kabamba	96	Tsasa Khandi
63	Kapebu Kabangu	97	Ebenga Khonde
64	Nsenga Kabesse	98	Mayaka Kidiatu
65	Baleja Kabeya	99	Kiwiya Kilonda
66	Mukendi Kabeya	100	Yamfu Kilunga
67	Mastaki Kabi	101	Kota Kimbana
68	Ngoie Kabongo	102	Lodila Lon Dil Kimbingi
69	Mbangama Kabundji	103	Elumbu Kimbo
70	Kadima Kadima	104	Issumo Kingamboyo
71	Kamba Kalala	105	Mutamba Kinkudi
72	Foma Kalira	106	Nganzi Kirongo
73	Lukuka Kalombe	107	Bugibabu Kirubi
74	Ingwa Kalonda	108	Nyembo Kitete
75	Mvita Kalubi	109	Mpeve Kiyanga
76	Kanku Kamanga	110	Poto Kolo Kolo
77	Likoko Bangala Kamango	111	Tonduangu Kongolo
78	Mosengo Kambono	112	Phukuta Kuala
79	Keto Dia Kanda	113	Smweray Kubuya
80	Molisho Kangela	114	Mwangala iam Kuetan
81	Ntambwe wa Kaniki	115	Kumbelo Kumerita
82	Ngalumulume Kankolongo	116	Mikobi Kwete
83	Mulenda Kankonde	117	Bay Bay Lekwindaon
84	Musuakala Kanku	118	Boluta Loele
85	Sambwa Kapuku	119	Dheda Loga
86	Nyembo ya Kati	120	Limbute Longele
87	Namwisi Kasemvula	121	Nkongi Ekuse Longongo
88	Lowa Kaseya	122	Ekofo Lonyeka
89	Mwamba Kasongo	123	Nshiku Luabeya
90	Ilunga Katobo	124	Senga Katako Lufa
91	Ntumba Katshinga	125	Tshibengabo Lufulwabo
92	Mulumba Katshisha	126	Mangonda Bagondika Luiza
93	Mirenge Katwa	127	Kabata Lukombo
94	Mbiye Kavulambidi	128	Kaninda Lunda

129	Nzolameso Wa Lusadisu	163	Kanzake Vangu Mbanza
130	Sesep Lutua	164	Nsudila Mbombo
131	Mulumba Lwateba	165	Ihando Mbalo
132	Mitelezi Mabongo	166	Katombe Mbaya
133	Sangwa Magoma	167	Kpanzi Mbunuzu
134	Mbakata Makambo	168	Kuminga Mbuyi
135	Mpeye Makende	169	Ndumba Mbuyi
136	Kanza Makoka	170	Mulumba Mbwaya
137	Kanduki Malibwana	171	Isilamunu Mibanda
138	Kitungwa Malinusu	172	Mabusa Mibemba
139	Kahindo Maliro	173	Mukwikila Mikiembo
140	Mabika Malu	174	Lingbengbe Mobudju
141	Malu Malu	175	Musiku Siku Wa Mokol
142	Mabongo Malu Malu	176	Imbumbu Mombili
143	Malambu Nsuka Mambu	177	Liwoke Monga
144	Mvonde Mambu	178	Mangbau Monga
145	Nzee Mambula	179	Kalala Mpumbwe
146	Kachama Mangolo	180	Lukanzu Mputu
147	Pataule Mibizabo Mantinti	181	Wango Mpola
148	Kayemba Manunya	182	Makunzu Mutulwa
149	Ngalu Maotela	183	Ndoki Muaka
150	Upumbu Olloa Martin	184	Madila Mubiayi
151	Ilunga Masangu	185	Mbeti Mubobo
152	Tupa Meli Mateso	186	Tshimanga Mudianvita
153	Meno Matiaba	187	Tshisimbi Mudipandi
154	Masani Matshi	188	Milanga Muena
155	Sibu Matubuka	189	Tabaro Mugula
156	Malonda Matundu di V	190	Ikabu Mujinga
157	Bipendu Matuka	191	Kangombe Mukanku
158	Nzey Man Mau	192	Kayamba Mukasi M.B
159	Numbi Mavinga	193	Kayi Mukendi
160	Muaka Mavungu	194	Ngandu Mukendi
161	Moke Mayele	195	Kabangu Tshiondo
162	Talombo Mazamba		Mukengeshayi

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- |     |                      |     |                           |
|-----|----------------------|-----|---------------------------|
| 196 | Sangu Mukiadi        | 230 | Muyenga Ndakisa           |
| 197 | Mukanya Mukishi      | 231 | Mavinga Ndangi            |
| 198 | Makaba Mukoko        | 232 | Kaseya Ndaye              |
| 199 | Toma Toma Mukoko     | 233 | Zirimwa Bagabo Ndaze      |
| 200 | Tingi Mukuta         | 234 | Malu-Malu Ndekolo         |
| 201 | Mbombo Mulengele     | 235 | Isase Ndelo               |
| 202 | Muanga Mulindia      | 236 | Dimoke Ndjadi             |
| 203 | Dikebelayi Mulumba   | 237 | Kajangu Ndusha            |
| 204 | Kahasa Siwa Munda    | 238 | Makaya Nene               |
| 205 | Lufungula Mundeke    | 239 | Matombi Ngbeu             |
| 206 | Bodisa Mundi         | 240 | Makonga Ngeti             |
| 207 | Mulombo Muni         | 241 | Mbila Nim Ngo             |
| 208 | Kwete Munkwete       | 242 | Tshimanga Ngoie           |
| 209 | Nkulu Muol           | 243 | Matuzola Ngoma            |
| 210 | Shamavu Murhimbo     | 244 | Tatukila Ngoma            |
| 211 | Byalukengu Musasa    | 245 | Rajabu Ngondo             |
| 212 | Kayembe Musasa       | 246 | Kalasi Ngoy               |
| 213 | Kabembe Mushagalusha | 247 | Mulumba Ngoy              |
| 214 | Muya Musonge         | 248 | Bajana Ngoya              |
| 215 | Kayoka Wa Mutombo    | 249 | Kaposo Ngoyi              |
| 216 | Lusamba Wa Mutombo   | 250 | Elesse Nguma              |
| 217 | Ntenda Didi Mutuale  | 251 | Nsibu Niemba              |
| 218 | Makunzo Mutulwa      | 252 | Madia Nika Nika           |
| 219 | Ngongo Muwaya        | 253 | Bangala Nísanga           |
| 220 | Lulua Muya           | 254 | Nswele Nkira              |
| 221 | Muhimuzi Muzibu      | 255 | Kayumba Nkudi             |
| 222 | Katanga Mwamba       | 256 | Tshiswaka Nsansila        |
| 223 | Lusiku Mwamba        | 257 | Maniragaba Nsekerabanzi   |
| 224 | Ngoyi Mwana          | 258 | Kazadi Nsensa             |
| 225 | Bushiri Imani Mwata  | 259 | Bazinga Nsunda            |
| 226 | Mayindombe Mwayi     | 260 | Kululu Nsungu             |
| 227 | Mawila Kutonda Naka  | 261 | Ntambwe Mutambayi Ntenday |
| 228 | Musafiri Nalwango    | 262 | Mbaya Ntita               |
| 229 | Lelu Nawej           | 263 | Banza Ntombe              |

- 264 Gulu di Mbenga Nzita  
265 Diadia Nzalankanga  
266 Mbwebwe Nzeleman  
267 Vola Nzungu  
268 Inenge Ofendji  
269 Moiko Okale  
270 Utshudi Mongodi Okito  
271 Lulengula Oleko  
272 Bogonga Ondumbi  
273 Lopala Opango  
274 Mweni Otempa  
275 Utshudi Owondje  
276 Katoto Oyombo  
277 Agabu Pariyo  
278 Ngoy Pemba  
279 Makwani Phaka  
280 Nzuzi Phukuta  
281 Bivegete Pinga Solo  
282 Mathe Poipo  
283 Ubulu Pungu  
284 Kanda-Kanda Safalani  
285 Kalonda Saidi  
286 Lamba Lamba Saidi  
287 Mposhi Samba  
288 Useni Sefu  
289 Kanane Semvula  
290 Mungulu Shabunda  
291 Mongo Tumbu Shambuyi  
292 Mundio Suelo  
293 Ilunga Tamin  
294 Kiana Tangongo  
295 Koko Tomasi  
296 Tshipama Tshibangu  
297 Ilunga Tshibatu  
298 Ngomba Tshienda  
299 Mutombo Tshikele  
300 Kabamba wa Tshilenge  
301 Ntumba Tshimpaka  
302 Ngalamulume Tshiwala  
303 Kalonji Tshinkunku  
304 Lumu Tsibas  
305 Ebwa Vala  
306 Mbuinga Vubu  
307 Ramazani Wazuri  
308 Imono Weloli  
309 Okitomebho Wetsho  
310 Mabita Yamba  
311 Munene Yamba Yamba  
312 Lofoli Wa Yaliyoli  
313 Longange Yalanga  
314 Booto Yietunga  
315 Ziki Zamba



# CUBA

Cuba gained independence from Spain in 1898, after the US-Spanish war. In 1902, Cuba adopted a republican form of government, but remained under US tutelage for three decades until 1934, when it was allowed self-government.

The Cuban Constitution adopted in 1976 at the First Congress of the Communist Party does not provide explicitly for division of powers. The political structure comprises the three classical branches of power (executive, legislative and judiciary) but their powers are not clearly defined nor separated. The executive power is exercised by the President, Fidel Castro, who has been in office since 1959. The legislative power is vested in the National People's Assembly (*Asamblea Nacional del Poder Popular*). The Council of State, a subsidiary organ elected out of the National Assembly, exercises legislative power when the National People's Assembly is not in session. The powers of the Council of State are established in Article 90 of the Constitution, and encompass wide-ranging legislative and executive powers.

In October 1997, elections for Municipal Assemblies were held nationwide. In January 1998, elections were held for the 601-seat National People's Assembly and the provincial assemblies. The electoral system does not allow competitive and free elections to take place. The candidates, 601 for 601 seats in the national assembly, were designated by Candidature Commissions or assemblies dominated by the ruling Communist Party, and were not allowed to present their own political platform to the voters. Other parties or independent candidates are not allowed to run in the elections.

## HUMAN RIGHTS BACKGROUND

Harassment and persecution of dissidents is systematic in the country, constituting a pattern of violations that has not changed in recent years. Human rights activists have also been persecuted and harassed. During 1997, a number of members of the Partido Pro Derechos Humanos, an unrecognised party, were tried and convicted for conspiracy, disobedience and contempt. Although independent associations, including human rights groups, are in general prohibited or not granted official permits for their activities, there are indeed many groups working in a semi-clandestine manner. These include the Cuban Committee of Independent and Pacific Opposition, the Civic and Democratic Association, the Pro-Human Rights Party, the Solidarity Foundation for Democracy, the National Council for Civilian Rights in Cuba, and the Cuban Council Coalition.

Pope John Paul II visited the country in January 1998 and spoke out in favour of human rights. On that occasion, the Government eased tight regulations prohibiting public religious activities and allowed some priests and nuns into the country. For the first time since 1959, Christmas was declared an official holiday. Following the Holy See's request for clemency for political prisoners, in February 1998 the Government released more than 200 prisoners in a gesture that was welcomed internationally. However, by year's end, four political dissidents awaiting trial had been tried and convicted, despite the international appeals sent to the Cuban Government to release them.

In February 1997, a code of conduct for foreign journalists working in Cuba entered into force. The code sets out rules to be respected by journalists while working in Cuba. The adoption of the "Reaffirming the Dignity and Sovereignty of Cuba Act 80" in December 1996 had already aggravated the situation of independent journalists by declaring any form of collaboration with the implementation of the US Helms-Burton Act illegal and subject to punishment. Activities considered as collaboration include distribution of information to or from the US. During 1997 and 1998, many journalists were harassed in application of these laws.

The Criminal Code and the Code of Criminal Procedure are both used as a means to repress political opponents and dissidents. The offences are sometimes vaguely worded so as to include political dissidence as a crime, using phrases such as "enemy propaganda", "contempt", "illegal association", "clandestine printing", "dangerousness", "rebellion", "acts against the state's security", etc. When arrested, and despite legal provisions, detainees are not provided with the minimum guarantees of due process of law, such as the right to remain silent and to have legal counsel at the time of questioning. Trials in general do not comply with internationally recognised standards for fair trials. In municipal courts, (first-level courts), the hearings are held one day after detention, thus preventing detainees from having adequate time and facilities to prepare their defence. The work of lawyers is further limited by the law and the actual harassment to which they are subjected due to their defence of political dissidents.

The conditions in prisons also remain poor. Ill-treatment of prisoners is combined with poor conditions of cells, food, medical services and lack of adequate legal services. According to Amnesty International, the actual number of political prisoners is unknown since the authorities do not publish the relevant data and independent monitoring of prisons by international or national organisations is severely restricted.

Cuba is party to some human rights treaties, among them the Convention on the Elimination of Discrimination against Women, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Cuba is not party to the main human rights instruments in the Inter-American system. However, this has not prevented the Inter-American Commission of Human Rights (IACHR) from reporting on the human rights situation in the country in recent years on the basis of Cuba being party to the Inter-American system of protection based in the American Declaration. The Government of Cuba does not recognise the IACHR's competence to monitor human rights in the country since Cuba was expelled from the Organisation of American States (OAS) shortly after the triumph of the revolutionary movement in 1959. However, the IACHR maintains that it was the Government who was expelled and not the state as such, thus the state remains bound by its obligation under the American Declaration of Human Rights. The Inter-American Commission issued two reports on Cuba within its annual report to the OAS. The first, corresponding to 1996, was issued in February 1997, and the second, corresponding to 1997, was issued in April 1998. The Commission also made public its report on the sinking of a tugboat carrying more than 40 persons on 13 July 1994 while trying to flee from the country. Survivors alleged that the boat sank as it was being pursued and assaulted by other vessels acting under official order, and that they were not allowed to surrender. The IACHR found the Government responsible for the death of the victims and recognised the right to reparation for survivors and victims' relatives.

The Committee on the Elimination of Discrimination against Women examined the periodic report of Cuba in February 1996. The Committee on the Rights of the Child also examined Cuba's report on its implementation of the Convention on the Rights of the Child in May 1997. The Committee Against Torture did the same in November 1997, and expressed concern at:

- reports that suggest that there occur serious violations of the Convention with regard to arrest, detention, prosecution, access to counsel and imprisonment of individuals, especially persons referred to in the reports as dissidents, and that serious violations occur in prisons
- the absence of adequate information about the investigation of complaints of torture and other inhuman and degrading treatment and the outcome of any such investigations.

During the 54th Session of the UN Commission of Human Rights in Geneva in 1998, a US-sponsored resolution on human rights in Cuba failed to be adopted. During the next session held in 1999, a new resolution, sponsored by Poland and the Czech Republic, was presented and narrowly adopted. The new resolution recognises some progress, although in general it cites concerns.

## THE JUDICIARY

The organisation and powers of the judiciary are set out in chapter XIII of the 1976 Constitution, as amended in 1992. Article 122 guarantees the independence of judges in their function. Article 121, however, states that “[t]he tribunals constitute a system of state bodies structured with functional independence from others and hierarchically subordinated to the People’s National Assembly and the Council of State”. With regard to this provision and others, the IACHR has concluded that in Cuba there exists “the subordination in fact and in law of the judiciary to the political power”.

### STRUCTURE

Organisation and structure of the judiciary is set out in the 1990 Law on the Popular Tribunals (*Ley de los Tribunales Populares*). The Supreme Popular Tribunal (*Tribunal Supremo Popular*) is the highest body within this structure, followed by Provincial Popular Tribunals in the provinces and Municipal Popular Tribunals in the municipalities. According to Article 124 of the Constitution all tribunals are collegiate and are composed of professional and lay judges.

The Office of the Public Prosecutor is charged with the defence of legality and the prosecution of offences. It is independent from the judiciary. Article 128 of the Constitution provides for its subordination to the People’s National Assembly and the Council of State. The Attorney-General receives also direct instructions from the Council of State.

In Cuba there is no separate body charged with the control of constitutionality of laws and regulations. That task is performed by the People’s National Assembly itself, which is also the body that enacts the laws (Article 75, paragraphs a, b and c of the Constitution). Thus the same body in charge of preparing and passing the laws has the jurisdictional power to review their constitutionality.

### APPOINTMENT AND TENURE

Justices of the Supreme Popular Tribunal are appointed by the People’s National Assembly, including its president and vice-presidents in accordance with constitutional provisions (Article 75, paragraph m). The same provisions grant the National Assembly the power to dismiss the Justices of the Supreme Tribunal, but no further provisions as to the causes for dismissal are set out. Justices of the Supreme Tribunal, just as other judges, are evaluated on the basis of their political behaviour rather than their professional competence.

The Attorney-General presides over the Office of the Public Prosecutor. Both the Attorney-General and the deputy Attorney-General are appointed

and can also be dismissed by the National People's Assembly (Articles 75 and 129 of the Constitution).

This system of appointment strengthens the dependence of the judiciary on the political power and does not guarantee impartiality in the discharge of its duties.

#### LACK OF JURISDICTIONAL PROTECTION OF HUMAN RIGHTS

The Cuban Constitution grants citizens a series of rights and freedoms, among them the right to equally enjoy other rights without discrimination, the right to work and to medical assistance, the right to education, and religious freedom (Articles 45 to 55). The Constitution also guarantees certain rights to persons accused in criminal proceedings. None of these rights, however, can actually be protected by the judiciary, due to the subordination of all human rights to political considerations. Article 62 of the Constitution states:

- None of the freedoms recognised to the citizens can be exercised in a way contrary to the Constitution and laws, the existence and ends of the socialist state, the Cuban people's decision to build up socialism and communism. The breach of this principle is punishable.

The determination as to whether a recognised freedom is exercised against the "existence and ends of the socialist state" lies in a judiciary that, according to the Constitution, is subordinated to the political power. In practice the courts have restricted the scope of personal rights and freedoms and have construed their exercise so as to allow political considerations to prevail in the ascertainment of rights and obligations for the citizens. The direct dependence of the judiciary on the political bodies is stressed in the provision of Article 90 of the Constitution, which grants the Council of State the power "to impart instructions of general character to the tribunals". This provision ensures the political control of the judiciary and makes jurisdictional protection of human rights dependent upon political convenience.

#### LIMITATIONS ON THE WORK OF LAWYERS

Decree-Law 81 of 8 June 1984 sets out the obligation of lawyers to register in the National Organisation of Collective Law Offices (*Organización Nacional de Bufetes Colectivos*) as a requirement to exercise the profession. To become a member of this organisation, it is necessary to demonstrate "moral conditions in accordance with the principles of our society". This condition has in fact barred the membership of lawyers who disagree with the Government or the ruling party.

The oversight, supervision and control of activities of this organisation, as well as of its members, lies with the Ministry of Justice. The Ministry may issue regulations and exert other functions as it may deem necessary (Decree Law 81, First special provision, and Article 42 of the regulation). This means that the Government has, in fact, control over the professional activities, discipline and sanction of lawyers in the country. This continues to be the source of undue restrictions on lawyers' professional activities and a serious handicap to the functioning of the judiciary (*see below*).

Lawyers who assume the defence of individuals accused of political offences are harassed and denied the facilities necessary to perform their duties adequately. Many of them are charged with "contempt" or "enemy propaganda" when they speak out criticising the poor human rights record of the country.

The IACHR reported that only one association of lawyers is allowed to exist in the country: the National Association of Jurists (*Union Nacional de Juristas*). Other organisations were denied official recognition, which means that they have to work in clandestine conditions, and their members could be criminally charged. The IACHR has actually reported that one lawyers association, the *Union Agramontista*, has unsuccessfully applied for legal recognition since 1991, and also that some lawyers have actually been convicted for exercising their profession independently.

## CASES

**Juan Escandell Ramirez** {lawyer}: Lawyer Escandell works with an independent organisation of lawyers called *Corriente Agramontista* and has defended political dissidents. He has reportedly been threatened by the authorities with a prison sentence. In September 1997, the authorities charged him with sexual harassment, and subjected him and his wife to investigations and interrogations by the police. Amnesty International believes that he and his wife have been harassed because of their work defending political prisoners.

**Rene Gomez Manzano** {lawyer and founder of a dissident group}: He was arrested, according to Amnesty International, in July 1997 and charged with issuing "enemy propaganda". By the end of 1998, he was still awaiting trial. Lawyer Gomez had also tried to establish an independent lawyers association but that attempt was denied by the authorities.

**Leonel Morejón Almagro** {lawyer of the Cuban National Alliance}: In his 1998 report, the UN Special Rapporteur on Human Rights in Cuba reported that Mr. Morejón had been repeatedly pressured to leave the country following his release from prison in 1997. He had been sentenced in March 1996 to 15 months in prison for "resistance to the authority" and

"contempt". On 19 August 1997, his wife was arrested, following her participation in the drafting of a document addressed to the Peoples' National Assembly calling for reforms in the electoral system.

Lawyer Morejón was also expelled from the National Organisation of Collective Law Offices (*Organización Nacional de Bufetes Colectivos*). The UN Special Rapporteur on the Independence of Judges and Lawyers sent an urgent appeal to Cuba with regard to this case. The Cuban Government responded on 25 February 1997, maintaining that Lawyer Morejón was expelled because of "repeated and serious failures to carry out his professional duties", and that in accordance with the law Lawyer Morejón had appealed the expulsion decision to the Minister of Justice, thereby recognising his fault. The Special Rapporteur observed that "it does appear that the Government, through the Minister of Justice, has some control over disciplinary sanctions on lawyers", and that this would run against Principle 28 of the UN Basic Principles on the Role of Lawyers providing that disciplinary proceedings against lawyers be dealt with by an impartial body, and subject to an independent judicial review.

# ECUADOR

The Republic of Ecuador is a constitutional democracy. In 1998 a Constituent Assembly adopted a new political Constitution, replacing the one in force since 1979. The new constitutional order entered into force in August 1998 and provides for division of powers between executive, legislative and judiciary. The executive power is exercised by the President of the Republic who serves a term of five years. The legislative power is vested in a unicameral Congress. The new Constitution increased the number of congressional seats from 81 to 121. The new Constitution also deprived Congress of its power to dismiss ministers.

The 1998 Constitution guarantees independence of the judiciary, just as the previous Constitution did, but in practice, the judiciary is subject to influence. The new Constitution reproduces some of the provisions and institutions introduced in previous amendments in 1982, 1992 and 1996, for example providing for an Ombudsman's Office and a modified Constitutional Tribunal already introduced in 1996.

In recent years the country has undergone a period of political and economic instability, leading to a constitutional crisis in 1997, when Congress dismissed the then President Abdala Bucaram for "mental incapacity", and later appointed its speaker, Fabian Alarcon, temporary President. A plebiscite confirmed Alarcon in the post until general elections were held in 1998. Alarcon appointed a new Cabinet that included former UN High Commissioner for Human Rights M. Ayala Lazo as Minister of Foreign Affairs. In June 1997, Congress appointed Roberto Gómez as new Attorney-General. On 12 July 1998 presidential elections were held, resulting in a victory for Jamil Mahuad.

On 10 July 1997, Congress dismissed the entire Supreme Court and started a period of important and far-reaching reform of the judiciary (*see Cases below*). In November 1997 a Constituent Assembly was set up to reform the Constitution. The new Constitution introduces a series of important changes in the procedure for appointment of judges; it also introduces the principles of an adversarial model into the legal system.

## HUMAN RIGHTS BACKGROUND AND IMPUNITY

The main human rights problems in Ecuador during the past years have been the practice of arbitrary detention by police and armed forces. Incommunicado detention of suspects is also the rule; detention pending trial normally lasts for unreasonable periods.

Prison conditions are very poor and severe overcrowding is mostly due to lengthy trials or long periods of detention pending trial. Official figures show that the percentage of unsentenced detainees reached 67.45%. To



counter this situation, the new Constitution provided that those accused under detention pending trial who had not been tried for more than a year when the new Constitution entered into force would be released immediately (Transitory Article 28).

The Government has continually used its constitutional power to declare states of emergency in the country, thereby derogating from some of the rights listed in the American Convention of Human Rights and the Constitution itself. During states of emergency, the security forces were charged with keeping order and security in the country. A 1995 decree-law granted the security forces immunity from prosecution in ordinary courts for offences committed during a state of emergency. The Inter-American Commission of Human Rights (IACHR) expressed concern regarding the use of the military for tasks for which it is not adequately prepared, pointing out abuses of human rights as the outcome.

During 1998, the Government, in an unprecedented move, settled through negotiations a number of cases pending before the IACHR and the Court of Human Rights. By these agreements, the Government agreed to pay reparations to victims or their relatives, and undertook to implement changes in the country's legal system. This move was welcomed by human rights organisations.

The IACHR issued its report on the human rights situation in Ecuador in April 1997 and the UN Human Rights Committee examined Ecuador's report in August 1998. The Human Rights Committee expressed concern for the "unreasonably long judicial delays", the "severe backlog in the courts", and the fact that accused persons can be held in detention pending trial for long periods of time. The Committee found the latter to be "incompatible with the presumption of innocence and the right to be tried within a reasonable time or to be released on bail" (paragraph 13). The committee also pointed out the severe shortage of public defenders for the poor in Quito and Guayaquil and their total unavailability in many parts of the country.

The new Constitution contains provisions granting most human rights to citizens, including guarantees of due process of law, which the 1996 constitutional amendment had extended to the pre-trial stage before a person is indicted.

## THE JUDICIARY

In its 1997 report the IACHR reported the following as the main problems in the administration of justice: excessive delays in starting proceedings, lengthy trials, corruption and a lack of security of tenure which hinder judicial independence, restrictions on access to justice due to an insufficient legal aid programme, and inadequate distribution of courts in the country.

## STRUCTURE

The judiciary (*función judicial*) is comprised of the Supreme Court of Justice, the lower courts established by law and the National Council of the Judiciary (*Consejo Nacional de la Judicatura*) (Article 198 of the Constitution). There is also a Constitutional Tribunal charged with maintaining the constitutional consistency of laws and norms of the lower levels. The Supreme Court has jurisdiction over the entire country and is composed of specialised chambers, whereas lower courts have jurisdiction over districts and other territories.

The National Council of the Judiciary is the body in charge of administrative and disciplinary matters (Article 206 of the Constitution). Its powers include budget preparation and resource allocation.

## APPOINTMENT AND SECURITY OF TENURE

According to constitutional provisions (Article 202), judges of the Supreme Court enjoy life tenure and can only be dismissed for causes stated in the law. They are appointed by the Supreme Court itself, meeting in plenary session and following criteria set out in the law of the judicial career. Under the provisions of the 1979 Constitution, as amended in 1992 and 1996, Justices of the Supreme Court were appointed by Congress from a list of candidates selected by each of the state branches, who served a renewable term of six years. Likewise, the Justices of the Constitutional Tribunal were appointed by Congress from a list of candidates selected by each of the branches and other corporate and social groups, who served a renewable term of four years. The IACHR reported that the brief terms constituted a cause of concern inside the judiciary, considering the necessary independence and impartiality judges should maintain. It is worth noting that the appointment procedure and serving term for members of the Constitutional Tribunal were not changed in the 1998 Constitution (Articles 275 -276).

The 1998 Constitution guarantees the judicial career and leaves to an ordinary law the task of setting out its content. Excepting the members of the Supreme Court, all lower magistrates and judges are appointed following a competitive examination. In May 1998, a public competition took place to select new judges for appellate courts,

The Council of the Judiciary had begun its term by the end of 1998. All of its members were appointed in accordance with the procedure set out in Law 68 (Organic Law of the National Council of the Judiciary), passed in March 1998. This law, following a general trend in the region, establishes that the Council is to be composed of individuals appointed by the courts, the bar associations and university deans. This method is supposed to provide for the further independence of this body.

## THE REFORM OF THE JUDICIARY

A far-reaching programme of reforms, initiated in 1994 with foreign aid, continued during 1997 and 1998. The programme consists of reforms at the administrative and jurisdictional level. At the jurisdictional level, the implementation of new procedures for the appointment of judges is aimed at providing them with greater independence, whereas at the administrative level, the implementation of measures allowing the judiciary to control its own resources is aimed at diminishing its dependence on resources allocated by the Executive.

The reform programme also envisages important reforms in the legal system. The 1998 Constitution, for the first time, introduces elements of an adversarial criminal model into the Ecuadorian legal system, providing for public trials and oral hearings. By the end of 1998, important legislation was introduced in Congress to implement the reform within a period of four years.

## MILITARY COURTS

Human rights organisations have repeatedly expressed concern over the frequent practice of trying police and military officers in special courts and not in ordinary ones. The IACHR reported that police and military officers are frequently tried by military courts, even for offences unrelated to their official duties, including human rights abuses. Proceedings in these special courts are not public; the hearings are held *in camera* and the sentences are not published. Basic requirements of due process of law in criminal proceedings are therefore not met by these special military and police courts. In 1997, the IACHR recommended that the authorities enact legislation limiting the jurisdiction of military courts to crimes directly related to military and police duties, and that all human rights abuses be tried in ordinary courts.

According to the IACHR, police and military courts are normally reluctant to convict members of the police or armed forces. In a 1995 report from the Under-Secretary of Police to a parliamentary commission on human rights, it was stated that out of 4,568 cases against police and military officers since 1985, convictions were achieved only in 49 cases. Many of the cases had been closed by application of the statute of limitations.

## THE WORK OF LAWYERS AND PROVISION OF FREE LEGAL AID

Reports say that no more than two dozen lawyers work for the legal aid programme run by the authorities. In a country where legal provisions require that any complaint before the courts be presented by a lawyer, this lack of an adequate legal aid programme was considered by the IACHR as a discrimination on economic grounds, since only those with the necessary

economic means are able to hire a lawyer, whereas others have to wait a long time before they can receive free legal counsel.

## CASES

**Carlos Solorzano Constantine** {President of the Supreme Court}: He and the other **30 members** of the Supreme Court were dismissed by a majority vote in Congress in July 1997, without following the procedure of impeachment mandated by the Constitution in force at that time. The alleged reasons for the dismissal were the politicisation of the body and the implementation of a popular mandate approved in the plebiscite of May 1997, when a large majority voted in favour of “depoliticisation of the judiciary”. Solorzano claimed that the dismissal was unconstitutional. A total of 31 judges were dismissed and in October new members were elected.

# EGYPT

The Constitution of the Arab Republic of Egypt was adopted in 1971 and amended in 1980. Executive authority is vested in the Head of State, the President, who is nominated for a six year term by a two-thirds majority of the People's Assembly, followed by a plebiscite vote. The President may be re-elected for subsequent terms. The President supervises the implementation of general state policy, and acts as commander in chief of the army. The current Head of State is Mohammed Hosny Mubarak, who was first elected to office in 1981, and was re-elected for another term in 1993.

The Government is the supreme executive and administrative organ of the state. It consists of appointed ministers, headed by the Prime Minister.

Egypt has a bicameral Parliament which is composed of the People's Assembly, (*Majlis Al Shaab*) the legislative branch of the state, and the Upper Consultative Council, (*Majlis Al Shoura*). The President may appoint no more than ten members to the People's Assembly. The Upper Consultative Council exercises advisory powers and acts as a consultative body only. It is composed of 258 members, of whom two-thirds are elected and one-third are appointed by the President. The ruling National Democratic Party has dominated both chambers by a large majority since 1978.

Administratively, Egypt is divided into 26 districts. Within these districts, units of local government establish and manage all public services. Local Popular Councils are elected bodies that work as government administrative units at various levels.

The political system is based on a multi-party system. Law No. 40/1977 prohibits the formation of religious-based political parties, although a number of them are active on the ground. The two main Islamist political groups in Egypt are *Al Jibad* and *Al Jamaa Al Islamia*. They both seek the installation of an Islamic state based solely on Shari'a law, and both use violence as a means to achieve their goals. These armed groups have been held responsible for numerous assassinations, as well as civil unrest.

Egyptian security forces have committed gross and systematic human rights violations in the name of fighting terrorism. These include arbitrary arrests, administrative detentions, mistreatment of prisoners, and mass arrests. Other abuses have been reported throughout 1997 and 1998.

In Upper Egypt, violent activities increased in 1997 and 1998, particularly violence aimed at Coptic Christians. Churches and other properties owned by Christians were systematically attacked. In August and September 1998, the Egyptian Organization for Human Rights (EOHR), an ICJ affiliate, issued two alarming reports, one regarding the deaths of persons held in custody in Egyptian prisons and the other regarding the torture of Coptic Christians in Upper Egypt. On December 1998 Mr. Hafez Abou Se'da, the Secretary General of the EOHR, was arrested in relation to the publication

of these reports (*see below*). The ICJ and the CIJL intervened in his case. Upon the exertion of international pressure, Mr. Abou Se'da was released on 6 December 1998 to attend the celebration of the 50th anniversary of the Universal Declaration of Human Rights in Paris.

On 22 February 1997, the People's Assembly voted to extend the emergency law for another three years, until May 2000. The State of Emergency Law has been in effect, uninterrupted, since 1981.

The State of Emergency Law authorises the detention of individuals without charge or trial. After thirty days a detainee can petition the state security court for review. If the review is favourable, the detainee must wait another month and then petition another state security court for release. The minister can, however, simply re-arrest the detainee. The Government commonly engaged in this practice in cases involving so-called Islamist extremists.

Another recent troublesome development was the introduction and implementation of a new law reshaping the relationship between tenant farmers and land owners. The Agrarian Reform Bill gives owners the right to expel tenants from their farms, lifting a previous restriction on that activity. Demonstrations against the bill erupted in rural areas throughout Egypt, resulting in clashes between security forces and demonstrators; mass arrests were reported (*see below*).

## THE JUDICIARY

The legal system in Egypt is founded mainly on the Napoleonic Code, the Shari'a, and the British model. According to the Constitution, the judicial authority is independent. The judiciary consists of different courts: the Supreme Court, which is the highest judicial body, the Court of Cassation, the Courts of Appeal, courts of first instance, and magistrate courts.

At the base of the court system are the magistrate courts, which are single judge courts with jurisdiction over minor civil and criminal cases. There is at least one tribunal of first instance above the magistrate courts in each district which is composed of a presiding judge and two sitting judges. The rulings of the courts of first instance are appealed to the Courts of Appeal, which also hear cases involving serious crimes. The seven Courts of Appeal are divided into criminal and civil chambers.

The Court of Cassation in Cairo accepts petitions on judgements rendered by the Courts of Appeal on two grounds: mistakes of law and violations of due process.

Special courts exist alongside these courts of general jurisdiction, including labour tribunals, military courts, and security courts (*see below*). A

three-tiered hierarchy of administrative courts adjudicates administrative disputes between ministries and agencies and is headed by the Council of State.

The Office of the Public Prosecutor, headed by the Attorney General, supervises the enforcement of criminal law judgements.

### THE SUPREME CONSTITUTIONAL COURT

The Supreme Constitutional Court is the head of the judiciary. It is composed of a Chief Justice and nine Justices. It settles disputes between courts and renders binding interpretations of the Constitution.

On 22 July 1998, the President of the Republic, without previous consultation with the People's Assembly, issued a decree amending paragraph 3 of Article 49 of law No. 48/1979 of the Supreme Constitutional Court, stating:

...a ruling of unconstitutionality of a provision of a law or regulation shall be implemented only as of the day following its publication, without prejudice to the benefit that a claimant may receive from such provision being deemed unconstitutional.

This amendment was aimed at, *inter alia*, ensuring that the Government does not have to pay back funds it obtains from imposing unconstitutional taxes on citizens.

After conducting a legal study of the amendment, the EOHR concluded that:

The new amendment eviscerates any real meaning from the supervisory role of the Supreme Court, in addition to being an attack on the judiciary. The established rule in international law is that invalid legal rules are invalid as of the time of their origination.

### APPOINTMENTS

According to Articles 165 and 166 of the Egyptian Constitution, judges and the judicial authority are independent. Judges are appointed for life and cannot be dismissed without serious cause. In practice however, since appointments are a presidential prerogative, the Executive enjoys considerable influence over the judiciary. The High Council of Judicial Authorities recommends appointees to the President, in addition to regulating judicial promotions and transfers. Judges are considered functionaries of the Ministry of Justice, which administers and finances the court system. This schema makes the Executive the *de facto* head of the judiciary, which

potentially undermines basic principles of impartiality and the separation of powers.

## **SPECIAL COURTS**

There are two types of State Security Courts in Egypt: the Permanent State Security Court and the Emergency State Security Court.

Article 171 of the Constitution states that the law shall regulate the organisation of State Security Courts and shall prescribe their competence and the conditions to be fulfilled by the State Security Court judges.

### **PERMANENT STATE SECURITY COURTS**

Law No. 105/1980 was promulgated to create the framework and competence of the Permanent State Security Court. These courts are composed of two chambers: the Magistrate State Security Courts and the Supreme State Security Courts. The Magistrate State Security Courts are normally composed of one sitting judge. Sentences of this court can be appealed to a specialised Chamber within the Court of Appeal and can be reviewed by the Court of Cassation. The Supreme State Security Courts are composed of three sitting judges. Judgements issued by these courts can be reviewed by the Court of Cassation. The President of the Republic may, however, order two additional military officers to the Supreme State Security Courts.

The law accords these courts a wide jurisdiction over a multitude of broadly defined matters. These include cases of national concern, internal and external security, political parties, economic stability, possession and use of firearms and explosives, financial misconduct and bribery.

As long as the State of Emergency remains in force, the President, as a final recourse, may order a retrial, an alteration, or a nullification of the decisions of these courts.

### **EMERGENCY STATE SECURITY COURTS**

The Emergency State Security Courts were established under the State of Emergency Law No. 162/1958. Crimes violating the decrees of the President or his representatives fall under this law. Crimes punishable by regular criminal courts, can be transferred by presidential order to the Emergency State Security Courts. These crimes include threatening the internal security of the State, bribery, embezzlement, possession and use of firearms and explosives.



Judges sitting at these courts are appointed by presidential decrees upon the recommendation of the Minister of Justice. Article 8 of the State of Emergency Law accords the President the ability to change the composition of the Emergency State Security Courts, filling them with military officers only, and turning them into *de facto* military courts.

Judgements passed by Emergency State Security Courts are theoretically final; however the President may in fact alter or annul any decision, and can even order the immediate release of a defendant. The execution of sentences requires the President's ratification.

### MILITARY COURTS

The President of Egypt has referred hundreds of civilians charged with acts of violence to the military justice system, based on Article 6.2 of the Law on Military Justice No. 25/1966. This is contrary both to internationally recognised principles and to the Egyptian Constitution, because of the nature and the procedure of military trials. The President's discretion in this matter has been upheld by the High Administrative Court and the Constitutional Court; however it contravenes the International Covenant on Civil and Political Rights, ratified by Egypt on 15 April 1982, as well as the fifth principle of the United Nations Basic Principles on the Independence of the Judiciary, which states:

Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

In military courts, however, military judges are part of the military hierarchy. They can be dismissed or promoted on the basis of the actions they take in court. Their impartiality and neutrality are thus jeopardised.

Procedures in the military courts do not adhere to the rules, conditions and guarantees of the Criminal Procedures Code. There is no right of appeal, although the decisions may be reviewed by other military judges and are subject to confirmation by the President of the Republic.

Many lawyers have reportedly complained of the speed of the military trials and the lack of time given to them for preparation. Coerced confessions have reportedly been accepted by military courts. Furthermore, there have been reports that on several occasions, military courts have refused to release prisoners who were found to be innocent, in direct contravention of all legal principles.

## LAWYERS ASSOCIATION DISMANTLED

The Council of the Egyptian Bar, which is largely controlled by Islamic lawyers, was dissolved on 28 January 1996 and a caretaker Judicial Committee was appointed. In light of this dissolution, the CIJL sent a mission to Egypt, from 10 to 16 March 1998, in order to examine the situation.

The CIJL mission found that the sequestration of the Egyptian Bar Association and its affiliate groups, as well as the dissolution of regional bar associations, in particular the Cairo Bar Association, are part of a general reaction against trade and professional associations on the part of the Government. In recent years, the Government has become concerned by the rise of Islamists in Egyptian society, particularly in professional associations, so it has taken steps to solidify control of social institutions.

In an attempt to control civil society associations, the Government introduced the Law of Guarantees of Democracy in Professional Associations (Law No. 100/1993 amended by Law No. 5/1995). According to the CIJL mission, the manner in which the law operates frustrates democracy. The law mandates a 50% quorum for an association vote to be valid. If this quorum is not reached, a vote of at least one-third of the registered members is required at a later stage. This provision is unrealistic, particularly in associations with large memberships.

Other sources of tension continue to exist between the Government and the Bar Association. These include the extension of the Emergency Law, the extension of the jurisdiction of the military courts to include civil matters, (which many lawyers considered undue Government interference in the civilian judicial system), and the rising level of unemployment among qualified lawyers.

The Government took advantage of alleged charges of financial misconduct levelled against the Egyptian Bar Association to sequester the Bar Council. Some lawyers supported this action on condition that the sequestration be limited to decisions specifically related to financial affairs. However, this was not the case. The sequestration extended to policy-making in such important issues as education, legislative affairs, and disciplinary procedures.

The CIJL mission concluded:

If fraud were suspected, it might have been thought sufficient to place the issue in the hands of the police and the prosecuting authority rather than seeking sequestration. Sequestration inevitably affects the whole EBA, whereas prosecution would presumably have targeted only those individuals suspected of fraud, leaving the EBA to function normally otherwise.

Currently, the Egyptian Bar Association is without a president and Bar Council. This state of affairs has been in effect for almost three years. Elections do not appear to be imminent. The suspension of the Bar has had an adverse impact on the administration of justice, and affects the population at large, not just the legal profession.

## CASES

**Hafez Abou Se'da** {lawyer, secretary-general of EOHR}: On 1 December 1998, the Egyptian Higher State Security Prosecution ordered a fifteen day detention of Mr. Abou Se'da, following his appearance as a witness in a court hearing about EOHR's finances. The financing hearing had commenced after EOHR published two reports, one concerning custodial deaths in Egyptian prisons and the other regarding the torture of Coptic Christians in Upper Egypt. Mr. Abou Se'da was detained incommunicado for five days, during which time his lawyers were denied access to the records of his interrogation. The charges against him carried a potential sentence of up to 15 years of hard labour. As stated above, Mr. Abou Se'da was released on 6 December 1998 on a LE 500 bail, and was permitted to travel to Paris to attend the celebration of the 50th anniversary of the Universal Declaration of Human Rights.

**Sayed Ahmad Al-Tokhi** {lawyer, member of EOHR}: On 9 August 1997, Mr. Al-Tokhi was arrested at Cairo Airport as he was boarding a plane to the United Arab Emirates. He was held in Tora Prison where he was allegedly ill-treated. He was charged with criticising Law 96 of 1992.

**Mostafa Thabit Bayyoumi** {lawyer}: Mr. Bayyoumi has been detained without charge or trial since 1994, in spite of release orders issued by the courts. According to credible reports from the Arab Centre for the Independence of the Judiciary and the Legal Profession, a CIJL affiliate, he is currently being held in Al-Wadi Al-Gadid Prison, south of Cairo. Mr. Bayyoumi is being denied medical treatment despite his deteriorating health. No charges were ever brought against him.

**Mohammad Sulayman Fayyad and Hamdi Haykal** {lawyers}: On 17 June 1997, Mr. Fayyad and Mr. Haykal were arrested in Banha, after allegedly criticising the Agrarian Reform Bill, No. 96/1992, in a public gathering (see above). They were allegedly charged with inciting farmers to oppose the law as well as possessing printed material critical of the bill.

**Mustafa Zidan** {lawyer, EOHR member}: On 2 December 1998, Mr. Zidan was summoned by the Higher State Security Prosecution to be questioned about information included in the EOHR report on the Al-Koseh village incident, and his role in gathering and compiling that information. Mr. Zidan was released three days later on a LE 200 bail, after being

interrogated about his purported dissemination of false information for the purpose of threatening Egypt's national interests.

## GOVERNMENT RESPONSE TO CIJL

On 2 July 1999, the Government of Egypt provided the CIJL with a response in Arabic to the draft chapter. Below is an English translation of the response.

The Egyptian judicial system has been known, throughout its history, as an institution protective of its independence. The High Council of Judicial Authorities is the only organ in charge of the affairs of this body.

It is strange that the report is entitled "Attacks on Justice" and portrays the persecution of judges and lawyers in some countries, including some paragraphs on Egypt, where unconvincing and meagre examples were given to show a defect in the administration of justice. The legal actions taken against the five individuals cited as cases in the report are not related to their professional activities, but they are the result of actions considered criminal by law.

We were hoping for an objective tone in this report, and the opportunity for governments to get a full chance to research, analyse, and explain the issues raised in this report.

1- The report deals with terrorism that has killed many civilians ... the government is determined to fight these activists, who are considered as part of a wave that threatens the whole world, in a context that respects legality and the rule of law. The government has used modern measures to curtail this crime by increasing the security apparatus and improving the training of its forces, increasing the punishments related to this crime, concluding bilateral and international treaties to expatriate criminals, and limiting foreign financing of those activities. This policy has proven to be successful. The logical and educated dialogue in the penitentiary institutions also proved to be successful in putting many individuals back on track, which led to the release of a significant number of them from prison.

2- Security personnel, all of whom have studied law, are following training sessions in human rights subjects. The police academy is working closely with social, judicial, and criminal research centres, as well as with the office of the High Commissioner on Human Rights ...

What happened in the village of Alkasheh in upper Egypt (the killing of two Coptic by another Coptic in a conflict over gambling) was nothing more than a regular murder where the police captured some suspects to catch the criminal. Some people filed complaints (14 in total), which were investigated with regard to the police brutality. The investigations resulted in negating these allegations. This proves that systematic harassment conducted by police officers is not the case. Some individual cases do occur, and the perpetrators are brought to justice (like in the Balkas incident).

3- In regards to the case of Mr. Hafez Abou Se'da, secretary-general of the Egyptian Organisation of Human Rights (EOHR), and Mr. Mustafa Zidan, EOHR member, it can be summarised in the complaint that was published by Mr. Mohammed Mostafa Bakry, head and editor in chief of Al Ousbouh newspaper, which contained a photocopy of a cheque issued by foreign sources, and asserting that it was cashed after the EOHR report with regards to the Alkasheh Coptic torture allegations was published. The general prosecution initiated an inquiry, and accused the named individuals of accepting foreign funds without acquiring a permit, with the intent of disseminating false information for the purpose of threatening Egypt's national interests. The accused were detained pending interrogation. A committee composed of 9 lawyers was put together to defend them. They were released on bail.

4. The extension of the use of the state of emergency law does not lead to the suspension of parliamentary or political life. Declaring the state of emergency is regulated by the Constitution, which requires that it be approved by Parliament and that the guarantees for protecting the rights and freedoms of citizens are provided, as well as respecting the International Covenant on Civil and Political Rights (Articles 6,7,8,11,15,16,18).

The ongoing state of emergency is linked with the continuation of the circumstances that created it. The actions taken under it are subject to judicial review. With regards to the Ministry of Interior's right to appeal the arrest orders, and to the fact that the security forces may be obliged to re-arrest individuals after their release, this is done under judicial supervision, and in the face of new information and evidence on individuals terrorists and groups.

### *5- The military courts*

With regard to military courts, legal and judicial systems of various countries allow the transfer of specific cases to special courts, and the establishment of tribunals to judge offenders in special crimes, or special circumstances based on the nature of the crime or the identity of the offender or the offended.

Military courts are permanent and created by a law. Their sessions, including the pronouncement of verdicts, are held in public. It is prohibited to hold sessions in secret unless the law specifies in law for the considerations of morality and public order.

All members of the military judicial body and the military prosecution are law graduates. They then join the military academy, and then they join the national centre of judicial studies of the Ministry of Justice.

Judges in those courts are neutral. The accused persons are permitted, in case of doubt of the judges' neutrality, to challenge them according to the law. A lawyer should be present alongside the accused in criminal matters in front of the high military tribunal. The adjudicating process in criminal matters in front of the military courts guarantees the accused the right to have the verdict reviewed by more experienced legal military officers, and to present memos to them, before the verdict is ratified, and this verdict can only lower the sentence. The convicted person may contest the verdict and the President of the Republic, according to the law, has the power to refer certain crimes to the military justice, based on their circumstances and their gravity. This referral is decided according to objective criteria to preserve public interest, in alignment with citizens' freedoms and rights guaranteed by the law.

The purpose of giving the military courts jurisdiction over civilians is the application of procedural matters in accordance with the Military Justice Law only. This does not include the actual crimes and punishment... which are dealt with in accordance with the regular penal code which is applied as it is by all criminal courts in the country.

### *6- Lawyers Association problems.*

The government is eager to promote the role of civil society with all its components, starting with the professional associations, since freedom of organisation and membership rules are guaranteed by law. Many Constitutional rulings assert this right. Law no. 100/1993, known as the law guaranteeing the

democracy of syndicates, amended by law no. 5/1995, was issued in order to add more transparency and ensure high participation in the activities and practices of these institutions so that the rights of the majority are guaranteed.

The Bar Association is one of the oldest syndicates in Egypt. Its current problem goes back to internal conflicts related to financial embezzlements. Some lawyers, who were members of the association, filed a lawsuit requesting its sequestration to put an end to the illegal actions of some of the board members. Then the legal process that is linked to the sequestration started, with its practices and consequences which are governed by judicial rulings. What is happening at present is related to the implementation of this verdict, and the executive cannot interfere with it. Lawyers' efforts could help in resolving those differences and calming the situation.

#### *7- Legal impact of the Supreme Constitutional Court rulings.*

The purpose of law no. 168/1998 is to regulate the retroactive effect of the Supreme Constitutional Court rulings and to exempt from this retroactivity rulings related to taxes. This amendment to article 3 of the law governing the Court came in the context of giving preference to certain legal orders to preserve higher economic state interests.

The report mentioned the law regulating rent issues between agricultural landowners and farmers, whose goal is to balance the interest and obligations of these two sections of society. Agricultural lands coming under this law represent around 9.5% of the total agricultural parcels in Egypt. Ninety percent of those cases were settled amicably and without problems.

The studies that accompanied law no. 96/1992, and the program for its enactment, were conducted with democratic discussions, with the participation of all the political parties and interest groups, and the concerned scientific, and civil associations. Opponents of this law were not subjected to pressure when expressing their opinion, but some of them were stirring up trouble and inciting violence, which led to legal action being taken against them... Tenants were incited to destroy public and private properties ... which led to confrontation between them and the landlords. Security forces intervened to preserve security, order and public and private ownership. The general prosecution accused those individuals of crimes punishable by law, people like Mr. Said Ahmad Al-Tokhi, Mohammad Souleiman Fayyad, and Hamdi Haykal, who were released after the investigation was completed. ...

# EQUATORIAL GUINEA

The Constitution, adopted in 1991, provides for a multi-party political system. However, elections scheduled for November 1998 were suspended due to the tense political situation. Dissenting political parties are barely tolerated and some groups are barred from open and legal activity. In general, political groups have a tenuous presence in political and social life. President Teodoro Obiang Nguema was re-elected in 1996 for a new seven year term, following an election process marred by fraud and corruption. He enjoys a wide range of powers, hardly consistent with the democratic organisation of the republic and the separation of powers.

By the end of 1997 the political situation showed some improvement, particularly after the National Political Dialogues were held in February and April of 1997. The dialogues resulted in a document that expressed the political consensus of the various groups. The agreement provided for, *inter alia*, the adoption of new legislation to guarantee political and civil freedoms.

The political process in the country became stagnant after the events of 21 January 1998, when the Government took harsh measures against the Bubi ethnic group. On 21 January 1998, a group of partisans belonging to an independent movement of the Bioko island allegedly attacked military premises there. Some members of the military were killed in the operation. The Government's response to this attack was disproportionate and discriminatory. In the following months the security forces detained and tortured members of the Bubi ethnic group, cutting off the ears of many of them, raping Bubi women, and attacking and looting Bubi property.

## HUMAN RIGHTS SITUATION

The situation of human rights in the country is very grim. Serious human rights abuses were committed during 1997 and 1998, and seem to follow a systematic and consistent pattern. The UN Commission on Human Rights has placed the situation in the country under scrutiny, and has appointed a Special Rapporteur, who visited the country in 1997 and 1998. The Special Rapporteur stated in his report that the democratisation process has gone backwards in 1998, following the armed attacks of January and the subsequent disproportionate repression.

Persecution of political opponents continues, as well as arbitrary detention and torture, and is aggravated by the repressive campaigning against the Bubis and political opposition. Torture has always been a common practice, and was increased against members of the Bubi ethnic group.

There is a general environment of impunity and the non-publication of laws and regulations enhances the feeling of judicial insecurity in the country. Law 6/1997 on Press and Audiovisuals establishes a set of principles that



are subject to arbitrary interpretation. The Government maintains a monopoly over radio and television broadcasting and all private press and broadcasting requires previous and special authorisation from the Government.

## THE JUDICIARY

Equatorial Guinea has a system of ordinary civilian courts composed of lower provincial courts, two appeal courts and a Supreme Court. One of the chambers of the Supreme Court functions as a Constitutional Court as well. There exist also a number of traditional tribunals in small villages or the countryside that apply customary law or mediate in minor civil and criminal cases.

Judges are appointed by the President and serve for an undefined term, basically until the President decides to dismiss or to transfer them. Justices of the Supreme Court are also appointed by the President. Few, if any, of the judges are law graduates and legal training of judges and lawyers is scarce and its quality low. The same individual sometimes performs the tasks of both the judge and solicitor.

The judiciary in general is not independent. One example illustrating this took place on 18 August 1997, when an Appeals Court forcibly dissolved the Progress Party of Equatorial Guinea after finding its leader guilty of criminal offences. The Appeals Court acted following a previous decision taken by the Council of Ministers on the same issue (*see below for other cases*).

Military courts try not only cases involving military personnel in service, but also any other offence where national security is allegedly involved. Military judges in general lack any legal training and use an old code of military criminal procedure.

### THE TRIAL OF MAY 1998

In May 1998, the Government publicly tried 116 persons, most of them belonging to the Bubi ethnic group. They were accused of having participated in the attacks of 21 January 1998. The trial, held in a local cinema, did not comply with the minimum standards of a fair trial. It was conducted before a military tribunal of five judges, all of whom were reportedly members of the dominant Fang ethnic group, using a summary procedure. The defendants were not allowed enough time to prepare their defence and were mostly provided with military officers as legal counsel, although some were defended by independent lawyers. Lawyers for the defence suffered harassment during and after the trial, reportedly from members of the Government (*see Cases below*).

The trial was basically a mockery. It was clear that the Government's intention was to teach a lesson to its political opponents and to punish those presumed responsible for the attacks. After a trial that lasted only a few days, most of the accused were convicted, and 15 were sentenced to death. The 15 did not appear in court when the sentence was given. Due to heavy international pressure, the sentence was afterwards commuted by the President. The military tribunal did not allow the defence to advance allegations or to challenge the proof on the basis that torture had been used to obtain confessions. Many of the 116 accused showed evident marks of having been tortured, including some with broken bones and their ears cut off, but no legal motion on that issue was even permitted by the tribunal.

## CASES

**José Oló Obono** {lawyer}: Lawyer Oló Obono is a well-known lawyer, criminal defender and General Secretary of one of the parties that has applied for government recognition. He was held in the public prison of Malabo and sentenced to five months incarceration for the crime of "insulting the Government", as well as payment of a fine of 200,000 CFA in addition to a compensation to the State of 15 million CFA (approximately US \$25,000).

The action was taken against the lawyer for his criticism of the authorities during an interview with representatives of the Spanish press concerning the death of his ex-client, Martin Puye Topete. The conviction also related to Mr. Oló Obono's claim for the body of Mr. Topete on behalf of his family. Lawyer Obono had been released by the end of 1998.

**Victoriano Obiang Abogo** {prosecutor}: Mr. Abogo was prosecutor in one of the appeals courts when he was dismissed and fined by a presidential decree on 1 October 1997. According to the UN Special Rapporteur for Equatorial Guinea, there was no stated reason for the dismissal other than "irregularities committed while in office". Eight days later, another presidential decree ordered him to spend five months in jail.

# FRANCE

In France's current Fifth Republic, enormous powers are given to the President of the Republic, who is elected for a seven year term by direct universal suffrage. Jacques Chirac became the fifth President of the Fifth Republic on 7 May 1995.

The President appoints the Prime Minister and, on the latter's recommendation, the other members of the Government. The French constitutional system consists of dual executive organs. The executive branch is headed by "two chiefs": the President of the Republic, as Head of State, and the Prime Minister, as Head of Government. The President of the Republic is responsible for determining major national goals, while the Prime Minister is responsible for implementing national policy with the aid of the Cabinet.

The President appoints the president of the Constitutional Council, brings matters before the Constitutional Court, and chairs the inter-ministerial councils. He also has the capacity to promulgate laws and to submit certain government bills to public referendum. The President is the guarantor of the independence of the judicial branch (Article 64); and presides over the High Council of the Judiciary (*Conseil Supérieur de la Magistrature*), which makes proposals or advises on the appointment of judges. The President ensures the regular functioning of the organs of government and the continuity of the State.

The President does not intervene in the daily running of the Government. Nevertheless, under the Fifth Republic, the powers of the President are interpreted broadly. Successive Presidents, when presidential and parliamentary majorities have coincided, have not been limited to those listed in the Constitution.

The Parliament is composed of two assemblies: the first is the National Assembly, whose members are elected by direct universal suffrage for a five year term, and the second is the Senate, elected for a nine year term by indirect universal suffrage, with one-third elected every three years.

## ELECTIONS

President Chirac announced that early legislative elections would be held in two rounds on 25 May and 1 June 1997, so that the Government would have a clear mandate with which to make key decisions on the European Monetary Union in 1998. The left, led by Socialist Party First Secretary, Mr. Lionel Jospin, won a solid National Assembly majority in the two rounds of balloting. President Chirac named Mr. Jospin Prime Minister, and he went on to form a government composed primarily of Socialist ministers, along with some ministers from parties allied with the left. In his

first speech to the National Assembly as Prime Minister, he promised a series of social, judicial, constitutional and immigration reforms. He promised to uphold the independence of the judiciary, and announced the end of ministerial interference in judicial inquiries into political corruption.

President Chirac established plans for the reform of the judicial system, calling for greater judicial independence, better protection of the presumption of innocence and simplified legal procedures. Accordingly, he announced the establishment of a 21-member commission headed by Pierre Truché, president of the Court of Cassation, charged with reporting to the government on how to achieve such reforms (*see below*).

## HUMAN RIGHTS BACKGROUND

There were reports of shootings, killings and ill-treatment by law enforcement officers, sometimes accompanied by racist insults. There were long delays in the judicial investigations of such cases and it was evident that, in some instances, there was a lack of thoroughness in the conduct of the inquiries.

The 1986 anti-terrorism law provides for a centralised court that deals exclusively with cases relating to terrorism; the prosecutors in this court have special powers of arrest, search and prolonged detention in police custody, up to 96 hours (as opposed to 48 hours in regular courts), and the accused persons do not have the same rights in determination of guilt as in the ordinary courts. Lawyers are permitted to get in touch with their clients only 72 hours after arrest. Delays in issuing judgements in terrorism cases are extravagant. In the Chalabi case for instance, 14 detainees spent at least four years in detention before a sentence was handed down in early 1999, and the six accused were released after having spent between 32 and 39 months in prison.

The case involved 138 suspects of North African origin who were accused of supporting violent groups in Algeria. The individuals were arrested in 1994 and 1995; 27 of them have been in detention since then. The trial, which ended in October 1998, took place in a gymnasium. Defence lawyers and human rights groups denounced the trial as a "circus".

The presumption of innocence in terrorism related cases is not always respected, and the "*juges d'instruction*" have a tendency to start their inquiry with a presumption of guilt, using complicated and long interrogation procedures. This anti-terrorism legislation is in clear derogation of the fundamental human rights guaranteed by the French Constitution, as well as international human rights instruments to which France is a party.

## THE JUDICIARY

The Constitution of 4 October 1958 provides the institutional basis for the Fifth Republic. According to Article 64 of the Constitution, the President of the Republic is the guarantor of the independence of the judiciary. He is assisted in this task by the *Conseil Supérieur de la Magistrature*, described below.

### COURT STRUCTURE

The judicial system is composed of local courts, 35 regional Courts of Appeal, and the Court of Cassation. The judicial branch in France makes a basic distinction between administrative courts and civil and criminal justice.

### ADMINISTRATIVE COURTS

Administrative courts are composed of three levels: the *Conseil d'Etat*, the Administrative Court of Appeal and the administrative courts. All disputes regarding the public sector are heard by administrative courts. The supreme court of the administrative hierarchy is the Council of State (*Conseil d'Etat*), whose members are protected by a statute guaranteeing their independence. The Council of State functions as both a court and a consultative body.

As a court it considers points of both law and fact. It rules directly on the legality of the most important administrative acts. In addition, it acts as a court of appeals for decisions issued by the administrative courts and administrative appellate courts. In this capacity, the Council of State is the court of final appeal in disputes involving the state and the public entities. It may also review and annul regulations signed by the President of the Republic or the Prime Minister, thus providing citizens with recourse against arbitrary use of power by the state.

As a consultative body, the Council of State serves as the Government's legal advisor, examining bills before they are deliberated at Cabinet level, as well as certain draft decrees. The Government may seek the opinion of the Council of State on a variety of legal questions.

Government services are also subject to budgetary checks by the magistrates of the State Audit Court (*Cour des Comptes*), which is assisted by the regional audit courts. The State Audit Court, which has a reputation for independence, audits the accounts of all the state paymasters and treasurers.

### CIVIL AND CRIMINAL COURTS (L'ORDRE JUDICIAIRE)

At the highest level, there is the Court of Cassation, which reviews points of law in appeals made against the decisions of the appellate courts.

The Court of Cassation is composed of civil chambers and at least one criminal chamber.

Under the Court of Cassation are Courts of Appeal which review points of law and fact in decisions issued by the lowest-level courts, which are themselves divided into two distinct branches: civil and criminal courts.

At the first instance, there are Civil Courts and judges of instruction that investigate crimes. There are also two specialised courts that look into such matters as commercial and labour disputes.

Cases of serious crimes are tried by the *Cour d'Assises*, which differ from other French courts in that they are composed of a presiding judge and two assessors who are professional magistrates, along with nine ordinary citizens whose names are drawn by lot from the electoral registers. Another peculiarity of the *Cour d'Assises* is that their decisions may not be appealed; appeals may be made to the Court of Cassation on points of law only.

#### THE CONSTITUTIONAL COUNCIL

Composed of nine members, the Constitutional Council is responsible in particular for overseeing the proper functioning of elections and for ruling on the constitutionality of organic laws and legislation submitted to it. Such a ruling is mandatory with regard to the rules of procedure of the two assemblies and organic laws, and is optional in the case of ordinary laws and international treaties and obligations.

On 26 January 1999, the Constitutional Council, in a controversial move, granted President Chirac immunity from prosecution in connection with a scandal during his time as mayor of Paris, when some 300 political allies were allegedly paid for fake jobs in the municipality. The President of the Constitutional Council, Roland Dumas, was himself under investigation, accused of embezzlement and complicity in the misappropriation of funds in the Elf Aquitaine affair.

#### THE HIGH COUNCIL OF THE JUDICIARY

According to the Constitution, the High Council of the Judiciary, (CSM), is presided over by the President of the Republic. The Minister of Justice is an *ex officio* Vice-President. The members of the CSM are appointed by the President of the Republic under the terms laid down by an organic law. The Council recommends the appointment, discipline, transfer and removal of judges in the regular judiciary to the Head of State. The sitting magistrates are appointed by the CSM.

The CSM makes proposals for the appointment of judges to the Court of Cassation and of Presiding Judges to the Courts of Appeals. With regard

to other judges, the Council gives its opinion, under the conditions stipulated by the organic law, on the proposals of the Minister of Justice.

According to Articles 64 and 65 of the Constitution, the CSM acts as the disciplinary council for judges. In such cases, it is presided over by the President of the Court of Cassation.

Ms. Elisabeth Guigou, Minister of Justice, submitted a bill regarding the exceptional recruitment of judges and modifying the conditions of recruitment of the advisers (*conseillers*) of the *Cour d'Appel* in extraordinary service to the Council of Ministers. The purpose of the bill is to authorise three exceptional competitions which will allow the recruitment of additional judges in 1998 and 1999, and relax the method of recruitment of the *Conseillers* or advisers of the *Cour d'Appel* in extraordinary service.

#### The Truché Commission

The Commission was established on 21 January 1997. It is composed of 21 members. Its objective is to review and examine the current role and function of justice in France. It was designed primarily to consider how to ensure better independence of the judiciary, in particular in relation to the connection between the prosecutor and the Ministry of Justice and to take into account the principle of the presumption of innocence. The Commission was chaired by Pierre Truché, first president of the Court of Cassation and six judges, four lawyers, two journalists, two advisers of the state and one financial inspector.

The 120 page report, which was drafted within six months, maintained the connection between the prosecutors and the Ministry of Justice. It suggested withdrawing the powers of the instruction judges in deciding during the pre-trial period; enhancing protection for detainees; forbidding the Ministry of Justice from reopening investigations and authorising them to establish a dialogue on the same matters with the prosecutors. The report also enlarges the public aspect of inquiries during the process of investigation, therefore ending the confidential procedure established by law. The main recommendations included the following:

- The judicial police will not be directly linked to the Ministry of Justice and the instruction judge will no longer be the judge of detention. The lawyers will be able to intervene from the first moments of the arrest, and the interrogations will be recorded, so as to end police abuse and brutality.
- The complaints of the detainees against judges will be examined by the examination commissions within the competence of the court of appeal. These commissions are composed of a sitting judge or prosecutor of the court of appeal (depending on whether the complaint was against a judge or a prosecutor), an adviser of the administrative court of appeal

and a magistrate of the regional court of accounts. Their decisions are not subject to appeal.

- The formula of oath for judicial office will be modified with respect to the obligation of confidentiality.
- The CSM will be composed mostly of non-judges or magistrates. The CSM is chaired by the President of the Republic; the CSM will be the disciplinary body of the magistrates, including the prosecutors.
- The power of the Ministry of Justice will be diminished. Its role will be limited to proposing candidates for judicial office; however it will not vote. The Ministry of Justice will take into account the opinions of the CSM.
- The appointment of prosecutors will take place upon proposals by the Ministry of Justice and the opinion or notification of the CSM will be sought.

On 10 March 1998, the *Syndicat de la Magistrature* opposed the reform of the prosecutors' statute on the grounds that it would give them the status of civil servants instead of granting them independence. In the meantime, President Chirac has backed the reform, including that of the *Conseil Supérieur de la Magistrature*, especially in relation to the appointments of the prosecutors.

#### Resources

On 7 November 1997, the Special Rapporteur on the Independence of the Judiciary sent a communication to the Government of France regarding a 6 November 1997 demonstration, in which most of the 33,000 French lawyers participated. The event was organised in order to draw the attention of the Government to the lack of human and financial resources of the French justice system, which has resulted in a large backlog of cases in the courts.



# GUATEMALA

**G**uatemala is a republic organised under a Constitution which was amended in 1985 and 1994. The Constitution provides for the division of powers among an executive branch, the legislature and the judiciary. The President of the Republic is the Head of Government and State, and serves for a sole term of four years. The last elections were held in 1995, when Mr. Alvaro Arzu won the presidency, as well as a majority in the 80-seat unicameral Congress.

The reform of the judiciary has become the key element in the implementation of the 1996 Peace Agreements between the Government and the guerrillas, which have stalled during the last two years. By the end of 1998, Congress passed important legislation and amendments to the Constitution that, if ratified by the people, would become a sound basis for the reform of the judiciary, and a move towards independence and effectiveness in protecting human rights. The growth of the crime rate and the widespread feeling of insecurity, fostered by the inability or unwillingness of judicial agents to act, have altogether enhanced a situation of impunity in the country.

## HUMAN RIGHTS BACKGROUND

Since the signing of the 1996 peace accords, the human rights situation in Guatemala has changed dramatically. On 29 December 1996 the Agreement on a Firm and Lasting Peace was signed in Guatemala City, putting an end to 36 years of internal conflict. This Agreement was preceded by several other agreements, which provided a framework for the reconstruction of the country on the basis of respect for democracy and human rights. Among these Agreements, two are of direct importance for human rights and the functioning of the judiciary: the Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have caused the Guatemalan Population to Suffer, signed in Oslo in June 1994, and the Agreement on the Strengthening of Civilian Power and on the Role of the Armed Forces in a Democratic Society, signed in Mexico City on 19 September 1996. As a result of the implementation of these agreements, the situation of human rights in Guatemala has improved substantially in comparison with previous years, but further progress has been hampered by the persistence of human rights violations and the inability of the judiciary to adequately deal with them.

The political and social situation in Guatemala is the origin of many of the conflicts. Many of these conflicts derive from the incomplete or insufficient implementation of agreements relating to land and labour reforms.

During the period under report Guatemala has continued to be the focus of international concern and support. The United Nations Mission for

Guatemala (MINUGUA) remains in the country, with its mandate extended until the year 2000. The Inter-American system of protection of human rights has focused its attention on Guatemala as well, mainly as a result of serious violations of the Inter-American Convention of Human Rights in the context of the application of the death penalty in the country (*see below*). The Inter-American Commission of Human Rights visited the country in August 1998, and will publish its report in June 1999. In May 1998 the UN Committee against Torture examined Guatemala's report. Among the factors hampering the implementation of the Convention on Torture, the committee pointed out "serious quantitative and qualitative insufficiencies, in the judicial organ, the Public Prosecutor and the police" and "frequent cases of intimidation to judges, prosecutors, witnesses, victims and their relatives".

#### THE COMMISSION FOR HISTORICAL CLARIFICATION AND IMPUNITY

In December 1996, a joint amnesty was envisaged as part of the Peace Accords. It was consequently enacted as the Law on National Reconciliation (*see Attacks on Justice 1996*). The law has reportedly been applied narrowly, without broad coverage of common crimes committed for non-political purposes. However, it has also been reported that due to a generalised climate of impunity that makes prosecution of human rights violations difficult, there is not even the need to appeal for exemption through the amnesty law.

The Commission of Historical Clarification (CEH, or *Comisión de Esclarecimiento Histórico*), established under the 1996 peace accords, completed its work by the end of 1998. Its report, *Guatemala, Memory of Silence*, was published in February 1999. In this report, the CEH details a series of human rights violations and establishes general responsibilities. Unfortunately, the Government has accepted neither the report nor its conclusions. The findings of the CEH were preceded by those of the report *Recovery of Historical Memory* from the Archbishop's Office for Human Rights. Bishop Gerardi, the head of the Office, was murdered two days after he publicly presented the report in April 1998.

During the time of investigation, the CEH faced significant obstacles concerning access to evidence and documents in the hands of the military. The CEH requested many times that certain documents be handed over by military authorities but received a negative response, and the argument that the requested documents were "state secrets", or classified as compromising state security.

The same problems hamper the ability of prosecutors and private attorneys to have access to the evidence necessary to successfully pursue a case. This is so in spite of Article 30 of the Constitution which declares the right of every person to have access to all documents produced by the administration. In any case, it is argued that the decision on the secret character of any document should be taken by a judge, and not by the military itself.

Furthermore, in many other cases evidence has been tampered with by state authorities, or the police and other auxiliary bodies have shown reluctance to take action or to collaborate with the work of judges and prosecutors. Judges and prosecutors have also shown reluctance to exercise their legal powers to investigate, prosecute and try, due to numerous threats and intimidation from inside and outside the judiciary. In addition, credible reports pointed out that the clandestine security apparatus which existed during the time of major internal armed conflict has not been deactivated and constitutes a major obstacle to ending impunity in the country.

The case of Myrna Mack illustrates the difficulty of the Guatemalan judiciary in impartially and effectively dealing with past and present human rights violations. Myrna Mack was an anthropologist assassinated in 1990, allegedly by military agents. It was many years before an indictment of the suspects was issued. The reasons for the delay include the fact that the case was successively dealt with by different courts, evidence held by the military was denied, purportedly because it constituted "state secrets", and the main witnesses were threatened and fled the country or were assassinated. In June 1998, the three high-ranking officials accused of being the minds behind Mack's murder were indicted by the prosecutor; the trial is due to be held in 1999.

Another illustrative case is that of the 1995 massacre at the Xaman ranch. Again in this case the evidence was retained or intentionally lost or altered by the military. In October 1998 the prosecutor resigned due to threats received and subsequently left the country. Judges and attorneys were also subject to threats.

This situation, together with the perceived growth of common criminality, has prevented the various judicial institutions from providing institutional protection to the citizens. This in turn has furthered the real or perceived feeling of insecurity among the population, and prompted individuals to take the law into their own hands. Frequent reports of lynching of criminal suspects demonstrate the popular distrust of the judiciary and auxiliary bodies such as the police, which have continually failed to act.

Due to threats and intimidation (*see below*), judges and prosecutors avoid dealing with the most serious cases of human rights violations. Additionally, old or inadequate laws, boycotts from parties to the proceedings, endless preliminary or ancillary questions, and challenges to jurisdiction, judges or prosecutors, result in lengthy trials. The 1985 Law of Amparo, Habeas Corpus and Unconstitutionality makes available to the parties a recourse that is supposedly to be used solely on an exceptional basis but is now routinely invoked.

## THE JUDICIARY

### STRUCTURE

The judicial organ (*organismo judicial*) is composed of the court system and the Office of the Public Prosecutor (*Ministerio Público*) as an auxiliary body. The court system consists of the Supreme Court, appellate high courts and lower courts. There exist also specialised courts for labour and juvenile-related matters, as well as a Constitutional Court.

Article 203 of the Constitution provides for the independence and exclusivity of the judicial function. Nevertheless, the organisation of the judiciary in Guatemala is characterised by a concentration of different powers in the Supreme Court, and its dependence on the political power.

The Office of the Public Prosecutor is in charge of investigation and prosecution of offences. Its head, the Prosecutor-General, is appointed by the President of the Republic for a period of five years.

### APPOINTMENT PROCEDURE

The Justices of the Supreme Court are appointed by Congress from a list submitted by a plural commission (*see Attacks on Justice 1996*). Congress also appoints the judges of the Appeal Courts (Articles 214 and 217 of Constitution). Supreme Court Justices serve a period of six years whereas other judges serve for a renewable period of five years.

All judges are entitled to an impeachment process as a prior step before facing criminal charges in a regular court. As for removal, the Justices of the Supreme Court are to be impeached in Congress, while lower court judges are to be impeached before the Supreme Court. Disciplinary sanctions are applied by the Supreme Court upon a recommendation by the supervising body.

### ADMINISTRATION AND RESOURCES

The Supreme Court appoints the administrative and auxiliary personnel. It is also in charge of disciplining and sanctioning judges and administrative personnel (Article 54.d Law of the Judicial Organ). The president of the Supreme Court administers the judiciary's budget, (Article 55.e), and performs the task of supervising the tribunals, (Article 56), with very broad powers to investigate and make recommendations.

### STRENGTHENING DEMOCRACY AND THE REFORM OF THE JUDICIARY

The Agreement on Strengthening of Civilian Power provided for wide-ranging reforms in order to promote human rights, among them the reform

of the judiciary and other agents in charge of protecting human rights. In March 1997 a Commission on the Strengthening of the Justice System was set up, with the task of preparing a set of recommendations to carry out the reform of the judiciary. The Commission, whose mandate was originally six months, had issued its final report by the middle of 1998. This report addressed the causes for the lack of independence of the judiciary, and advanced a series of recommendations for modernisation of the judiciary, in addition to constitutional amendments necessary to support its reform.

While the Commission on the Strengthening of the Justice System was still in function, the Government presented to Congress its own proposals for legislative and constitutional amendments. A multi-party parliamentary commission then discussed the government proposals and accepted opinions from civilian groups. In October 1998 Congress approved a set of constitutional reforms related to the judiciary that have yet to be ratified in a popular referendum.

The following are the most significant amendments to the Constitution approved by Congress:

- The powers vested in the Supreme Court have been altered. The new rules establish a separation of jurisdictional functions from administrative ones by means of the creation of an administrative chamber within the Supreme Court, composed of three judges and assistants. The creation of an independent Council of the Judicial Career (*Consejo de la Carrera Judicial*) is also envisaged by the reform. The future law setting out its functions will spell out requirements for candidates for the judiciary and criteria for promotion and discipline.
- The composition of the Supreme Court and the manner of electing its members have been modified. The number of Justices of the Supreme Court has been raised to 15, and two of them will be replaced every two years.
- The concept of "judicial career" already existing in Article 209 of the Constitution has been further developed. The new Article sets out the basic principles upon which the law of the judicial career will be elaborated.

This amendment purports to reduce the work of the Supreme Court, allowing the judges to give priority to their jurisdictional tasks rather than to their administrative and disciplinary ones. The reforms are also aimed at enhancing the professionalism and efficiency of the judiciary.

However, by the end of 1998 there was no proposal in the Parliament for a law on judicial career.

The Agreement on Strengthening of Civilian Power provides also for the reform and strengthening of the Office of the Prosecutor. Significant efforts were made to improve professional skills among public prosecutors in 1997

and 1998, but the main problems still remain unaddressed. The Office of the Public Prosecutor lacks the necessary resources throughout the country. Most of the resources tend to be concentrated in the capital city. The causes of the prosecutor's ineffectiveness have been attributed mainly to the lack of adequate training and the absence of a clear criminal policy with clear priorities and methods.

Additionally, the Public Prosecutor's office and the national police do not adequately co-operate with each other. The prosecutor is in charge of the investigation and leads police activity in that regard. Nevertheless, the police reportedly often act without notifying the prosecutor or without his presence, negatively affecting the investigation. The prosecution is then ineffective, since much of the evidence has not been collected in full compliance with legal standards. For this to change, collaboration between prosecutors and police should be enhanced, adequate training should be provided, and police investigations should conform to prosecutorial standards.

Finally, the Agreements provided also for amendments of laws and the Constitution so that the rights of indigenous peoples to use their own language and customary law be respected. Although substantial progress has been made in this regard, much remains to be done. The Public Defender has been created and the Code of Criminal Procedure has been amended, allowing community justices of the peace to take into account Mayan customary law when settling cases involving Mayan people.

As for the lack of a coherent and co-ordinated criminal policy, in September 1997 an agreement was signed by the Attorney General, the President of the Supreme Court and the Minister of the Interior, (*Ministerio de Gobernación*), creating a co-ordinating organ for the Justice Branch. This body elaborated on a document on criminal policy. Although this document was presented publicly, it has not been passed into law and therefore lacks any legal force, with the result that, by the end of 1998, the different institutions related to the judiciary still do not share a set of common guidelines.

#### APPLICATION OF THE DEATH PENALTY WITHOUT DUE PROCESS OF LAW

In 1995, Decree 14-95 extended the death penalty to cases of kidnapping not resulting in death of the victim (Article 201 of Criminal Code). This extension constitutes a breach of Guatemala's obligations under the American Convention of Human Rights, which prohibits the extension of capital punishment to cases to which it was not applicable at the moment of ratification of the Convention.

By the end of 1998, 35 individuals had been sentenced to death. Of these, 21 were convicted under the amended provision in the Criminal Code extending the penalty to cases other than those existing at the time of Guatemala's accession to the American Convention. Contradictory jurisprudence exists with regard to this issue. Some courts have sentenced persons

to death applying the amended provisions, while other courts have acquitted the accused on the grounds that the amendment is not applicable because of the prohibition in the American Convention.

Most of the cases involving the death penalty presented serious procedural problems. The case of Manuel Coronado presents an example of the application of the death penalty in a manner that violates the Convention, along with other serious procedural flaws. Manuel Martínez Coronado was executed on 10 February 1998 while the Inter-American Court of Human Rights was still considering issuing precautionary measures upon the request of the Inter-American Commission. The precautionary measures were to entail the postponement of the execution until the Court decided on the case. The Guatemalan Supreme Court considered that the Inter-American Court did not have jurisdiction on the issue and allowed the execution to proceed. The case had been brought to the Inter-American Court because of serious procedural deficiencies. This is not the only case in which a measure issued by the Inter-American bodies was not respected.

In the midst of the debate about the death penalty, some groups initiated a campaign to annul Guatemala's acceptance of the compulsory jurisdiction of the Inter-American Court. After ratifying the Convention, Guatemala accepted the compulsory jurisdiction of the court by an executive decree. Currently there is a petition to declare this executive decree unconstitutional on the grounds of non-compliance with internal constitutional requirements, thus declaring null and void Guatemala's acceptance of the jurisdiction of the Inter-American Court. At the end of 1998 the case was still pending before the constitutional court.

#### INTIMIDATION AND THREATS TO JUDGES, PROSECUTORS AND WITNESSES

The harassment of judges and prosecutors has become one of most common practices affecting the judicial system in Guatemala. It is also one of the main causes for its ineffectiveness, together with widespread corruption.

By the end of 1996 Congress passed a Law of Protection of Procedural Subjects and other persons linked to the criminal justice system (Decree 70-96). The purpose of this law is to provide protection to judges, prosecutors, defence attorneys, victims and witnesses. The law entered into force in January 1997 under the monitoring and responsibility of the Office of the Public Prosecutor. However, experience has shown that the implementation of this law suffers from serious shortcomings. First, the law is restricted to providing bodyguards to threatened individuals. Second, the corps of bodyguards or police include former members of the civil defence patrols or other paramilitary groups, constituting a major threat rather than protection to persons under their care. Third, the resources available have been insufficient so far to meet the basic needs of such a mechanism.

## CASES

**Iris Jazmín Barrios Aguilar** and **Morelio Ríos** {judges}: The two judges received death threats by phone. They were part of the bench that convicted two ex-functionaries of the Government for the assassination of the student Mario Alioto. They reported the death threats on 17 November 1997.

**Silvia Jerez Romero** {prosecutor}: She was shot dead while driving her car on 20 May 1998. Justice Jerez Romero was dealing with several high-profile cases of kidnapping, killings, and drug trafficking. Those presumed responsible for her murder were arrested some days later but they managed to flee. Furthermore, the main witness to her murder was killed afterwards in his workplace.

**Gustavo de León Rodas** {lawyer}: Lawyer León was working on children's rights for Casa Alianza, a human rights NGO based in Guatemala City, when he was threatened by the ex-Military Commissioner Carlos Morales Sosa. He received the threats on 22 January 1997, the day the courts convicted Morales Sosa for the murder of a street youth in 1993. Lawyer León had been instrumental in the conviction of Morales Sosa, in his capacity as legal counsel for the victim's relatives; he was told by Morales to face the consequences. During the trial itself, some witnesses for the prosecution received threats, and were offered money as a bribe, "or else". Lawyer León has often been subjected to threats for his work as a lawyer, and fears for his security and physical safety.

**Miriam Maza Tujillo** {judge in a first-level court in the Department of Quiché}: A grenade was thrown into her office on 10 February 1998; the police intervened, evacuating the building and deactivating the explosive device. Judge Maza was dealing with cases involving members of paramilitary groups accused of serious human rights violations. The attack against Judge Maza's office prompted a mobilisation of the Judges and Magistrates Association in her support, denouncing the continued threats and harassment against magistrates in the country. Judge Maza had also received threats to withdraw from the cases she was dealing with or otherwise her family would face the consequences. The authorities have not yet acted upon these events.

**Henry Monroy** {judge in a first-level criminal court}: He resigned his post on 24 March 1998, allegedly due to harassment and threats he had received during the past year. He was the judge for the case of anthropologist Myrna Mack's murder in 1990, and he ordered the criminal proceedings to start in January. The threats started immediately thereafter. Later, in February, he took up the case of the murder of Bishop Gerardi for investigations and the pressure on him augmented.

Judge Monroy denounced pressures from the secretariat of the Supreme Court and also from the secretariat of the Strategic Analysis



Presidential Committee not to open investigations into the murder of Bishop Gerardi.

**Ronald Ochaeta** {lawyer}: Mr. Ochaeta is Director of Guatemala's Archbishop's Human Rights Office based in Guatemala City, and works nation-wide. He has received frequent threats for his work as a human rights defender during the last few years, but during 1998, the harassment against him increased due to his demands for investigations into the assassination of Bishop Gerardi in April 1998. Lawyer Ochaeta was defamed in the press and also received telephone threats.

**Victor Salguero** {judge}: He resigned on 29 September 1997 after receiving death threats. Judge Salguero was dealing with cases of drug-trafficking, and it is believed that the threats come from drug-traffickers under investigation. The Supreme Court requested protective measures for Judge Salguero and other judges dealing with sensitive cases.

**Maria Eugenia Villaseñor** {judge in an Appeals Court}: She was transferred to another post in the department of Sacatepequez after writing a book criticising the judiciary's handling of a case. Judge Villaseñor is known for her work to combat impunity and has often received threats because of it.

# INDIA

**T**he Republic of India is a federal state with 25 states, seven union territories and 439 administrative districts. It has both a strong central and local government. Executive power of the State of India is vested in the President (Head of State), Prime Minister (Head of Government) and the Council of Ministers (Cabinet). President R.K Narayanan, was elected by an electoral college made up of members of the Parliament and members of the state assemblies.

The duties of the President are largely ceremonial. In recent years, however, the President has played a pivotal role in selecting Prime Ministers and in requiring the Cabinet to submit to confidence motions. Furthermore, he has used his power flowing from a 1978 Constitutional amendment to refer back Cabinet decisions on a once only basis. He has exercised this referral power twice in 1997 and 1998 to prevent the imposition of emergency rule (President's Rule) on certain States of the union.

The President and the Vice-President are elected indirectly for five year terms by a special electoral college. Real national executive power is centred in the Council of Ministers, led by the Prime Minister. The President appoints the Prime Minister, who is designated by legislators of the political party or the coalition commanding a parliamentary majority. The President then appoints other ministers on the advice of the Prime Minister.

India's bicameral Parliament consists of the *Rajya Sabha* (Council of States) and the *Lok Sabha* (House of People). The Council of Ministers is responsible to the *Lok Sabha*. At the state level the legislatures are either bicameral or unicameral. The legislatures of the states and union territories elect 233 members to the *Rajya Sabha*, and the President appoints another 12. The elected members of the *Rajya Sabha* serve six year terms, with one-third of the members up for election every two years. The *Lok Sabha* consists of 545 members, 543 of whom are directly elected for five-year terms. The other two members are appointed.

Elections for the lower house of the legislature, *Lok Sabha*, took place in four phases from 16 February - 7 March 1998. During the campaign period and also during the elections themselves many people were injured and killed by bomb attacks. None of the parties were able to win a strong majority in the *Lok Sabha*, and eventually Atal Behari Vajpayee of the Bharatiya Janata Party (BJP) was appointed as Prime Minister of a coalition government on 19 March. In the following months, the Government suffered from corruption allegations which very quickly led to the dismissal and resignation of two ministers in April.

Also in April, elections for the state legislature took place in several states, new governors were appointed and Soli Sorabjee was appointed as the new Attorney-General.

A series of nuclear tests by both India and Pakistan in May 1998 worsened relations between the two countries. The detonation of the bombs caused both countries to receive harsh criticism and condemnation by the UN Security Council. International pressure led to the start of talks between the Prime Ministers of India and Pakistan in July.

Ethnic violence claimed many victims in Kashmir and Assam in the last months of 1998. In October and November, Pakistan and India held talks on the future of Kashmir and other common problems such as drug trafficking and economic development.

The fragile coalition government was threatened several times with collapse over disputes such as the water-sharing plan that several states conducted and which angered politicians from other states. The draft Women's Reservation Bill, which reserves one-third of the seats in Parliament for women also created severe tensions.

A National Security Council (NSC) was created in November to deal with security issues of the country. The secretary of the Prime Minister was appointed as National Security Adviser. The NSC includes several members of the Cabinet and the army.

### CORRUPTION SCANDALS

Some serious scandals have affected the political system in India. In February 1997 allegations of corruption involving a contract with the Swedish arms manufacturer Bofors were investigated. Officials of the Central Bureau of Investigation (CBI) named five individuals, among them Octavio Quattrocchi, an Italian businessman and a close associate of the assassinated Prime Minister Rajiv Gandhi. The report submitted to the Government in April 1997 named the then Prime Minister Rajiv Gandhi as one of the main conspirators in the scandal. In addition, the legacy of the Congress Party was very damaged by the involvement of former Prime Minister Narsinha Rao in a corruption scandal.

In April the new government faced its first crisis when CBI announced it would prosecute Lalu Prasad Yadav, president of the Janata Dal Party (JD) and Chief Minister of Bihar. In June, Mr. Yadav was charged with several accounts of conspiracy in an animal food scandal. The CBI said that it had charged Yadav and four other politicians in relation to misappropriation of funds ranging up to Rs 9.5 billion over some 20 years from a series of Bihar schemes designed to provide subsidised animal food.

In July, Mr. Yadav gave himself up and was arrested. This provoked protests in Bihar, one of the country's poorest states, which has a reputation for lawlessness and caste divisions. Mr. Yadav resigned as Chief Minister of Bihar and named his wife as his successor. His wife then won a vote of confidence in the state assembly and named 61 new ministers to join the

existing 14-member state Cabinet. However, Mr. Yadav was released from prison by the Patna High Court in December after the Central Bureau of Investigation (CBI) failed to prove their case.

## HUMAN RIGHTS BACKGROUND

Severe human rights violations continue to take place in Jammu and Kashmir, Punjab, Andhra Pradesh and Manipur and emerge from religious and ethnic conflicts.

During the early 1980s, the Government implemented several special laws intended to help law enforcement authorities fight against insurgency. They are the preventive detention provisions which are still in force in national legislation, including the National Security Act, and state-specific legislation, including the Jammu and Kashmir Public Safety Act and the Tamil Nadu Goondas Act.

The Terrorist and Disruptive Activities (Prevention) Act, (TADA), lapsed in 1995, and the Criminal Law Amendment Bill, proposed in 1995 as a replacement to it, was not yet enacted; therefore, hundreds of persons remained in detention under the TADA.

In February 1996, the Supreme Court eased bail guidelines for persons accused under the TADA, taking into account the large backlog of cases in special TADA courts. The TADA courts use restrictive procedures; for example defence counsel is not permitted to see witnesses for the prosecution, who are kept behind screens while testifying in court.

Other special legislation that remained in force includes the Armed Forces (Special Powers) Act which gives the security forces wide powers to use arms with virtual impunity and the Disturbed Areas Act. Judicial review of these statutes have been pending in the Supreme Court of India since 1980.

The United Nations (UN) Working Group on Enforced or Involuntary Disappearances in its report to the 1998 session of the United Nations Commission on Human Rights reported on 28 new cases of disappearances and the 272 pending cases, and expressed its concern that new cases continue to be reported while few of the pending cases are resolved. Many of the reported cases occur in Punjab and Kashmir. The Working Group observed that the emergency legislation in the States of Punjab and Jammu and Kashmir "facilitates enforced disappearances and other human rights violations" due to extensive periods of administrative detention.

The UN Special Rapporteur on Summary or Arbitrary Executions in his report to the 1998 session of the UN Commission on Human Rights referred to the existence of a pattern of killings in Manipur and noted that

Civilians, including women and children, as well as suspected members of armed opposition groups are reportedly killed by members of the armed forces, many of them allegedly deliberately and arbitrarily. The Armed Forces (Special Powers) Act of 1958 reportedly gives security forces widespread powers to shoot to kill and protects them from prosecution for any acts carried out under its provisions. The situation is further aggravated by the restrictions on access to the region by the Government. The result of this policy is a climate in which security forces are able to use excessive force with impunity.

Due to the persistent allegations of deaths in custody, excessive use of force, impunity and failure to take preventive measures, the Special Rapporteur has attempted to visit India since 1993; his request has been persistently denied.

The UN Special Rapporteur on Torture sent several urgent appeals to the Government expressing his concern about reports from Punjab regarding the widespread use of torture by the police.

The continuing concern expressed over the years by the Special Rapporteur about the extent and lethal nature of torture allegedly inflicted by the law enforcement authorities remains undiminished. He notes the concern expressed by the Human Rights Committee "about the incidence of custodial death, rape and torture" in the country (A/52(40), para. 438) and again notes his outstanding request for an invitation to visit the country, non-compliance with which was also a matter of concern for the Committee.

The National Human Rights Commission (NHRC) was established in 1993 under the Protection of Human Rights Act 1993 to monitor and investigate human rights violations, promote the protection of human rights and advise the Government on human rights issues. By the same Act, State Human Rights Commissions were established to do the same work at the state level. Four years later, the Jammu and Kashmir Protection of Human Rights Act 1997 created the Jammu and Kashmir Human Rights Commission since it was felt there was a need to deal specifically with the grave problems in that region.

The two major weak spots in the mandate of the NHRC are the lack of legal authority for the NHRC to demand full co-operation from the authorities and the lack of remedy when there is no co-operation; and that the NHRC lacks the power to investigate the armed forces when are suspected to be involved in human rights violations. The Commission can only ask for a report from the Government. A Committee, headed by Chief Justice Ahmadiya, is currently re-examining the need for legislative and other amendments to the legislation constituting the NHRC.

After consideration of the third periodic report of India, the UN Human Rights Committee, the monitoring body for the International Covenant on Civil and Political Rights made the following concluding observations:

The Human Rights Committee regrets that the National Human Rights Commission is prevented by clause 19 of the Protection of Human Rights Act from investigating directly complaints of human rights violations against the armed forces, but must request a report from the central Government.

The Committee expressed concern about the human rights violations by security and armed forces as well as paramilitary and insurgent groups acting under special legislation, such as the Armed Forces (Special Powers) Act, the Public Safety Act and the National Security Act. The Committee also noted with concern that, no action is taken against the security and armed forces with the sanction of the Government.

Another area of concern is the fact that many people continue to be held in detention under the lapsed Terrorist and Disruptive Activities (Prevention) Act. Early trials or releases are required in this respect.

#### IMPUNITY

Impunity remains a serious problem in Jammu and Kashmir and in the north-eastern states where security forces have committed serious human rights violations, including extra-judicial killings, disappearances, and torture. In some districts of Andhra Pradesh, where the Disturbed Areas Act has been in force for more than a year, the police have extraordinary powers for arrest and detention, and operate with practical impunity.

During the period 1 January 1990 - 30 June 1997, only ten members of the security forces were tried and sentenced to 10 or more years of imprisonment for violations of human rights in Jammu and Kashmir and Punjab. An additional fourteen received sentences of between one and 10 years, and 73 received sentences of less than one year. During the same period, 42 members of the security forces were dismissed or forced to retire and 20 were reduced in rank or seniority, following conviction on charges of human rights violations. Therefore the vast majority of violations by security forces have gone and continue to be uninvestigated and unpunished.

According to the United Nations Special Rapporteur on Torture, torture victims or their relatives have reportedly had difficulty in filing complaints because the police in Jammu and Kashmir were issued instructions not to register a case without permission from higher authorities. In addition, Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act provides that unless approval is obtained from the central Government,

no prosecution, suit, or other legal proceeding shall be instituted...against any person in respect of anything done or purported to be done in exercise of the powers of the Act.

While considering the third periodic report of India, the United Nations Human Rights Committee expressed concern about this procedure. The Committee noted that "this contributed to a climate of impunity and deprives people of remedies to which they may be entitled". In addition, the Committee highlighted the climate of impunity created by the disregard of court orders, in particular for *habeas corpus* by the police and security forces.

In several cases complaints have been lodged, in what are known as First Information reports (FIRs), with police and forwarded to judicial magistrates for investigation to determine whether a trial can start. Advocates representing the security forces have then filed review petitions challenging the rights of magistrates to investigate offences alleged to have been perpetrated by members of the security forces, on the grounds that they do not have the jurisdiction to hear such cases. This has had the effect of delaying the legal process.

As mentioned above, the NHRC and the Jammu and Kashmir Human Rights Commission are not able to investigate abuses and violations committed by the members of the paramilitary and armed forces.

## THE JUDICIARY

India's independent judicial system began under British rule, and its concepts and procedures resemble those of Anglo-Saxon countries. On 15 August 1947, India achieved independence from the British rule and its Constitution was adopted on 26 January 1950.

The judiciary occupies a central position in the Constitution. It is viewed not only as an institution for resolving disputes between parties but as the guardian of the Constitution and a medium to bring about the social revolution which the framers of the Indian Constitution had envisaged. Thus, Article 32 which confers extraordinary jurisdiction on the Supreme Court to issue any appropriate decree for the enforcement of any of the "Fundamental Rights" is itself a fundamental right, being itself placed in the Chapter "Fundamental Rights of the Constitution". The Constitution empowers the High Courts as well as the Supreme Court to review legislative as well as executive actions.

## COURT STRUCTURE

The judicial system is vertically structured with the Supreme Court of India at the top, high courts at the state level and subordinate judiciary at the district level.

The Supreme Court of India, which sits in the capital New Delhi, is the highest court of civil and criminal appeal and is also vested with original and advisory jurisdiction. It consists of a Chief Justice and 25 other Justices, all appointed by the President in consultation with the Chief Justice. It has original jurisdiction in any dispute between the Government of India and one or more states or between states in a dispute which involves any question (whether of law or fact) on which the existence or the extent of a legal right depends.

The Supreme Court has appellate jurisdiction in appeals from the High Courts of any judgement, decree or final order whether in civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of India's Constitution.

The High Court established for each state or groups of states, in relation to that territory constitutes the highest court of civil and criminal appeal, review and revision. Every High Court is a court of record and has all the powers of such a court. Under Article 216 of the Constitution, the President is the authority for appointing the Chief Justice and judges of all High Courts.

The appointment of judges to the superior judiciary is done by the President in consultation with a Collegium of the Chief Justice and his senior colleagues whose recommendation is virtually binding on the Executive. In October 1998, the Supreme Court of India, in the case *Special Reference No. 1 of 1998 (JT 1998 (5) S.C.*, reviewed its earlier 1982 and 1993 decisions on the matter. The case, known as *Gupta v. Union of India* (also known as the First Judges' case), decided in 1982, was seen as seriously imperilling the credibility of the judicial appointment process, as it held that the President, though obliged to consult with the Chief Justice in the course of the appointments process, was under no obligation to follow his advice. However, in a 1993 decision known as the Second Judges' case, a nine bench panel of the Supreme Court overruled important elements of the earlier judgement and affirmed the centrality of the Chief Justice to the appointment process. The Court held that the opinion of the Chief Justice has primacy over the opinion of the Executive. The October 1998 decision went further. It stated *inter alia* that the expression 'consultation with the Chief Justice of India' required consultation with a plurality of judges in the formation of the opinion of the Chief Justice. The Court said that the individual opinion of the Chief Justice does not constitute 'consultation' within the meaning of the Constitution.



The power to appoint or promote to the post of a District Judge vests in the Governor of the State, to be exercised in consultation with the Chief Justice of the High Court exercising jurisdiction in the territory. In such appointments there is an element of favouritism or arbitrariness that may not be consistent with the independence of the judiciary, as is also the case regarding the appointment of temporary or additional judges.

According to Article 222 of the Constitution, the President may, after consultation with the Chief Justice of India, transfer a judge from one High Court to any other High Court. When the office of Chief Justice of a High Court is vacant or when any such Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such of the other judges of the High Court as the President may appoint for this purpose.

The power to recruit and appoint persons other than district judges to the judicial service of a State vests in the Governor, to be exercised in accordance with the rules made by him as Governor, after consultation with the State Public Service Commission and with the High Court, exercising jurisdiction in relation to such a state.

The object of these provisions of the Constitution with regard to the appointment of district judges is to ensure the independence of the judiciary from the lowest to the highest level. The same is sought to be achieved by Article 235 of the Constitution which vests the entire administrative control over the subordinate courts and judges to the High Court.

#### STATE OF THE JUDICIARY

The courts in India are heavily overloaded with cases. The problem of delay has damaged the public's confidence in the capacity of the courts to redress their grievances and to grant adequate and timely relief. The result of the overloaded system has been the detention of persons awaiting trial for periods longer than the sentences they would receive if convicted. Prisoners may be held for months or even for years before obtaining a trial date. The Government acknowledged that 73% of all prisoners held in 1997 were so-called "under-trials", i.e. unconvicted remand prisoners awaiting the start or the conclusion of their trials. In March 1997, the Government disclosed that more than 42,000 people were detained pending their trial under the Terrorist and Disruptive Activities (Prevention) Act (TADA). However, following a Supreme Court directive to release various categories of detainees on bail, the Government revised the figure to 2,000 in December 1997.

The Government announced that it would take reform measures in July 1997 such as sanctioning plea bargaining, setting time limits for court proceedings, promoting alternative dispute resolution methods and establishing

independent prosecution agencies to help clear the backlog of over 30 million cases.

In the northern state of Jammu and Kashmir, the judicial system rarely functions and has been disrupted due to threats by militants against judges, witnesses, and their family members, because of the tolerance by the Government towards anti-militant actions, and the frequent refusal of security forces to obey court orders. Courts in Jammu and Kashmir are either not willing to hear cases involving terrorist crimes or fail to act expeditiously on *habeas corpus* cases. As a result, there have been no convictions of alleged terrorists in Jammu and Kashmir since 1994, even though some militants have been in detention for years. Jammu and Kashmir courts currently have a backlog of more than 600 pending cases for *habeas corpus* filed by family members of those who are missing.

## CASES

**Jalil Andrabi** {lawyer and chairman of the Kashmir Commission of Jurists}: In March 1997 he was kidnapped and murdered. His body was found in the Jhelum river, near Srinagar, in Jammu and Kashmir. Three weeks earlier he had been detained by members of the Rashtriya Rifles, who were accompanied by unidentified armed men. Investigations into his abduction and death continued at the High Court in Jammu and Kashmir. At a High Court hearing on 10 April 1997, the Special Investigating Team, made up of police officials, submitted a report in which they claimed that a major from the 103rd Unit of the territorial army was responsible for the abduction and murder of Jalil Andrabi. It also reportedly indicated that several soldiers under his command were involved. The report of the Special Investigating Team was not made public.

The Special Rapporteur on the Independence of Judges and Lawyers requested the Government of India on 21 February 1997, and again on 29 May 1997, to advise him of the status of the investigations concerning the kidnapping and killing of Mr. Andrabi.

**Bashir Ahmad Butt** {lawyer and vice-president of the Jammu and Kashmir Liberation Front (JKLF)}: He was taken hostage by members of the Indian security forces in an attempt to force the surrender of his brother-in-law Ghulam Rasool Dar. He was threatened with death and severely beaten before he was taken away in the early hours of 4 March 1997. He was released from custody by the Border Security Forces (BSF) on 5 March 1997.

**Max Fhajang** {Chief Judicial Magistrate of Tamenglong District, Manipur}: He was arrested on 6 May 1998. The Gauhati High Court directed Mr. Y.I. Singh, a retired judge, to inquire into the incident. His report

established that the arrest was illegal and that it amounted to obstruction of the victim's court duties. It was also established that Mr. Fhajang was tortured by several means, including electric shock. No legal action was taken against the security personnel involved.

**Jaswant Singh Khalra** {lawyer}: In August 1997, the Central Bureau of Investigation submitted an interim report regarding allegations that police in Punjab had extra-judicially executed hundreds of young men and disposed of their bodies. The report found that at one site alone 934 unidentified bodies - presumed by human rights groups to be those of "disappeared" young men - had been cremated between 1990 and 1995. The Bureau completed its inquiry into the abduction of Jaswant Singh Khalra, a lawyer and human rights activist from Punjab who "disappeared" after filing a petition in the Supreme Court about the cremation grounds. The inquiry concluded that he had been taken by the police; his current whereabouts are unknown.

**T. Puroshotham** {lawyer and joint secretary of the Andhra Pradesh Civil Liberties Committee}: On 27 May 1997, he was attacked and beaten by men in plain-clothes. The Green Tigers group claimed responsibility for this attack a few days later. It has been alleged that the Andhra police have contributed to the establishment of the Green Tigers to counter activities of human rights defenders.

**Daljit Singh Rajput, Rajinder Singh Neeta and Jaspal Singh Dhillon** {lawyers}: They were arrested respectively on 27 July 1998, 12 June 1998 and 23 July 1998 and charged with planning a conspiracy to free several prisoners at Buraill jail, who were charged with assassinating the former Chief Minister of Punjab in 1995. It is widely believed that the lawyers were arrested because of their activities in support of human rights.

**W.A. Shishak** {judge of the Gauhati High Court}: The Special Rapporteur on the Independence of Judges and Lawyers expressed his concern, in his report to the 1998 session of the UN Human Rights Commission, about the assault against Mr. Shishak, whose house was raided allegedly because of his activities in defence of human rights in Manipur.

The Manipur Bar Association condemned the excesses of the Army and called it an act of "impairing the dignity and administration of justice". In spite of the demand of the Bar Association for judicial inquiry into the incident, no action has been taken against the army personnel involved.

**Amrik Singh and Harshinder Singh** {lawyers}: They were threatened with arrest by a police inspector of the Chandigarh police station on 29 July 1998 if they continued their human rights work.

**Khaidem Mani Singh** {lawyer and vice-president of the Manipur Bar Association}: On 31 March 1997, Mr. Khaidem Sonamani Singh, a relative of the victim, alleged to be a member of the banned PLA, was sitting in Mr. Mani's house, in order to consult with him on his legal problems. A

police team arrested Mr. Sonamani at the house, and that evening, Mr. Mani and his wife were arrested on the charges of harbouring the armed opposition. A case was registered against Mr. Khaidem Sonamani, Mr. Khaidem Mani and Ms. Khaidem Ongbi Gambhini Devi. Mr. Khaidem Mani and Ms. Gambhini were released on bail on 1 April. The Government of Manipur challenged the order of the magistrate by filing a revision petition against the magistrate's order. The revision petition was rejected on 27 June 1997.

**Thokchom Ibohal Singh** {Advocate of Manipur}: On the night of 4 April 1997, at around 3 am, some soldiers entered his house. They interrogated Mr. Singh, alleging that he was a sympathiser of an underground organisation, and conducted a search in his house. Contempt of court proceedings against the perpetrators are pending in the Gauhati High Court.

On 23 September 1997 the Special Rapporteur on the Independence of Judges and Lawyers transmitted a communication to the Government concerning the harassment of Mr. Singh.

**Jasved Singh** {lawyer}: The Special Rapporteur on the Independence of Judges and Lawyers transmitted a communication to the Government of India on 29 May 1997. Mr. Singh was reportedly accused of harbouring terrorists and his home had been raided more than 100 times. Allegedly, Mr. Singh received such treatment because of his defence of suspected terrorists and his human rights work.

**Chongtham Cha Surjeet** {lawyer}: On the night of 4 July 1997, just one day before Mr. Chongtham Cha Surjeet was to leave for Geneva to attend the 60th Session of the United Nations Human Rights Committee, his house was raided by a team composed of the Indian Army and Rapid Action Police Force of the Manipur police. The house was thoroughly searched. The army and the police left the house, taking some audio and video cassettes.

# ISRAEL

The state of Israel has no written Constitution, but has a number of Basic Laws dealing with such constitutional matters as the Government, the judiciary, the Parliament (Knesset), and the army. In 1992 Israel enacted two Basic Laws related to human rights, Basic Law: Freedom of Occupation, and Basic Law: Human Dignity and Liberty. New legislation violating these laws may be invalidated by the courts. These Basic Laws define Israel as a state which is both Jewish and democratic.

The Israeli Head of State is the President. His powers are mainly ceremonial. On 4 March 1998, the Israeli unicameral legislature, the *Knesset*, re-elected Ezer Weizman as President of the State for another five year term. On 21 December 1998, the Knesset voted to hold early elections in May 1999, for both the legislature and for the post of Prime Minister, following mounting pressure on the Netanyahu right wing government.

Benjamin Netanyahu held the post of Prime Minister, the chief executive, from May 1996 until May 1999 when Ehud Barak was elected. The peace process between the Israelis and the Palestinians was hampered by many obstacles during 1997 and 1998, mainly because of the expansion of existing Jewish settlements, and the unilateral construction of new ones. In addition, Mr. Netanyahu pushed for a slower territorial hand-over than that provided for under the Oslo framework. The change of government has raised hope for a change of policies, in particular with regard to the peace process, which has been stalled under the Netanyahu government.

## HUMAN RIGHTS BACKGROUND

The most serious threats to human rights in Israel are those that are connected to the continuing conflicts between Israel and its neighbours, and the intense internal conflicts about these issues, culminating in the murder of Prime Minister Rabin in 1995.

Israeli-Lebanese borders have known military unrest since the 1970s. In the 1978 Litany operation, Israel took control over Lebanese territory; later that month, the UN Security Council passed Resolutions 425 and 426 on Lebanon, calling for Israel to unilaterally withdraw from all Lebanese territory, and establishing a UN Interim Force in Lebanon. In 1982, the Israeli forces invaded Lebanon, reaching as far as Beirut; they later withdrew to the so-called "Security Zone". Some Lebanese groups continue to attack Israeli positions in the security zone, and in Northern Israel, at times causing civilian casualties. Human rights abuses committed by the Israeli Forces, as well as the SLA, a militia trained, financed and otherwise controlled by Israel, remain a major problem. The increasing death toll of Israeli soldiers occupying southern Lebanon and west Bekaa led to growing agitation among the

Israeli public over the Israeli presence in Lebanon, and increasing public debate about the policy on Lebanon.

Israel has acknowledged that Lebanese nationals are currently held in Israeli detention centres without charge or trial, or beyond the expiration of their sentences, some for periods of up to 11 years. Israel's High Court of Justice, in violation of international humanitarian law, upheld the administrative detention of Lebanese nationals as bargaining chips in negotiations for the return of missing Israeli soldiers. A three-judge High Court panel officially acknowledged that the Lebanese detainees had committed no crime and are being held in efforts to recover four Israeli soldiers missing in action in Lebanon. This decision, strongly criticised by Israeli and international non-governmental organisations as well as the press is now pending before a larger panel of the Supreme Court.

As a result of the 1967 war, Israel occupied the Syrian Golan Heights, and later began establishing Jewish settlements in the area. The Heights were annexed to Israel in 1982, when Israel enacted a law applying its own legal and administrative systems to the Heights. On 26 January 1999 the Knesset enacted a law which provided that no agreement to relinquish Israeli presence in the Heights would be valid unless it is approved by a 61 majority in the Knesset and supported in a referendum. As a result of the 1967 war, the Israeli Government has taken control over a large part of the West Bank and Gaza, including East Jerusalem, and established a large number of settlements in those occupied territories, populating them with Jewish Israeli citizens. Settling members of the occupying force in occupied territories is in clear violation of Article 49 of the 4th Geneva Convention.

#### EXTRAJUDICIAL EXECUTIONS

Israeli secret service agents and soldiers have been responsible for extrajudicial executions, both in the Occupied Territories, and throughout the world. Following the failed assassination attempt of a *Hamas* leader in Jordan, senior Israeli officials publicly acknowledged and justified Israel's policy of extrajudicial assassinations, stating that Israel will not refrain from killing suspected "guerrilla leaders", wherever they are.

#### LEGALISING TORTURE

Israel's security forces systematically use interrogation methods, determined by the UN Committee on Human Rights to amount to torture, as a means to force detainees into confessions or press them for information. Their methods include violent shaking, kicks, slaps, prolonged sleep deprivation, exposure to extremely high or low temperatures, exposure to loud music, and tying detainees in painful positions. On the several occasions in which detainees have petitioned the Israeli High Court of Justice, the state has acknowledged and justified the use of such methods by claiming that

they are legal under Israeli and international law. Although torture is absolutely prohibited under international law, in particular the UN Torture Convention, of which Israel is a party, the Israeli High Court of Justice has effectively legalised torture by approving its use in specified individual cases. An expanded panel of nine judges of the Supreme Court is examining this issue. A statute that sought to give members of the security services an explicit authority to use such methods and to grant them immunity was proposed; however it failed to be enacted due to public pressure.

#### LEGISLATING IMPUNITY AND THE LAW DENYING PALESTINIANS COMPENSATION

In July 1997, the Israeli Government proposed a law to deny compensation to Palestinians killed or injured by Israeli soldiers during the period of occupation. This bill grants the state sweeping exemption from liability. If this law had passed, civilians negligently injured by Israeli soldiers, both in the past and in the future, would not have received compensation for medical care and rehabilitation, nor would the families of those killed have been able to sue in civil courts. This bill was not passed due to prolonged and well co-ordinated public pressure.

#### UNFAIR TRIALS

Palestinian detainees receive unfair trials in the military courts set up by Israel for the West Bank and the Gaza Strip. Convictions are invariably based on the accused's confession, which is often coerced. Most of the protections afforded by law are not extended to Palestinian prisoners, who are submitted to the jurisdiction of the military law.

#### CLOSURE OF THE OCCUPIED AREAS

Continued impediments to the movement of Palestinians between and within East Jerusalem, the West Bank and the Gaza Strip continued to be implemented by the Israeli authorities. These measures severely affect the weak Palestinian economy. During periods of closure, movement of goods, students, workers, and sometimes patients in need of urgent medical care, in and out of the closed areas is completely restricted. In addition, individuals are denied permits without explanation or the right to appeal.

#### ADMINISTRATIVE DETENTIONS

The Israeli authorities systematically employ administrative detention of Palestinians. Detainees are kept in the dark as to why they are detained and the nature of the allegations and evidence brought against them. International law requires that administrative detention be used solely as a short term, exceptional, and preventive measure, in response to a clear

danger to security, yet the Israeli authorities are going beyond these criteria in applying administrative detention. The Minister of Defence is empowered, by Israeli military orders as well as the State of Emergency Powers Law, to detain persons for up to six months, and to extend detentions indefinitely. In some cases, people have been held in administrative detention for years. In the last year, as a result of a systematic campaign by various NGOs, the number of detainees was reduced, declining from close to 800 to the present number of 200 individuals. However, the administrative detention of one person was recently extended again, bringing the period of his detention without trial to five years.

## THE JUDICIARY

Judicial independence is accepted as a central value by most of Israel's political system. Judicial authority is vested in courts and tribunals. The courts have general authority in criminal, civil, and administrative matters while other tribunals have specific authority in particular matters, and in regards to certain people, such as the religious tribunals, the labour tribunals, and the military tribunals, which operate under the auspices of the Ministry of Defence. The military tribunal in Israel is comprised of a judicial system with independent administration and its own appellate system, established by the Military Justice Law of 1955. They try soldiers for military offences committed during the period of their service, as well as civilians accused of committing military offences.

The Basic Law of the Judiciary establishes three levels of courts: the Supreme Court, district courts, and magistrate courts.

### THE MAGISTRATE COURTS

The magistrate courts sit as courts of first instance in criminal and civil matters. They have jurisdiction in criminal matters where the accused is charged with an offence punishable by up to seven years imprisonment. In civil matters, these courts have jurisdiction over the use and possession of real estate, and in matters not exceeding a million shekels; they also act as small claims courts, traffic courts, and family courts. Judgements of the magistrate courts may be appealed to the district courts.

### THE DISTRICT COURTS

The district courts sit as courts of first instance, and also, in some cases, as appellate courts on the judgements of the magistrate courts. They also hear appeals of judicial and quasi-judicial decisions of administrative tribunals and other bodies. As courts of first instance, the district courts hear cases not within the jurisdiction of any other court. In criminal matters, they



hear cases where the accused faces more than seven years imprisonment, while in civil matters, they hear cases of monetary claims of over one million shekels. The district court also has jurisdiction in other matters, such as prisoners' petitions, appeals on tax matters and arbitration.

Judgements of the district court may be appealed to the Supreme Court, either by right or by leave to appeal.

### THE SUPREME COURT

The Supreme Court is at the head of the court system and sits in Jerusalem. A ruling of the Supreme Court is binding upon every court in the country, and the head of the Supreme Court is the head of the entire judicial system. The Supreme Court sits as an appellate court as well as a High Court of Justice. As an appellate court, the Supreme Court considers cases on appeal from judgements and other decisions of the district court; it also handles prisoners' petitions, administrative detentions, and other issues. As the High Court of Justice, the Supreme Court rules as a court of first instance, mainly on matters relating to the legality of decisions of state authorities. The Supreme Court is normally constituted of a panel of three Justices, although a larger number may sit in matters involving issues of particular importance.

### APPOINTMENT AND TENURE

The power to appoint judges is given to the President of the State upon the proposal of an appointments committee, which is composed of nine members: three judges, two ministers, two members of the *Knesset*, and two representatives of the Israel Bar Association.

Judges in Israel enjoy tenure until retirement at the age of 70. It is difficult to remove a judge from office, and the official procedure for doing so has never been invoked. The Basic Law on courts, specifically prohibits interference in the conditions of work of judges.

### PALESTINIAN LAWYERS

The Israeli occupation of Palestinian land severely affects lawyers and the legal environment. Practising lawyers in the West Bank and Gaza often recount instances of lack of respect by the military, such as having to queue unnecessarily, being kept waiting for unreasonable lengths of time at police stations, and excessive delays at checkpoints.

Lawyers from Al-Haq, an ICJ affiliate, routinely visit Palestinian detainees and political prisoners in Israeli jails to check on their well-being. On one occasion, while visiting Telmond prison, and after having waited for

two hours, lawyers were requested to sign a pledge stating that they would solely discuss legal matters with the prisoners, otherwise the lawyers' visit to their client would be cut short, and charges pressed against them. The pledge enables Israeli authorities to listen to any conversation between lawyer and client. Many Israeli and Palestinian lawyers have been denied meetings with their clients for refusing to sign the pledge.

Another problem facing Palestinian lawyers is the Israeli authorities' refusal to give permits to Palestinian lawyers to go to Israel and visit their clients in Israeli jails. This has been combined with an Israeli policy of transferring detainees from the Occupied Territories to prisons in Israel. Lawyers have also reported difficulty in seeing their clients, despite receiving permits from the appropriate authorities allowing visits.

### **ISRAELI SUPREME COURT UNDER ATTACK**

In general, the courts have enjoyed a high level of respect in Israel. Scholars have commented on the fact that the courts have often been more willing to protect human rights, in issues other than those that concern the rights of Palestinians. There is a debate among those who study the Israeli court system as to whether the courts' impact on the occupation has been one of mitigation of harms or of mere legitimisation of violations. A closer look at the Israeli court decisions indicates that the courts' controversial human rights rulings do not stem from the absence of a structural independence, but from judges' identification with the state and its purposes.

Within the Jewish sector, freedom of expression is protected; this has permitted an open discussion within Israel of both general human rights concerns, as well as criticism of the state and the legal system for violations of human rights. In 1998, the Israeli Supreme Court has been under attack from Ultra-Orthodox Jews, who claim that the Court's rulings force them into conflicts with their beliefs. The Ultra-Orthodox Jews have been angered by several Supreme Court decisions, including rulings that exemption from military service for students in religious seminaries was illegal, and shopping on the Sabbath was permitted. They also strongly oppose what they perceive to be moves by the Supreme Court to end the Ultra-Orthodox monopoly on conversion to Judaism. The level of criticism became so intense that **Aharon Barak**, the President of the Supreme Court, has been under continuing personal protection for the last three years.

# JAPAN

According to its 1947 Constitution, Japan is a parliamentary democracy. Sovereignty is vested in the people, and the Constitution refers to the Emperor as the "symbol of the state". Executive power is held by the Cabinet, composed of the Prime Minister and ministers of state, which is responsible to the Diet, a bicameral Parliament holding legislative authority. The Diet is elected by universal suffrage and secret ballot and is composed of the 500 member House of Representatives and the 252 member House of Councillors. The Prime Minister must be a member of that body. The Emperor has no powers related to government, but formally appoints the Prime Minister.

The Government formed in November 1997 was a coalition led by the Liberal Democratic Party (LDP), in which the Social Democratic Party and the New Party Sakigake co-operated with the LDP from outside the Cabinet. The present Cabinet was formed by the LDP in July 1998 under Prime Minister Keizo Obuchi.

## HUMAN RIGHTS BACKGROUND

In March 1997 a law establishing a Human Rights Commission within the Justice Ministry came into effect. The Commission's five-year mandate is to develop measures to educate citizens with regard to human rights ideals, and to promote measures to ameliorate the effects of existing human rights violations.

On 28 and 29 October 1998 Japan presented its fourth periodic report to the Human Rights Committee on its implementation of the provisions of the International Covenant on Civil and Political Rights. Human rights groups in Japan, among them the Japan Federation of Bar Associations (JFBA), an ICJ affiliate, submitted an alternative report. In its concluding observations of 19 November 1998, the Human Rights Committee welcomed the enactment of the Law on the Promotion of Measures for Human Rights Protection as well as amendments to a number of laws affecting the promotion and protection of human rights.

The Committee however, expressed concern that

- Japan failed to reduce the number of crimes for which the death penalty may be applied and expressed concern about the conditions of persons held on death row;
- the pre-trial detention system is not in conformity with the Covenant, and stated that it was  
deeply concerned that the guarantees contained in Articles 9, 10 and 14 are not fully complied with in pre-trial detention in

that pre-trial detention may continue for as long as 23 days under police control and is not promptly and effectively brought under judicial control; the suspect is not entitled to bail during the 23-day period; there are no rules regulating the time and length of interrogation; there is no State-appointed counsel to advise and assist the suspect in custody; there are serious restrictions on access to defence counsel under Article 39(3) of the Code of Criminal Procedure; and the interrogation does not take place in the presence of the counsel engaged by the suspect;

- a large number of convictions in criminal trials are based on confessions. This could imply that confessions are extracted under duress. The Committee therefore strongly recommended that interrogation of suspects in police custody or substitute prison be strictly monitored, and recorded by electronic means;
- that under Japanese criminal law, the prosecution is not obliged to disclose evidence other than that which it intends to produce at trial, and that the defence has no right to ask for the disclosure of such material;
- that there is no independent authority to which complaints of ill-treatment by the police and immigration officials can be addressed for investigation and redress;
- that the recommendations issued after the consideration of the third periodic report have largely not been implemented. Many of the concerns the Committee had in 1993 still remain.

The Human Rights Committee recommended that human rights training should be made available to judges, prosecutors and administrative officers to the courts.

There continue to be reports from bar associations and human rights organisations that police physically and psychologically abused detainees to obtain confessions. It is also believed that confessions given by persons held in *daiyo kangoku* which have led to death sentences have later proved to be erroneous. The *daiyo kangoku* is the substitute prison system which is under the control of a non-investigating branch of the police. However, because of the fact that the prison is not under the control of a separate authority, the chance of abuse of the rights of detainees, especially the rights as laid down in Articles 9 and 14 of the International Covenant on Civil and Political Rights, are considerable.

The view that court processing of warrants in Japan does not conform with the provisions of the Constitution and the Code of Criminal Procedure (CCP) has long been expressed. According to the JFBA,

It has long been pointed out that courts are not carrying out their constitutional role of checking and rectifying violations of

the rights of suspects by investigative agencies, and that the system of warrants has degenerated into meaninglessness.

Japan has no provisions for *ex post facto* verification of what considerations determine the issuance of a warrant. It is regrettable that the courts resist even modest requests for information concerning their examination of warrant applications behind the appended statistics.

## THE JUDICIARY

The Constitution establishes the independence of judges in the exercise of their duties. It vests judicial power in the Supreme Court and inferior courts as established by law. The inferior courts include eight High Courts (with six additional branch courts), 50 District Courts (with 242 local branches), 50 Family Courts (also with 242 local branches) and 438 Summary Courts.

The Supreme Court has jurisdiction over appeals and those complaints specifically prescribed by the Code of Procedure. The opinion of every judge of the Supreme Court must be expressed in writing. The High Court has jurisdiction over appeals from judgements rendered by the lower courts.

### APPOINTMENT PROCEDURES

The Supreme Court consists of 15 Justices, among them the Chief Justice, who is designated by the Cabinet, and formally appointed by the Emperor. All other Supreme Court Justices are appointed by the Cabinet in an unpublicised process. It is believed that the Prime Minister and the Chief Justice together determine who will be appointed. Article 41 of the Court Organisation Law provides that Supreme Court Justices shall be appointed from among persons "of broad vision and extensive knowledge of law, who are not less than forty years of age". The law also requires that at least ten of the Supreme Court Justices have been a President of the High Court or a judge for at least ten years, or have been a judge of the Summary Court, a Public Prosecutor, a lawyer or a professor or assistant professor of Legal Science for a total of at least 20 years.

Lower court judges are appointed by the Cabinet from a list prepared by the Supreme Court. The list is generally composed of recruits who have passed the bar and who have completed two years at the Judicial Research and Training Institute. The recruits selected from the list serve as assistant judges for ten years, after which they can be appointed to full judicial positions, renewable every ten years. While it is rare for judges not to be reappointed, in the event they are not, they are effectively dismissed without any right to a hearing.

## SECURITY OF TENURE AND IMPEACHMENT

The retirement age of Supreme Court Judges is 70. As provided for in Article 79, the appointment of the judges of the Supreme Court is reviewed at the first general election of the House of Representatives after a lapse of ten years. When the majority of the voters favors the dismissal of a judge, he shall be dismissed.

The Constitution provides that judges shall be removed only by public impeachment or when the judge has been declared mentally or physically incapable of performing his duties.

No disciplinary action is to be administered against a judge by any executive organ or agency. The Constitution provides, however, that when a judge has

deviated from his duty, neglected his duty or degraded himself, he shall be subjected to disciplinary punishment by decisions as provided for elsewhere by law.

According to the Law of Impeachment of Judges enacted in November 1947 a judge is

liable to be removed from his post on being impeached and convicted for either conduct in grave contravention of official duties or grave neglect of official duties; or other misconduct seriously affecting the integrity of a judge.

The Indictment Committee of Judges consists of five members of the House of Representatives and five members of the House of Councillors and is convened by the Chairman or on request of at least five members of the Committee. The Indictment Committee investigates the request for indictment, but it may also entrust the investigation to government officials. A resolution to remove or suspend a judge requires a two-thirds majority vote of the members. The proceedings of the Committee are not open to the public.

A Court of Impeachment consisting of seven members of the House of Representatives and seven members of the House of Councillors considers the written indictments. The Court of Impeachment must notify the indicted judge upon receiving a written indictment, whereupon the indicted judge is entitled to retain a lawyer. The provisions of the laws and ordinances concerning criminal procedure will apply.

Oral proceedings are conducted in public and a written judgement is determined by a two-thirds majority of the judges participating in the hearing. A judge shall be removed upon the pronouncement of a judgement; however the position may be recovered if, after five years, a justification exists or any new evidence is found which rebuts the cause for removal.

According to the Court Organisation Law, the courts at all levels are responsible for their own administration and supervision by means of a

Judicial Assembly at each level, and the corresponding Chief Judge. The Judicial Assembly of the Supreme Court is ultimately responsible for the administration of the judiciary.

The Judicial Assembly is comprised of all the Supreme Court Justices with the Chief Justice as its Chair. The Supreme Court itself is administered by a General Secretariat; the Judicial Assembly acts through resolutions implemented by the General Secretariat of the Supreme Court. The Supreme Court General Secretariat, together with the Legal Training and Research Institute sponsors conferences and study sessions on various topics, including the interpretation of the law.

The recommendations of these conferences are compiled by the General Secretariat and distributed to the judges for application when deciding cases. It is feared that this practice allows the General Secretariat to exercise *de facto* control and influence over the Judicial Assembly and consequently, the judiciary.

Judges' remuneration is constitutionally fixed and cannot be decreased during their term of office. There is a tiered system of wages, commensurate with seniority.

## LAWYERS

The Constitution provides under Article 34 that there shall be no arrest or detention without privilege of counsel; the criminal procedures code (CCP: 40.1) guarantees the right to counsel for all suspects and accused.

However, the right to request legal counsel with government funds is guaranteed by the CCP only after indictment, even for capital cases (CCP 36, 38). Thus it could be said that in Japan, only persons able to pay lawyers' fees are guaranteed rights to counsel before indictment. Through the efforts of the bar associations, the Duty Attorney System, supported by funds from the lawyers themselves, gives free first visits with counsel. For suspects who require pre-indictment counsel but are unable to pay lawyers' fees, there is a legal aid system run by the Japan Legal Aid Foundation.

However due to, *inter alia*, the small amount of available funds, the pre-indictment counsel system was used in 1997 in only 5,489 cases. This is a very small number of cases compared to the 45,599 cases that year in which the court appointed attorneys on government funds following indictment (data from the Supreme Court General Secretariat). It is clear that for the vast majority of suspects unable to pay lawyers' fees, it is not possible to engage a lawyer before indictment.

## CASES

**Tsutomu Kobayashi** {leader of the Defence Counsel Team in the Wakayama Curry Poisoning Case}: On 25 July 1998, at a summer festival for residents of the Sonobe ward in the northern part of the city of Wakayama, arsenic was mixed into a curry stew. Four people died and 63 became ill from the poison. In late August, it was determined that a Mr. and Mrs. H., who are currently under arrest, were the culprits. They were arrested on 4 October. From late August until their arrest in October, approximately 100 journalists gathered around the suspects' house, day and night, reporting on their comings and goings and interviewing neighbours.

In early September, Mr. and Mrs. H. consulted attorney Tetsuya Kimura and other members of the Mass Communication and Human Rights Study Group of the Osaka Bar Association, with regard to possible countermeasures against the damage inflicted on them by the massive media activity. Accordingly, the attorneys lodged a protest with the media and filed an application for human rights relief with the Wakayama Bar Association.

After the arrest of Mr. and Mrs. H. for insurance fraud on 4 October, seven attorneys, members of both the Osaka and Wakayama Bar Associations, gathered to assemble a defence team for Mr. and Mrs. H., using Mr. Kimura as an intermediary.

Between their arrest on 4 October for insurance fraud and the indictment on 29 December on charges related to the poison incident, Mr. and Mrs. H. were arrested and detained by the police and prosecution on three different occasions. Mr. and Mrs. H., who continued to deny any involvement, were interrogated in a windowless room until midnight every day for 87 days. Meanwhile, the attorneys continuously filed applications for procedures, including hearings for disclosure of the reasons for detention and applications for cancellation of the detention. The investigation did not result in a confession and the matter was sent to the Wakayama District Court for a public trial that was to begin in the spring of 1999.

Loud criticism was voiced by the mass media and individuals regarding the defence activities in this case. The attacks on the attorneys have consisted of: threatening telephone calls and letters to the Bar Associations, the police stations and the attorneys' offices and homes; printing by several newspapers and weekly magazines of articles and columns criticising the defence team for their role; and requests from the police and the prosecutors asking the clients to change their attorneys. In response, the defence team filed a complaint. The prosecutors argued in their defence that "...where a suspect's interests diverge from those of his wife, it is problematic from the standpoint of legal ethics for the same lawyers to defend both suspects". The court dismissed the complaint, criticising the prosecutor's argument because he did not communicate the objection to the defence before the proceedings.



**Yoshikuni Noguchi** {lawyer belonging to the Kobe Bar Association}: From 3 July to 26 July 1997, Mr. Noguchi received a total of eleven harassing telephone calls to his home, related to his defence of a 14 year old school-boy accused of a series of assaults against four elementary school children and the murder and dismemberment of a 6th grade boy.

Similar calls continued until 20 October when the decision in the juvenile procedure hearings was reached. In addition, more than 100 telephone calls expressing protest, slander or threats were received by other defence team lawyers and the Kobe Bar Association (which provided the lawyers) between 29 June and mid-October 1997.

**Isao Okamura** {lawyer belonging to the Dai-Ichi Tokyo Bar Association}: On 10 October 1997, at approximately 5:45 pm, a man posing as a parcel delivery service called at Mr. Okamura's home and fatally stabbed the lawyer's wife with a knife when she came to the door.

The attacker had previously been arrested for making threats against Yamaichi Securities Co. for alleged losses in stock trading. Mr. Okamura had been consulted by the company concerning these threats and so it is thought that the attack was perpetrated because the man held a grudge against Mr. Okamura. The attacker pleaded guilty and was indicted for murder on 7 November 1997.

The case was still being tried as of February 1999.

**Masao Sumida** {lawyer belonging to the Nagoya Bar Association}: Mr. Sumida was observing the transfer of a woman's possessions, at her request, from her home in Higashi-ku, Nagoya, in order to establish her residence apart from her eldest son. Mr. Sumida was then attacked with a knife by the son. The assailant was arrested and received a sentence of 2 years and 6 months penal servitude, suspended for four years, subject to probation during the period of suspension.

**Takashi Takano** {lawyer, member of the Saitama Bar Association and representative of the Miranda Association}: (*see Attacks on Justice 1996*). The Government responded to the CIJL's request for comments and stated that "[t]he prosecutor requested the suspect to appear for an interview, but he refused without reasonable grounds and then disappeared".

According to the JFBA, however, the suspect and his legal counsel, attorney Mr. Takano, did not refuse to be interviewed; rather, when Mr. Takano asked to be present during the questioning, the prosecutor refused to proceed with the interview. Thereafter the prosecutor made no further requests for the suspect to appear.

Secondly, the Government asserted that the suspect "disappeared". According to the JFBA, it is true that the suspect changed his residence several days after the call to appear before the prosecutor, but two days after the change of residence he registered the move with his new city hall. Moreover,

he notified the prosecutor, Mr. Uetomi, through Mr. Takano, of his new address. Five months after the suspect had changed residence, he was arrested by the public prosecutor's office at his new address.

**Kazushi Teranishi** (in 1997 assistant judge, Asahikawa District Court/in 1998 assistant judge, Sendai District Court): The organised crime countermeasures legislation draft was criticised because it includes provisions that give broad authorisation to conduct the monitoring of communications. Mr. Teranishi wrote a letter reflecting this concern which appeared in the letters column of the 2 October 1997 morning edition of the journal 'Asahi Shimbun,' noting that the "reality concerning warrants is that they are issued just as prosecutors and police officers want them to be." Mr. Teranishi asked in his letter, "Do you think it would be safe to leave the examination of requests for warrants to wiretap to such judges?" A reply to this by Mr. Kenjiro Tao, Deputy Chief Justice of Tokyo District Court appeared in the same column of the 8 October morning edition of the 'Asahi Shimbun'. It stated

Mr. Teranishi's criticism is not only far removed from the actual state of the processing of warrants, it is an insult to judges and court clerks who devote themselves seriously to this job.

On 8 October 1997, Judge Teranishi received the following official admonition from the presiding judge of the Asahikawa District Court on account of his newspaper submission. The letter stated, *inter alia*:

Your letter states that judges engaged in the processing of warrant requests do not conduct proper examinations and that they are not worthy of trust. There is a great possibility that this would give readers the impression that judges' processing of warrants does not meet the requirement of the Constitution and laws and damage the faith of the people in judges and courts. It is exceedingly inappropriate that a practising judge should write such a letter to a publication, and it is unworthy of a judge. You are strongly advised in writing that such a thing should not occur again.

On 6 February 1998, a declaration criticising the above sanction was issued by the Japan Federation of Bar Associations, in the name of the president.

On 18 April 1998, Mr. Teranishi attended a conference in opposition to the three separate bills for Anti-organised Crime. At the conference, the judge disclosed his judicial function, adding that he had been told that he would be sanctioned if he spoke at the conference. Nevertheless, Assistant Judge Teranishi actively participated in the conference. Apparently as a result of his actions there, on 1 May 1998, the Sendai District Court applied to the Sendai High Court under the Judge Tenure Law for disciplinary

action against Kazushi Teranishi. Accordingly, the District Court stated that his actions at the conference constituted

active political activity under Article 52 para. 1 of the Judiciary Act, and were in breach of the professional obligations set forth in Article 49 of the Judiciary Act.

Based on the Judge Tenure Law, a hearing was convened by the High Court and the Special Court of the Sendai High Court. The presiding judge ruled on 24 July 1998 that Mr. Teranishi would receive a warning. This marked the first time since the promulgation of the Judge Tenure Law in 1947 that a judge was subject to disciplinary action as a result of political activities.

Assistant Judge Teranishi appealed the ruling; the Supreme Court confirmed the ruling of the Sendai High Court and dismissed the appeal. For the first time, the Supreme Court held that with regard to the constitutional guarantee of freedom of expression, "statements of judges cannot escape certain restrictions", and that "Assistant Judge Teranishi's activities in this case constituted active political activity".

The majority opinion issued by the panel was as follows:

It is not prohibited for a judge as a citizen to hold an opinion in opposition to statutory law, and to express that opinion in a forum that does not cast doubt on the judge's independence, impartiality and fairness. However, the conference in this case was convened as part of a partisan campaign seeking the rejection of draft legislation, and the making of a statement expressing agreement with such a goal at a forum of this nature is intended to apply pressure on the Diet to abandon its legislative activity, and goes beyond the mere expression of an opinion by an individual. The statement in this case was an act that must be avoided at all costs by someone in the position of a judge, and constitutes 'active political activity'. It is not prohibited for a judge to express an opinion for or against legislation as a member of a deliberative body such as a council or commission, nor is a judge barred from stating a definite opinion advocating the revision or abolition of a rule pertaining to the judicial system. Assistant Judge Teranishi's actions were different in nature from these actions, and a warning is appropriate.

On 3 December 1998, the JFBA issued a statement in the name of the president criticising the Supreme Court's decision.

The JFBA expressed the opinion that the provision of the Judiciary Act imposing limitations on 'active political activity' requires an extremely restrictive interpretation. While the actions of Assistant Judge Teranishi

that were considered by the Supreme Court might be broadly interpreted as political activity, the JFBA held that it could not be considered 'active political activity'. If Article 52 para. 1 of the Judiciary Act would prohibit all political activity it casts substantial doubt on its constitutionality.

The JFBA also stated that given the nature of the case, the trial proceedings should have been open to the public if the defendant so desired.

## GOVERNMENT RESPONSE TO CIJL

On 5 July 1999, the Government of the Japan responded to the CIJL's request for comments. The Government stated:

The Permanent Mission of Japan to the International Organizations in Geneva presents its compliments to the Centre for the Independence of Judges and Lawyers and has the honour to refer to the letter from Mrs. Mona Rishmawi, Director of the latter, to the former's Permanent Representative, H.E. Mr. Nobutoshi Akao, dated 11 June 1999, requesting the Government of Japan to provide comments concerning an annual report of the CIJL.

The Permanent Mission of Japan has further the honour to transmit herewith, under instructions from its home Government, the comments of the Government of Japan and to call for attention the fact that the comments to cover certain points of the report. Nevertheless, the remaining points should not be considered as endorsed by the Government of Japan, even if the Japanese Government does not mention them in its comments.

The Permanent Mission of Japan to the International Organizations in Geneva avails itself of this opportunity to renew to the Center for the Independence of Judges and Lawyers the assurances of its highest consideration.

### I. HUMAN RIGHTS CONCERNS

Concluding observations of the Human Rights Committee referred to in this report do not accurately reflect the human rights situation in the criminal justice system of Japan. Please refer to the fourth periodic report of Japan and statements by Japanese delegation in Geneva in 1998.

### *1. Substitute Prisons*

At the Police Custodial facilities, the detention officers who belong to a non-investigating branch of the police treat the detainee properly with paying attention to his/her rights. Thus, the rights of detainees are duly protected.

Article 38 paragraph 1 of the Constitution of Japan provides that "no person shall be compelled to testify against himself" and Article 36 stipulates that "the infliction of torture by any public officers and cruel punishments are absolutely forbidden". Hence, a law enforcement official involved in a criminal investigation who commits an act of violence, cruelty or the like upon a suspect or any other person, is to be subject to both criminal punishments and severe discipline.

In addition, Article 38 paragraph 2 of the Constitution provides that "confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence." The Code of Criminal Procedure also stipulates that not only the confession referred to above but also an confession suspected not to have been made voluntarily shall not be admitted in evidence, and thereby guarantees that such acts will not be inflicted on suspects.

### *2. No verification of the issuance of warrants.*

Warrants are issued by courts appropriately according to the Constitution and the Code of Criminal Procedure. The issuance of arrest warrants is to be examined in the detention hearing for the pre-indictment detention, and so is that of other warrants such as search ones in the quasi-appeal. Therefore, the verification of the issuance of warrants by judges is always available.

## II. THE JUDICIARY

### *A. Appointment procedure*

#### 1. Appointment Procedure of Supreme Court Justices

The Chief Justice does not determine who will be appointed as the Justice of Supreme Court. The Constitution vests the power to appoint the Justices of Supreme Court only in the Cabinet.

#### 2. Reappointment of Judges

As the Constitution does not adopt the life-employment system but the terminal-employment system for judges of interior

court, it is a matter of course that judges lose their positions when their terms expire. Judges of inferior court are re-appointed by the Cabinet from a list prepared by the Supreme Court in a similar way to their first appointment. The Supreme Court designates the nominees fairly and deliberately with a careful examination for their qualification for the position, considering that the position is especially guaranteed in security for their responsibility and independence to make a official judgement independently, and that the appointment is actually based on the career-system.

### 3. Appointment Procedure of Judge

It is not true that the Cabinet exercises so much influence over the judiciary. The Constitution vests the power to appoint the Justices of Supreme Court in the Cabinet with the view of checks and balances, as the Supreme Court has the entirely independent position and is the final adjudicator of constitutional questions. And the Constitution provides that the Cabinet must appoint the judges of inferior court from a list prepared by the Supreme Court in order to restrain the Cabinet from asserting its influence on the judiciary through the appointment of judges.

#### *B. Security of tenure and impeachment*

##### 1. Review by the People on the Appointment of Supreme Court Justice

The comment of the report that the review by the people on the appointment of Supreme Court justices has the potential to undermine the security of tenure is beside the point. The Supreme Court is the final adjudicator of constitutional questions and its opinion sometimes causes a political influence. Therefore, the review of appointment of the Justice of the Supreme Court by the people is an important system to control those Justices in a democratic way.

##### 2. General Secretariat

The Comment of the report that "This Supreme Court itself is administered by a General Secretariat, the Judicial Assembly acts through resolutions that are implemented by the General Secretariat of the Supreme Court" is not based on the fact. The Judicial Assembly of the Supreme Court makes the decision on administration, and the General Secretariat only puts the decision into practice. The General Secretariat is set up to assist the Justices of Supreme Court because it is so hard for the 15 Justices to perform all the extensive duties of the

Supreme Court including final adjudication, ultimate administration of judiciary and establishment of the regulation by themselves.

### 3. Conferences

When the Supreme Court holds a conference, the General Secretariat handles only general affairs such as planning and preparation for the conferences, compilation of the result etc. The chairperson chosen by the members leads the conference, and the staff of the General Secretariat only attends the conferences and make the point of argument clear when he/she is required his/her comment by the chairperson. There is no possibility that the opinion of the staff has more weight than those of the members. The indication is not based on the fact, and moreover, it is beside the point, because it is against the meaning of the Constitution. The Constitution provides that all judges are independent in the exercise of their conscience and are bound only by the Constitution and the laws.

### III. CASES

**Kazushi Teranishi.** The official admonition on account of Assistant Judge Teranishi's newspaper submission and the disciplinary action on account of his speech and behavior at the demonstration meeting were delivered legally according to the appropriate procedure established by law. The disciplinary action was confirmed by the judicial determination of Grand Bench of the Supreme Court. Therefore, the case is not an appropriate example of an attack on justice or harassment and persecution of a judge.

# KENYA

**A**fter gaining independence from the United Kingdom in 1963, Kenya adopted a one party system that led to serious repression of human rights and democratic freedoms, particularly in the 1980s. In 1991, multi-party participation was introduced; the first multi-party elections took place in 1992, but did not bring about much change.

The President, Mr. Daniel Troitich Arap Moi, has been in power since 1978; he was last elected during the general elections of 29 December 1997. These elections, which took place at the presidential, parliamentary, and local levels, were marred by allegations of widespread fraud. Mr. Moi is not eligible for re-election.

The unicameral Kenyan National Assembly is composed of 210 elected members. Various political parties nominate 12 members that are approved by the President. The President also appoints the Vice-President, although this position remained vacant until early 1999, when the first Vice-President was appointed.

The President also appoints Cabinet members from the Parliament. The maximum term of the National Assembly is five years from its first meeting, unless it dissolves itself by a no-confidence vote, or is dissolved by the President.

Before the 1997 elections, Kenya undertook some substantial constitutional, legal, and administrative reforms. A compromise package within the inter-party parliamentary group was reached. One element was the reform of the Electoral Commission by allocating 10 additional seats to the opposition. The reform also included: giving all political parties and presidential candidates equal access to the state-owned media; allowing the appeal of human rights issues to the Court of Appeal; and prohibiting civil servants from politicking during elections.

Nevertheless, the Electoral Commission was criticised by local groups and observers for its role in the controversial legislative and presidential elections. A commission on constitutional reforms was created, but no substantive constitutional changes were introduced.

Later in 1998, the Constitution of Kenya Review Commission Act was enacted into law, setting down the basis for constitutional review and establishing organs to facilitate public involvement in the review of the Constitution.

## HUMAN RIGHTS BACKGROUND

In 1998, and before and after the December 1997 general elections, widespread violence and killings were reported, particularly in the Rift



Valley and the coastal area. Hundreds of individuals were killed and thousands were displaced, allegedly by supporters of President Moi, in retaliation against those who had voted against him. The Government has systematically failed to investigate these crimes and punish the perpetrators. These events have highlighted more than ever the failure of the Government to protect its own citizens.

There have been several cases of summary executions. Although Kenya is a party to the Convention against Torture, police brutality and instances of torture are still being reported. The methods of torture reported include: beatings, electric shocks, solitary confinement, and sexual abuse, including rape, and threats of rape to the victim or the victim's family.

Persons wishing to file a complaint against the police for ill-treatment were said to be discouraged or refused. Impunity continues to be a problem and police brutality is often not investigated or punished. In fact, the lack of access to justice is a serious cause for concern, particularly in domestic violence cases.

In August 1997, the American embassy in Kenya was bombed. Hundreds of individuals were killed and injured. The human rights situation was gravely affected by this incident. The Kenyan Government cracked down intensely on foreigners and anyone suspected of links with violent Islamic movements or Muslim NGOs. Many Islamic relief agencies and other NGOs were either put under pressure or disbanded and their registration cancelled.

## **THE SOCIETIES ACT AND THE PUBLIC ORDER ACT**

Prior to the 1997 elections, the Societies Act, which initially restricted freedom of association, was revised, making it easier for political parties to register.

The Public Order Act was also amended. This Act was widely used by the Government to restrict any activity regarded as opposition to the state, through such means as limiting public gatherings, imposing curfews, and prohibiting flags and emblems of political organisations. The amendment requires organisers to notify local police of planned meetings, rather than asking for a license. Although this was meant to be an improvement, the police treat the notification as a request for a permit, and often refuse to allow meetings to be held.

Furthermore, Kenya still retains the Public Security Act, which was enacted during the colonial era. This Act allows for the use of administrative detention. Although it is not currently employed, the mere preservation of the Act as part of the body of laws in Kenya constitutes a further threat to the respect of human rights in the country.

## THE JUDICIARY

Kenya has one Court of Appeal, and various High Courts and magistrate courts. The legal system is based on English common law tradition and customary law. Islamic law and Hindu law also apply in personal status issues for Moslems and Hindus.

The judicial system in Kenya suffers from a serious lack of resources. The *Kenya Law Reports*, for instance, have not been issued for many years. In addition, the judiciary lacks financial autonomy, as it depends on the Office of the Attorney General for budget allocations.

Delays are reported in both civil and criminal justice matters. Corruption is widespread. Executive pressure and interference with the judiciary is common. President Moi has made "presidential comments" publicly predicting the outcome of pending cases. Pursuant to one such comment, former Chief Justice Hancox reportedly issued a memorandum to all magistrates, ordering them to follow the President's directive on limiting bail for certain crimes.

In January 1998, the Chief Justice appointed a Committee headed by Justice Richard Kwach to look into the situation of the judiciary. The Committee's report, known as the Kwach report, was extremely critical of the manner in which the judiciary functions. The report confirmed that corruption is widespread.

Judges from both courts have tenure up to the age of retirement, which is currently 74. They may be removed from office however, on grounds of incapacity or misbehaviour. Transfers are sometimes used as a means of punishment.

Judges have been transferred to the executive branch while maintaining their judicial status. Judge **Aron Ringera** currently heads Kenya's Anti-Corruption Committee. This matter is now subject to a challenge before the courts. The same judge also served as a solicitor-general, another executive position, while still maintaining his status as a judge.

## JUDICIAL APPOINTMENTS

Magistrates are hired and dismissed by the Judicial Service Commission (JSC), which also handles transfers, promotions, and disciplinary matters. The JSC is composed of five members: the Chief Justice, a judge of the High Court, and a judge of the Court of Appeal, who are all three appointed by the President. In addition, the Attorney General and the Chairman of the Public Service Commission, are *ex officio* members of the JSC. Both the Attorney General and the Chairman of the Public Service Commission are themselves appointed to their respective offices by the President, which

makes the JSC under the unreserved influence of the Executive. Moreover, the JSC is a very weak institution. It has no independent offices. Its secretariat is controlled by the Assistant of the Chief Justice and the Registrar of the Court of Appeal.

Judges of the High Court and the Court of Appeal are appointed by the President of Kenya, based on the advice of the JSC. Consultation with the JSC is minimal, as appointments are often based on political considerations. The Chief Justice in Kenya is appointed at the President's sole discretion.

## THE ATTORNEY GENERAL

The Attorney General, appointed by the President, has a diverse variety of functions. He is the legal adviser of the Government, he is in charge of overall criminal prosecution, and is, in practice, the Minister of Justice. He is also an *ex-officio* member of the Cabinet and the National Assembly. The functions of the Attorney-General are so wide that a potential conflict of interest may arise. The Attorney-General has the constitutional right to interrupt proceedings in private prosecution cases before a judgement is rendered, which curtails the independence of the judiciary.

The office of the Attorney General is the subject of considerable controversy in Kenya, as it is perceived to be lenient on important personalities, applying justice in a selective and political manner. For instance, despite several claims against the Police Commissioner, the office of the Attorney General has not been effective in remedying police brutality.

## CASES

**Babu Achieng** {Chief magistrate in Nakuru}: On 15 January 1998, Judge Achieng was murdered a few metres from his home, in what police described as a deliberate assassination by unidentified thugs. No theft was carried out. Babu Achieng's murder was witnessed by his 9 year old daughter. Immediately afterward, judicial officers voiced concerns for their physical safety and called on the Government to provide protection for them.

**Juma Kiplenge** {lawyer}: In October 1997, Mr. Kiplenge and thirteen others were arrested and charged with incitement to violence and unlawful assembly after organising and attending a peaceful one day cultural event, which was violently broken up by the police. Mr. Kiplenge had been harassed on many occasions by the Kenyan authorities; he had also received death threats. After international pressure, the charges were withdrawn on 16 October 1998.

**Samuel K. Ndungi** {lawyer}: On 22 April 1997, Mr. Ndungi was shot to death along Moi Avenue in Nairobi. Mr. Ndungi was a criminal lawyer, frequently representing clients charged in significant cases of armed robbery; as result of his professional activities, his relations with the police had become strained. Mr. Ndungi had reportedly been followed by unidentified persons for some time before his death. In January 1996, charges of murder and robbery were laid against Mr. Ndungi and then abruptly withdrawn after six months of detention.

In February 1997, 96 million Kenyan shillings were stolen during the course of an armed robbery at the Standard Chartered Bank on Moi Avenue. Mr. Ndungi represented some of those implicated in the crime, and had reportedly accused some members of the police force of taking some of the recovered stolen money for themselves.

On the day he was killed, Mr. Ndungi apparently realised he was again being followed; when he stopped to park his car, he was seen getting out of the car and raising his arms in surrender. Nevertheless, Mr. Ndungi was shot, reportedly eight times, and died instantly. It seems that Mr. Ndungi had found evidence incriminating either his own clients, the police, or both. Although an investigation was opened, no tangible results were uncovered. The Attorney General directed the Director of Public Prosecution to place the investigation file before the Chief Magistrate, in Nairobi, in order to hold a public inquest into the killing of Mr. Ndungi. No conclusions were reached as a result of the inquest.

# MALAYSIA

The Federation of Malaysia consists of thirteen states: the eleven states of peninsular Malaysia and the two states of Sarawak and Sabah along the northern coast of the island of Kalimantan (Borneo). Malaysia has a parliamentary system operating under the constitutional monarchy. The largely ceremonial monarch, the *Yang di-Pertuan Agong*, is elected on a rotating basis every five years by the Conference of Rulers, which consists of the nine hereditary Malay rulers of peninsular Malaysia.

The *Yang di-Pertuan Agong* appoints a Cabinet headed by a Prime Minister, who is Head of Government. Government authority rests in the hands of the Prime Minister and his Cabinet.

A bicameral federal Parliament holds legislative power. The Senate, (*Dewan Negar*), consists of 69 members who serve three year terms, two members of which are elected by the legislative assemblies of each of the states while the remaining 43 members are nominated by the *Yang di-Pertuan Agong*. The 177-member House of Representatives, (*Dewan Rakyat*), is elected by universal adult suffrage for a five-year term and by simple majority in contested elections in constituencies.

Elections, however, have been won by the multi-racial National Front Coalition (*Barisan Nasional*) which has held power since 1957, and with more than two-thirds majority. The coalition headed by Prime Minister Dr. Mahathir bin Mohamad increased its majority in a 1995 general election.

Malaysia has not acceded to some major international human rights treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, and the Convention on the Elimination of All Forms of Racial Discrimination. Malaysia is, however, a party to the Convention on the Rights of the Child, although with reservations, the Convention on the Prevention and Punishment of the Crime of Genocide, and the Convention on the Elimination of All Forms of Discrimination against Women, also with reservations.

In fact, Malaysian officials have often challenged the universality of human rights in favour of what has been termed Asian values. Under their construction, human rights may be subject to historical, political, cultural, social, or religious interpretation.

## RESTRICTIVE LEGISLATION

There are a number of laws in Malaysia that impose serious restrictions on individual rights and freedoms. These include the Internal Security Act of

1960 (ISA), enacted during the existence of an active communist insurgency in the country. This law is still in force. It permits far-reaching means to prevent action, by persons both inside and outside Malaysia, "...intended to cause and to cause a substantial number of citizens to fear, organised violence against persons and property". Moreover, actions that are prejudicial to the security or economic life of Malaysia, to the maintenance of essential services, or simply considered likely to be prejudicial in the manner described above, may allow the administrative detention of a person for a period of 60 days without a warrant. With a detention order signed by the Minister of Home Affairs, the detention may be extended to two years. Furthermore, detention orders are known to be renewed even after the two year period has expired. Judicial review of a detention order is severely limited.

In November 1998, the Deputy Home Minister stated that, in the last ten years, no person had been detained under the Internal Security Act for political reasons, except for Communist activists. There are reports however, that at least 223 persons were detained under this Act. The Deputy Home Minister has himself classified those detained as 131 for forging documents, 89 for smuggling illegal aliens, two for deviant Islamic teaching and one for association with Free Avcheh Movement.

There is also the Emergency (Public Order and Prevention of Crime) Ordinance. This emergency legislation, that was enacted in response to the violence that erupted during the 1969 elections, remains in force. It permits the Minister of Home Affairs to issue a detention order for a maximum of two years if he or she deems it necessary to protect the public order, or for the "suppression of violence or the prevention of crimes involving violence". The Government does not disclose the number of those detained under this Ordinance, and the Bar Council and other groups have called for its repeal.

In addition, the Dangerous Drugs Act, as well as the immigration laws, also allow the use of detention without charge or trial for an extensive period of time. Furthermore, the Restricted Residence Act of 1933 provides for confinement or exclusion to a restricted area by an administrative order of the Minister of Home Affairs, and not pursuant to a judicial order by a court of law after a trial, which could be indefinitely renewed.

The 1948 Sedition Act seriously restricts freedom of expression, prohibiting, *inter alia*, public comment on issues considered "sensitive". The Printing Presses and Publications Act of 1984 also imposes serious limitations on freedom of the press. The Act was amended in 1987 to make the publication of malicious news a punishable offence. The amendment also expanded the power of the Government to ban or restrict publications. Furthermore, the amendment prohibits judicial challenges to orders to suspend or revoke publication permits.

In his report to the 55th session of the Commission on Human Rights, the UN Special Rapporteur on Freedom of Expression asked for the repeal of this restrictive legislation.

## THE JUDICIARY

The Malaysian judiciary consists of a Federal Court, two High Courts, namely the High Court of Malaya and the High Court of Bairew, the Court of Appeal and the Subordinate Courts. The *Yang di-Pertuan Agong*, on the recommendation of the Prime Minister, appoints Justices to the Federal Court, Court of Appeal, and High Courts. The Federal Court is the highest judicial authority in the country and the final court of appeal.

Justices enjoy the security of tenure until the age of 65. The Judges' Remuneration Act establishes the remuneration of judges; it cannot be altered to the disadvantage of a judge after appointment.

Article 125 of the Constitution provides that the *Yang di-Pertuan Agong* may appoint a tribunal to investigate an allegation by the Prime Minister, the Lord President of the Federal Court, or the Chief Justice of a High Court, that a Federal or High court judge should be subject to removal on the ground "of misbehaviour or of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office". The tribunal, consisting of no fewer than five persons that are or have been judges, will then make a recommendation, based on which the *Yang di-Pertuan Agong* may remove the judge. Pending the report from the tribunal, the *Yang di-Pertuan Agong* may suspend a judge from the exercise of his functions after consultation with the Lord President of the Federal Court for federal judges, and with the Chief Justice of the High Court for High Court judges. The conduct of a Federal or High Court judge may be discussed in any chamber of the Parliament only if a motion is passed by at least one quarter of the members of the chamber.

## THE ADMINISTRATION OF JUSTICE

Since 1988, actions by the Executive as well as legislative branch, including constitutional amendments, have seriously undermined the independence of the judiciary in Malaysia by increasing the government influence over the judiciary.

Judges feel that they are continuously scrutinised by the Government, and therefore feel they should not fall out of favour with it. In August 1998, Malaysia's Attorney General publicly cautioned judges to adhere to their code of conduct. He referred to situations that could result in conflicts of

interest, such as hearing cases that involve relatives, receiving free golf club memberships, and gambling.

Lim Guan Eng is an opposition member of Parliament and the first son of the leader of the opposition. In defence of an underage Malay girl who was alleged to have had sex with an influential Chief Minister of State, he made certain statements in a public speech, inter alia, questioning the Attorney General's power of selective prosecution. Mr. Lim was charged with publishing false news and for sedition. The High Court acquitted him of sedition, but found him guilty of publishing false news, sentencing him with a fine. The Attorney General appealed to the Court of Appeal. The Court of Appeal increased the sentence to imprisonment of eighteen months. In increasing the sentence, the presiding judge said words to the effect of, "let this be a lesson to anyone who criticises the judiciary". The Federal Court confirmed the sentence. Mr. Lim is still serving the sentence. He has lost his seat in Parliament. His petition for pardon was turned down. This case was seen by a number of Malaysians as a travesty of justice.

Several cases during the last few years, such as the Cumarswamy case (*see Cases below*) and the Anwar case below have continued to cast doubt on the independence of the judiciary and generally on the integrity of the administration of justice. On 2 September 1998, Mr. Anwar Ibrahim was ousted from his official position as Deputy Prime Minister. On 20 September 1998, he was first detained for nine days under the Internal Security Act, without access to his family or to lawyers. He was severely beaten on many parts of his body. When he later appeared in Court, bruises were seen on his face, eye, arms, and neck. Mr. Anwar was charged with committing acts of sodomy and corruption. The witnesses recanted their confessions. They said that they were tortured and coerced by the police to testify against Mr. Anwar. Later in the trial, the prosecution dropped some allegations of sodomy and sexual abuse. After a highly publicised trial, where due process of law was not respected, on 14 April 1999 Mr. Anwar was convicted and sentenced to six years imprisonment on each of the charges, to be served concurrently from the day of sentencing rather than the arrest. Several of the lawyers who represented Mr. Anwar were harassed. (*See Cases below*)

The CIJL, jointly with the International Bar Association, CLA and their advocate, is sending a Mission to Malaysia to examine questions related to the independence of the judiciary and the legal profession in April 1999.

## CASES

**Dato' Param Kumaraswamy** {lawyer, Member of the Executive Committee of the International Commission of Jurists and the CIJL Advisory Board and United Nations Special Rapporteur on the Independence of Judges and Lawyers}: The principle judicial organ of the



United Nations, the International Court of Justice, heard the case of Dato' Param Cumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers, on 7-10 December 1998. The case was referred to the International Court of Justice for an Advisory Opinion by the United Nations Economic and Social Council (ECOSOC) through a resolution adopted by consensus on 5 August 1998. The Advisory Opinion will be binding upon the parties.

The UN Secretary-General requested ECOSOC to act when the Malaysian courts failed to uphold the immunity granted to the UN Special Rapporteur under international law. The immunity of Dato' Param Cumaraswamy was undermined by several civil suits filed against him in Malaysia. The cases were brought by businessmen who claimed that the Special Rapporteur defamed them in a press interview where he was quoted as saying, *inter alia*, that he was investigating complaints that highly placed businessmen were manipulating the Malaysian judicial system. Several attempts by the UN Secretary-General to assert the immunity of the Special Rapporteur from legal process in accordance with the 1946 Convention on the Privileges and Immunities of the United Nations failed. The defamation suits filed against the Rapporteur amounted to US\$ 25 million. On 29 April 1999, the World Court ruled in favour of the Special Rapporteur. The Court also said that Dato' Cumaraswamy should not be financially accountable for any costs imposed on him by the Malaysian courts, and that the Malaysian Government is under a duty to communicate the World Court's opinion to its domestic courts so that Dato' Cumaraswamy's immunity is respected. The case generated much international attention (*see update in the introduction*).

**Manjeet Singh Dhillon** {lawyer}: Mr. Dhillon is the lawyer who prepared the statutory declaration in the Anwar case (*see case of lawyer Zainur Encik Zakaria below*). The judge hearing the Anwar case, Mr. Justice Augustine Paul, issued a warrant to arrest him because of contempt of court. On 2 December 1998, Mr. Singh Dhillon appeared in court with his lawyer to show cause why he should not be held in contempt. During this session, he apologised to the court and the proceedings were terminated.

**Pawaaneek Marican** {lawyer, member of Anwar's defence team}: On 19 November 1998, the police raided the offices of Mr. Marican and searched his legal documents. When he complained, the judge hearing the complaint said that the police have the right to conduct investigations. The judge also said that lawyers are "wasting time" by submitting such complaints.

**Tommy Thomas** {lawyer, former Secretary General of the Malaysian Bar Council}: Libel and slander suits were also brought against Tommy Thomas (*see the case of Param Cumaraswamy above*). Unlike Cumaraswamy, he had no claim to immunity. In November 1998, the claims were settled out of court. The settlement required the payment of a large sum of money and a humiliating apology. Thomas told a journalist that the settlement was forced on him by insurance. As a result, he was charged with contempt of court. In

December 1998, he was sentenced to six months imprisonment. The appeal of this case is still pending.

**Zainur Encik Zakaria** {lawyer, member of Anwar's defence team and former president of the Bar Council of Malaysia}: On 30 November 1998, Mr. Zainur was sentenced to three months imprisonment for contempt of court. The contempt charges were initiated by Mr. Justice Augustine Paul, the judge hearing the Anwar case. The charges were apparently in response to an application submitted to the Court, supported by a statutory declaration, about an attempt to fabricate evidence against Mr. Anwar by the Attorney General's office. The judge refused to consider the merits of the application however, and ruled that the motion amounted to an interference with the course of justice. The judge demanded that Mr. Zainur state publicly that the application was baseless and an abuse of process, and asked him to apologise.

Lawyer Zainur said that he was unable to apologise as this would prejudice the interest of his client. He requested time to consult with his counsel, who in turn requested time to prepare the defence on Mr. Zainur's behalf. He also requested to call witnesses but the Judge rejected all of these requests.

The Judge also refused to hear the president of the Malaysian Bar Association, who wished to appear in the contempt case as *amicus curiae*, because he was concerned with the conduct of the advocate and solicitor. In contrast, and although the Judge earlier determined that the parties to the contempt consisted only of himself and Lawyer Zainur, he nevertheless accepted the Attorney General as *amicus curiae* and allowed him to speak on several occasions. On 4 December 1998, the Court of Appeal granted a stay order on the sentence pending an appeal.

# MEXICO

**P**olitical reforms allowing for competitive and transparent elections carried out during the past years constitute the framework in which elections for Parliament and states' governors were held in July 1997. The results were accepted by most of the participating candidates and parties. The ruling party lost its majority in the Chamber of Deputies for the first time. The opposition also won the election for governor of the Federal District and two other states.

Mexico is a federal and representative republic composed of 31 states and a Federal District organised under the rule of a federal Constitution dating from 1917 and periodically amended. The Constitution provides for division of powers among the legislative, executive and judiciary branches. The Parliament is composed of two bodies: a 500-seat Chamber of Deputies, and a 128-seat Senate, both of them elected periodically. The executive branch is headed by the President of the Republic who at the same time is Head of State and of the Government. Among his wide powers, the President can nominate and dismiss ministers, and, with the approval of the Senate, appoint high-ranking officers of the army, navy and air force, the Attorney-General of the republic, and the Justices of the Supreme Court (Article 89 of the Constitution). One of the permanent political features in Mexico has been the excessive predominance of the executive branch, and especially the President, over the other branches. This has historically upset the balance of power and has not allowed the rule of law to prevail.

In December 1998, the Mexican Government accepted the compulsory jurisdiction of the Inter-American Court of Human Rights but advanced some reservations with regard to the Court's jurisdiction on the expulsion of foreign human rights activists carried out by the Government.

## HUMAN RIGHTS BACKGROUND

Serious human rights abuses continued in Mexico during 1997 and 1998. A significant number of extrajudicial executions, enforced disappearances, torture, including rape in detention, arbitrary arrests, widespread disrespect for basic guarantees of due process, and threats against journalists and human rights defenders were reported during this period. Reports pointed to security forces, whether military or police, and paramilitary as those responsible for these violations. Leftist guerrillas are also responsible for some abuses.

Mexico was reportedly one of the three countries with the highest number of extrajudicial executions during 1997, and also the one with the third highest number of complaints for enforced disappearances lodged before the UN Working Group on Forced or Involuntary Disappearances. In 1997 the

UN Special Rapporteur on Torture visited Mexico, and issued his report in January 1998, manifesting concern for the impunity widely granted to the practice of torture in the country.

One factor that encourages the practice of torture in Mexico is the manner in which judges commonly accept incriminating declarations obtained by torture as valid evidence. Furthermore, in November 1998, a legislative package was passed with the declared purpose of fighting crime, but which in fact lowered the standards of protection of basic human rights. These laws allow a longer period of pre-trial detention, and further restrict the validity of Amparo petitions to protect the right not to be arbitrarily detained.

Many of the human rights abuses were committed in the states of Chiapas, Guerrero and Oaxaca, where social unrest and guerrilla activities, as well as the military presence, have increased. Paramilitary groups and supporters of the ruling Revolutionary Institutional Party (*Partido Revolucionario Institucional*) confronted presumed partisans of guerrilla groups in some localities resulting in the murder, torture or abuse of scores of innocent people. For example, in December 1997, forty-five people were killed by paramilitary groups in Acteal, a small community within the municipality of Chenalhó. This massacre prompted a wave of international concern for the human rights situation in Mexico and encouraged international non-governmental organisations to pay on-site visits to the affected zone. The massacre also caused a strong reaction from the Mexican Government. The Government expelled many human rights activists through administrative procedures, in which their right to legal counsel and to due process of law were not respected.

The National Human Rights Commission (CNDH) received complaints regarding acts or omissions by the public administration, including officials and public servants. The CNDH performs the tasks of a human rights Ombudsman, and makes independent, non-binding public recommendations. Although its work has been important during recent years, it has nevertheless proved to be largely insufficient as a mechanism capable of tackling human rights abuses and putting an end to impunity. Its most significant shortcoming is that the head of the CNDH is appointed jointly by the President and the Senate, which is always dominated by the ruling party, affecting the nature of the recommendations it makes.

## THE JUDICIARY

### STRUCTURE

Article 94 of the federal Constitution vests the judicial power in a Supreme Court, an Electoral Tribunal, circuit courts, district courts and a federal Council of Judicature. The judiciary is organised into two levels: the

federal system and the state system. The state system is organised under state regulations.

According to amended Article 105 of the Constitution, the Supreme Court also performs the role of a Constitutional Court and hears petitions to declare laws unconstitutional. However, the right to file such a petition is limited to a number of congressmen, members of state's assemblies, political parties, and the Attorney-General. There is no right for an individual or group petition. An additional factor limiting the capacity of the Supreme Court as a Constitutional Court is the requirement that at least eight votes out of eleven are secured for the ruling of unconstitutionality to have general effect. Otherwise it will have effect only with regard to the parties to the dispute.

The Federal Council of Judicature (*Consejo de la Judicatura*), an organ created in the constitutional reform of 1994, is competent to determine the number, territorial jurisdiction and specialisation of the circuit courts and district courts. Its powers extend also to the administration, oversight, discipline and career within the federal judiciary, with the exception of the Supreme Court (Article 100 of the federal Constitution and Article 68 of the Federal Judicial Organisation Act, or LOPJF). The Council is composed of the President of the Supreme Court, who acts as its head, two members appointed by the Senate, one appointed by the President of the Republic and the rest appointed by the circuit and district courts.

Article 21 of the federal Constitution distinguishes between the trial and punishment of offenders and the investigation and prosecution of offences. The first task is given to the judiciary and the second is the task of the Public Prosecutor (*Procurador*). The latter is part of the Office of the Attorney General of the Republic (*Procuraduría General de la República*) or the State Attorney General's Office (*Procuraduría General de Justicia*) respectively. These are organs of the state and federal executive branches. The Public Prosecutor's powers include a monopoly over investigations and the decision to bring the case to the courts. The importance of these powers in relation to the rights of citizens, as well as the fact that the Public Prosecutor depends on the executive branch, stress the need for an urgent reform of this organ in order to enhance its independence (*see below*).

The military justice system handles cases involving military personnel. This contributes to impunity.

#### APPOINTMENT PROCEDURE AND SECURITY OF TENURE

The appointment of Justices to the Supreme Court is made by the Senate from a list compiled by the President of the Republic. In accordance with the Constitution, judges serve 15 years and are not to be removed unless they commit a fault as set out in Title Four of the Constitution. The system of appointment has been criticised because of the powers the

President and the ruling party have in the process, as the ruling party has historically held both the presidency and the majority in both chambers of Parliament. In this context, the appointment of the Justices for the Supreme Court has usually been considered as a political matter.

Circuit court judges and district court judges are appointed by the Federal Council of the Judiciary (Article 97), and serve for six years. They enjoy security of tenure only if they are ratified for another term or promoted to a higher level. This means that during the first period of six years they do not enjoy security of tenure. The Supreme Court can also appoint *ad hoc* judges from among their members, but only in exceptional cases.

In the Federal District, the judicial function is performed by a High Court of Justice and the respective Council of the Judicature. The Justices of the High Court are appointed by the legislative assembly of the states, upon the submission of a candidate by the Governor, whereas the remaining lower court judges are appointed by the Council of the Judicature of the state concerned.

Decisions of the Federal Council of the Judicature are not subject to appeal except on matters of appointment, assignment and removal of judges, in which case their decisions can be appealed in the Supreme Court.

## RESOURCES

The Supreme Court prepares its own budget and administers it. The Council of the Judiciary prepares the budget for the rest of the federal judiciary, and together, both budgets make up the judiciary budget (Article 100 of federal Constitution).

## IMPUNITY

The level of impunity in Mexico has reached alarming proportions. President Zedillo himself recognised this problem reporting that, for 1997, only 150,000 arrest warrants were issued out of 1,500,000 crimes reported. Only 85,000 of these arrest warrants were carried out, i.e., only 6% of the total reported crimes. Many other crimes remain unreported, because of lack of confidence or fear of the police.

Most human rights abuses go unpunished. This is due to the fact that in the majority of cases the authorities are unwilling to take action to prevent crime, or otherwise to investigate and bring the persons responsible to justice. What worsens the problem is that the same authority responsible for the abuse, as in most cases of alleged torture during detention or rape, is the one investigating. Under-qualified prosecutors, judges and defence attorneys also add to an already poor picture of overloaded and poorly paid magistrates of the judiciary.

The Human Rights Commission has played an important role in fighting impunity of crimes committed by public officials, notwithstanding its lack of enforcement powers and the limited jurisdiction it has over complaints. In a few cases, the authorities accept and implement recommendations of the CNDH. In most cases where the recommendations are accepted however, they are not implemented.

#### THE INDEPENDENCE OF THE PUBLIC PROSECUTOR'S OFFICE

According to Article 21 of the federal Constitution, the Public Prosecutor has a monopoly over the investigation and prosecution of offences. To carry out his duties the Public Prosecutor has the help of the Judicial Police as an auxiliary body. Despite the importance of the tasks attached to this office, such as fighting against impunity and protecting human rights, its work has proved to be insufficient. Among the causes for its ineffectiveness is its dependence on the executive branch. As the Office of the Attorney-General is part of the executive branch, its head is appointed jointly by the President and the Senate, as already mentioned. This has been a major factor in the decisions taken by Public Prosecutors as to whether or not to prosecute an offender.

Until the constitutional reform of 1994, the Public Prosecutor's decision to investigate a case or to close it could not be judicially challenged. The amended Article 21 now grants victims the right to challenge the Prosecutor's decisions before the courts. This constitutional provision remained inapplicable during 1998 due to the lack of implementing legislation. In a ruling dated 11 November 1997, the Supreme Court ruled that Amparo petitions shall be available for challenging the Prosecutor's decisions when violations of individual guarantees are at stake. Notwithstanding the value of this precedent, the Inter-American Commission has emphasised the need to enact implementing legislation for Article 21 so as to provide citizens with an effective remedy and to foster juridical security.

At the end of 1998 there was a proposal pending in Congress to grant the Office of the Attorney-General, i.e., the Public Prosecutors, autonomous status as an independent body outside the executive branch.

The role of the Public Prosecutors has been further criticised because of the excessive powers they were granted pursuant to legislative reforms to fight criminality in recent years. The Public Prosecutors presently enjoy powers tantamount to those of an investigating judge, with the authority to order the detention of suspects "in urgent cases" and to order the necessary steps to gather or verify evidence against the suspect. All of this exists without the counter-balance of a strong defence that can preserve the suspect's interests and rights.

## THE NATIONAL SYSTEM FOR PUBLIC SECURITY, AND THE ROLE OF THE ARMED FORCES IN THE MAINTENANCE OF PUBLIC ORDER

The lack of independence of the prosecutor has been further undermined by the General Law Establishing the Grounds for the Co-ordination of the National System of Public Security of January 1996 (*see Attacks on Justice 1996*). This law, enacted within a general strategy to fight crime, created a Unit for Co-ordination of the Public Security System, and placed all crime prevention and judicial police under a single command, in which the armed forces have not only an important presence, but the main responsibilities. According to this decree, the Office of the Public Prosecutor is required to report to the Co-ordinating Unit any action taken with regard to investigations and prosecutions. The public prosecution has been treated as an administrative dependence, and effectively subsumed into a broad decision-making body, destroying its autonomy. The Inter-American Commission on Human Rights has advised Mexico to revise the law establishing the Unit for Co-ordination of the System of Public Security "since it seems to clash with the principles which inspire and which should guide the institution of the Public Prosecutor, since there is a clear violation of the autonomy which that organ should have".

The increase in the demands for public security, as a result of the alarmingly high rates of common crime and impunity, has been taken as a pretext to grant the armed forces broader powers with regard to public security. The reported presence of the armed forces in different parts of the country, assuming tasks normally performed by the police and the public prosecutor, has raised concern within the human rights community. Moreover, the law establishing the Co-ordinating Unit of Public Security entrusts this body with policy-making in the areas of crime prevention and judicial police, accentuating the control of the military on public security matters.

## LIMITATIONS ON THE WORK OF LAWYERS

Judicial proceedings are seriously flawed, since the purported adversarial procedure in reality assigns to one party more power and facilities while the other remains structurally weaker. In general, the work of defence attorneys is severely limited mainly due to the deficiencies in the legal system.

There is a programme of free legal assistance established by the executive branch or the judiciary in each state; however the number of lawyers falls far short of meeting the needs of an effective defence, and the free legal counsel (*defensor de oficio*) is largely formal.

Lawyers are subject to humiliating treatment, especially in prisons, where they are subjected to body searches before meeting their clients. This happens mainly in the Federal Centres for Social Rehabilitation, the high security prisons. The prison authorities have reportedly established strict



regulations that violate prisoners' rights, as well as the UN Principles on the Role of Lawyers. Lawyers do not enjoy confidentiality in their communications with their defendants, since all documents from lawyer to defendant and vice versa must pass through the authorities who photocopy them. In addition, the authorities have installed cameras in the area where lawyers meet their clients.

Some court hearings take place in rooms inside the prison, which serve as courtrooms, yet without providing all the facilities for the lawyers to adequately conduct their defence. The conditions in which the hearings take place are very poor. Sometimes the accused's relatives are not allowed into the prison and the hearings are not public.

#### VISIT OF THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

The Inter-American Commission of Human Rights paid a visit to the country in 1996 upon an invitation issued by the Mexican Government. The Commission was able to visit and see the most important places and authorities as well as representatives of NGOs and grassroots organisations. In September 1998, the Commission issued its approved report. The report recommended that the Government should, *inter alia*:

- continue adopting the necessary measures for the implementation of Article 21 of the Mexican Constitution
- strengthen the autonomy and independence of the Office of the Public Prosecutor
- review the legal attributes and competence of the Unit for the Co-ordination of Public Security in the nation
- limit the authority of the Office of the Public Prosecutor to those functions which are consistent with its mandate
- reform the Law on the National System of Public Security with a view to restricting the National Armed Forces to the role for which they were created, namely, the security and defence of the Federation against outside attack.

#### CASES

**Adriana Carmona** {lawyer}: She was working with the NGO *Centro Fray Francisco de Vitoria*, when criminal proceedings were instituted against her in the military court system; she was subsequently subjected to interrogation and harassment, during September 1998.

**Juan Carlos Martínez** {lawyer}: Lawyer Martínez worked for an NGO in the state of Chiapas. He suffered harassment during 1998, and as a result, he resigned his post, and abandoned the state, fearing for his life.

**Pilar Noriega** {lawyer}: Lawyer Noriega works in the Federal District. She defends cases of detainees in the maximum security prisons. She suffered harassment and arbitrary restraints when trying to get into the prison to meet with her clients. The guards made her undress and proceeded with a body search. All of this occurred in 1998.

**Israel Ochoa** {lawyer}: Lawyer Ochoa works in the state of Oaxaca. He was accused of having links with the Popular Revolutionary Army, because of his defence of persons accused of belonging to the same group. The report appeared in the newspaper *Mexico Hoy* on 14 August 1998.

**Arturo Requesens** {lawyer}: Lawyer Requesens works for the NGO *Centro Bartolomé de las Casas* in the Federal District. He and his companions were attacked when travelling to the area where the massacre of Acteal occurred in January 1998. A group of alleged paramilitaries threw stones and sticks at the car in which they were travelling. The victims denounced the event to the Public Prosecutor, who did not intervene.

**Julio César Sánchez Narváez** {judge}: He allegedly was removed from office and received death threats from the president of the Upper Tribunal of the State of Tabasco, after he refused to issue an arrest writ against a former politician being tried for fraud. According to the Mexican Government which answered the Special Rapporteur on Independence of Judges and Lawyers' appeal on 20 October 1997, Judge Julio César Sánchez was just seeking to avoid criminal responsibility for fraud in a trial in which he is already being tried (*see Attacks on Justice 1996*).

**José Sánchez Sánchez** {lawyer}: Mr. Sánchez is legal adviser to a peasant organisation in the southern highlands, as well as to the families of those killed in the community of Aguas Blancas. He was imprisoned on charges of damaging private property and robbery. He is currently serving in the prison of Acapulco, state of Guerrero. All of this happened in 1998.

# MOROCCO

**M**orocco is a royal Kingdom with a hereditary monarchy. It is governed by the provisions of the Constitution, which was approved by referendum on 13 September 1996, and provides for separation of powers.

The King of Morocco is the ultimate authority in the country; he acts as Head of State and commander in chief of the armed forces. He appoints the country's Prime Minister, and upon the Prime Minister's suggestion, appoints the rest of the Cabinet. The King can dissolve the 325 member Chamber of Representatives which is the country's legislature, elected by the people. The new Constitution introduced a second house of Parliament in 1996, the "*Chambre des Conseillers*" is composed of 270 members.

Morocco's political structure allows for a multi-party system. General elections were held on 14 November 1997. The majority of seats went to the opposition Socialist Union of Popular Forces, followed by the Constitutional Union.

In March 1998 the King asked socialist leader Abderrahmane Youssoufi to form a government, marking the first government for decades formed by the opposition in Morocco. Mr. Youssoufi is a well known lawyer and human rights activist in the Arab world. He was the vice-president of the Arab Lawyers Union and a founder and board member of the Arab Organisation for Human Rights. He has also served on the CIJL Advisory Board.

## HUMAN RIGHTS BACKGROUND

After years of harsh rule, the Moroccan monarchy is fostering a new image based on King Hassan's goal of promoting human rights.

With the change of government in 1998, the human rights situation in Morocco witnessed some improvement, yet there continue to be serious deficiencies due to problems in the structure and the personnel of the state.

Morocco has in recent years made efforts to improve its legal protection of human rights, which has led to the creation of many institutions and the ratification of different international conventions related to human rights. These include the Convention against Torture and Other Cruelties, the Convention on the Elimination of All Forms of Discrimination against Women and Children, and the Convention on the Rights of the Child.

Although there have been no new cases of disappearances in recent years, the file of previous disappearances in Morocco is still awaiting more concrete results. Hundreds of individuals have disappeared throughout the years, mostly supporters of the Polisario front; however the Government of Morocco persistently denied this fact as well as denying the existence of

secret prisons and detention centres. Many of the disappeared were released from detention in the early 1990s, but the Government has declined to conduct a full inquiry.

Death sentences are still issued, but no executions have been carried out recently. Prison situations are still poor. Cases of detainees who died as a result of torture in custody, or from cruel, inhuman or degrading prison conditions, are still being reported.

Detainees' contact with their families and lawyers during the first 48 hours of detention is very restricted, thus increasing the potential for torture. Security forces often act with impunity and custodial deaths and other instances of potential abuse are left uninvestigated.

In March of 1998, a new law was introduced by the Ministry of Justice, implementing the routine use of autopsy for any death in custody or in detention, in order to curtail any allegations of torture against prison administrations.

A law on prisons will be submitted to the Parliament in the near future. It has been studied by the Advisory Council on Human Rights, with the aim of ensuring its conformity with international human rights standards.

Cases are often adjudicated on the sole basis of confessions, some of which are obtained under duress. The Government provides an attorney at public expense for serious offences; however, court-appointed attorneys often provide inadequate representation.

Although the law provides for a limited system of bail, it is rarely used; this fact has been criticised as well as the fact that the law does not provide for *habeas corpus*.

Lawyers in Morocco are not always informed of the date of arrest, and thus are unable to monitor compliance with incommunicado detention limits, due to the fact that access to detained persons is kept at a minimum as the situation of detainees in Morocco is poor. Judicial police carry out investigation of detainees held in *garde à vue*, or without supervision. Moreover detainees only have access to a lawyer after they are released from *garde à vue* detention and brought before the public prosecutor or an investigating judge. Furthermore, during the interrogatory the lawyer has no right to require a defence statement to be included in the interrogation records or even to pose questions.

## WESTERN SAHARA

In 1975, Spain abandoned its colony, the territory of western Sahara, the same year Morocco invaded the area. The Polisario Front emerged as the

liberation movement for the Saharawis, claiming the right to self-determination. The war between the Polisario Front and Morocco lasted until the 1991 cease-fire accord, which resulted in the placement of a UN peace-keeping mission and the promise of a referendum on the self-determination of the people of Western Sahara. The holding of the referendum continues to be obstructed, mainly by Morocco, who is changing facts on the ground. Morocco has been able to delay the referendum until December 1999. Serious human rights violations have been committed over the years, including repression, extrajudicial killings, torture, forced disappearances, and population transfers.

## THE JUDICIARY

The independence of the judiciary in Morocco is still theoretical. Corruption is widespread and the administration of justice is archaic. No rigorous control over judges' salaries is exercised although such control is provided for by law. Resources allocated to the judiciary are minimal, thus affecting the human and material resources of the courts, and gravely undercutting the proper functioning of the judicial system.

The judiciary in Morocco is comprised of ordinary courts and special courts. There are three levels in the ordinary court system: the courts of first instance, the Courts of Appeal, and the Supreme Court.

The special courts are composed of the Special Court of Justice, which handles cases of civil servants implicated in corruption, and the Military Tribunal, (or Permanent Court of Armed Forces), which hears cases involving military personnel and on certain occasions, matters pertaining to state security. State security issues usually fall under the jurisdiction of the regular court system. A High Court was envisaged by a law passed on 8 October 1977, but never established.

### THE COURTS OF APPEAL

The Court of Appeal has two functions. It acts as Court of Appeal with regard to judgements issued by the courts of first instance, which deal mainly with offences and infractions. It also has first-hand jurisdiction over criminal cases (crimes punishable by life imprisonment, prison sentences between five and 30 years, negation of civil rights or death penalty, and house arrest), appeals against judgements passed by Tribunals of Original Jurisdiction as well as appeals against rulings made by the latter's presiding judges.

The sentences of the Court of Appeal can only be reviewed by cassation before the Supreme Court.

## THE SUPREME COURT

The Supreme Court is Morocco's highest judicial authority and sits in the capital. The Supreme Court reviews rulings made by lower tribunals. Its powers extend, among others, to disputes over jurisdiction arising among lower courts and claims of bias filed against magistrates and courts.

## ADMINISTRATIVE COURTS

Administrative tribunals are empowered to make initial rulings on claims for cancellation acts filed against administrative authorities, disputes related to administrative contracts and claims for compensation of prejudice caused by public entities' acts or activities. They are also empowered to ascertain the consistency of administrative acts with legal provisions.

## SPECIAL COURT OF JUSTICE

This special court handles cases in which magistrates or government employees are involved, such as embezzlement of public funds, corruption, or abuse of authority. The Special Court of Justice is located in Rabat and is composed of five judges, the Public Prosecutor and the Clerk.

The Special Court was established by decree on 6 October 1972 and amended on 25 December 1980. According to the decree, a case investigation must be completed within a six week span, if it is to be brought before this court. The defendant must appoint a lawyer within 24 hours of appearing before the investigating judge, otherwise one will be appointed for him. Trials are conducted in a speedy manner, and procedural guarantees afforded by the Constitution are generally not observed.

## THE STANDING TRIBUNAL OF THE ROYAL ARMED FORCES (MILITARY COURTS)

The Military Court is regulated by the July 1977 Law on the Military Judiciary. It has jurisdiction over unauthorised possession of firearms, offences committed by soldiers or by prisoners of war, and crimes perpetrated against the armed forces. It can hear cases concerning crimes and offences committed by civilians against the internal or the external security of the state, if a military element exists.

In criminal offences, the court is presided over by a civilian judge with four military judges who act as counsellors. In cases of infractions and "*correctionnel*" offences, the court is presided over by one civilian judge and two military judges as counsellors. Civilian judges are members of the Courts of Appeal. The cases are prosecuted by a military prosecutor. Trials in the Standing Tribunal of the Royal Armed Forces are regularly conducted *in camera*. Moreover, military court decisions can only be reviewed by cassation.

### THE CONSTITUTIONAL COUNCIL

The Constitutional Council was set up on 21 March 1994. Article 79 of the 1996 Constitution describes the composition of the Constitutional Council. Six of the 12 members are appointed by the King for a period of nine years; three of the remaining six are appointed by the President of the House of Representatives, and the rest are appointed by the President of the House of Counsellors, upon consultation with the parliamentary groups. A third of each category of members is to be renewed every three years. The chairman and the members of the Constitutional Court serve for a non-renewable term of office.

The Constitutional Council decides on the validity of elections, as well as that of referendum operations and the alignment of new legislation with the Constitution. Its decisions are final and binding upon all public authorities, administrative and judicial sectors.

### APPOINTMENT, TRAINING, DISCIPLINE, TRANSFERS AND REMOVALS

The King presides over the Supreme Council of the Magistracy, and appoints magistrates in accordance with the conditions prescribed by law.

According to Article 86 of the 1996 Constitution, the Supreme Council of the Magistracy is presided over by the King and composed of the Minister of Justice as vice-president, the First President of the Supreme Court, the Prosecutor General in the Supreme Court, the President of the First Chamber of the Supreme Court, two representatives elected from among the magistrates of the Court of Appeal, and four representatives elected among the magistrates of first degree courts.

Judges are initially appointed by decree of the Minister of Justice as judicial assistants once they pass the required examination. There is a requirement of two years of training before the final examination. Once accepted, they are appointed by a Royal Decree, upon recommendation of the Supreme Council of the Magistracy.

Article 14 of the Statute of the Law of the Judiciary of November 1974 forbids judges from forming or joining associations, thus contradicting Article 9 of the 1985 UN Basic Principles on the Independence of the Judiciary which states:

Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

According to the Constitution, magistrates on the bench cannot be removed, and they can be transferred only by law. Article 62 of the Statute of the Judiciary of November 1974 permits the Minister of Justice to

dismiss a judge who has committed a so-called "grave error". The decision to dismiss a judge is made independently of the Supreme Council of Magistracy; however the Supreme Council must confirm the decision to dismiss.

The Minister of Justice can transfer a judge to any region in Morocco for a period of three months, which can be renewed with the agreement of the judge. This time frame is not always respected, and could create a form of pressure on judges.

The Supreme Council of Magistracy, which had not convened for three years, finally did so in 1998, and issued sensitive and harsh disciplinary decisions against **30 judges**. Among these, **nine were dismissed**, and **13 suspended** for a six month period. Neither clear explanation, nor the names of the judges were divulged to the public, and no judicial actions were taken against the allegedly corrupt judges.

## GOVERNMENT RESPONSE TO CIJL

On 1 July 1999, the Government of Morocco responded to the CIJL's request for comments on a draft of the chapter. A few of the comments made by the Government were already incorporated by the time Morocco's response was received; these comments are omitted from the following translation into English of the Government's response, which was submitted in French. The Government stated:

### *Human Rights Background*

The Government of Morocco announced in April 1998 its willingness to deal with the detained and disappeared persons file, in collaboration with the *Conseil Consultatif des droits de l'homme*, (CCDH), a national institution formed by representatives of political parties, unions, human rights NGOs, lawyers' and doctors' associations, *Oulemas*, scientists and certain ministers.

In October 1998, His Highness King Hassan II pardoned 28 political detainees, on the suggestion of the CCDH.

We can now conclude that the file of political prisoners has been closed.

Those persons who did not benefit from this royal pardon are directly implicated in violent crimes or smuggling weapons.

The CCDH handled the disappeared persons file with a view toward national consensus, based on the lists provided by the Moroccan human rights NGOs and Amnesty International.



As a result, in April 1999, the CCDH announced, after having studied the individual cases, a revised list of 112 persons. The investigations have produced the following results:

- 13 person who were presumed to be disappeared are still alive
- The identity of five names on the list are unknown. Although contacts have been established with the organisations that listed these names, they have no further information regarding them.
- Five individuals died of natural causes
- 42 detainees were confirmed dead
- It was confirmed that 23 individuals are considered missing and there are several indications that they are to be presumed dead
- 24 individuals were identified, but the circumstances and the causes of their disappearances are different, the information gathered indicates that those people were not engaged in political or union activities.

The CCDH upholds the principle of compensation for the families of the deceased, and has formed a commission to handle the situation. It is presided over by a magistrate.

In sum, Morocco is handling this painful file with a political will, while working on the reconciliation of the Moroccan people with a part of their history, in a spirit of national consensus that consolidates the democratic gains and re-enforces the rule of law.

### *Western Sahara*

We regret that the CIJL uses language showing political bias in stating that:

Morocco invaded the territory of western Sahara.

The holding of the referendum continues to be obstructed, mainly by Morocco.

Serious human rights violations have been committed over the years, including repression, extrajudicial killings, torture, forced disappearances, and population transfers.

On the other hand, the Polisario Front, is mentioned only twice; 1) as the liberation movement for the Saharawis,

claiming the right to self-determination, and 2) as the party that signed a cease-fire accord with Morocco.

... one would think that this is a clear political statement, especially since the report did not mention the situation of human rights in the Tindouf camps, about which deserting Polisario members (of whom hundreds returned to Morocco) reported the horrors and violations committed: torture, killings, forced labour, etc., not to mention the lack of freedom of opinion, movement, etc.

Throughout history, many of the ruling dynasties of Morocco have originated from Western Sahara. It was recovered following an international agreement with Spain, which was registered at the UN. A peaceful *marche verte* was initiated by his Highness King Hassan II, after the consultative opinion of the International Court of Justice in The Hague, which recognised the ties of allegiance between the inhabitants of Western Sahara and the Moroccan Monarchy, ties which were reconfirmed by the Jamaa (the assembly of the representatives of the Sahrawi tribes), whose members declared allegiance to the King of Morocco.

Being convinced of the soundness of its cause, Morocco has accepted since 1981 the principle of the referendum. Morocco worked for the conclusion of the Houston Accord, and wholly supported the UN peace plan. Morocco collaborated with the Working Group on Enforced Disappearances (GTDFI) in clarifying 70% of the cases submitted to it, which totalled 242: 130 cases were clarified by Morocco (many of whom live normally in Morocco, others of whom are prisoners of war held by the army and are visited by the ICRC, and others of whom are war victims). Forty-one cases were clarified by the GTDFI itself.

We would have wished that the CIJL, which we know to be rigorous, remain impartial with regards to this issue by evaluating the situation from the point of view of both sides and by relying on more credible sources without prejudice.

### *Justice*

With regards to the Constitutional Articles concerning the independence of the judiciary, we ask you to refer to Articles 82 through 87 of the Constitution; we will mention only that the *Dahir* is always signed by the King who is the president of the Supreme Council of the Magistracy (Article 86).

In order to become a judge, a person must hold a law degree (equivalent to *la maîtrise* in France), pass the required competitive examination, and undertake three years of training in the *Institut National des Etudes Judiciaires* (INEJ).

It is to be noted that added to the several courts cited in the report, commercial courts are being created (Law of 6/1/1997) in order to improve the output of the judiciary in this area, to accompany socio-economic changes and to address the needs of investors.

The adoption of the Prison Law by the Chamber of Representatives in May 1999 was accompanied by a large programme of prison repair and renovation, an increase in prison capacity, the improvement of detainees' living conditions, and an opening of the prisons to NGOs who visit the prisons, either to investigate them or to hold social and cultural activities and awareness programmes (see annual report of OMDH of 1998).

These measures are part of a plan of action aimed at modernising and improving the administration of justice, reinforcing its independence, and maintaining the flow of training and information, etc.

This work is being done in consultation with staff, and the bar associations.

In order to bring justice closer to the people, and improve the working conditions, the Ministry of Justice accelerated its achievements over the course of 1998: creating three appellate courts, four tribunals of first instance; and putting in use nine commercial courts.

To conclude, we can assert that the work initiated reflects the political will of His Highness King Hassan II and of his government, in order to consolidate the rule of law and reinforce the acquired democratic values of Morocco.

## MYANMAR (BURMA)

From 1990 until November 1997, power in Burma has been centralised in the ruling military government, referred to as the State Law and Order Restoration Council (SLORC). On 15 November 1997, SLORC was dissolved and reconstituted as the State Peace and Development Council (SPDC). The purpose was said to be to “ensure the emergence of an orderly or disciplined democracy” and to establish a “peaceful and modern State...in the interest of all the national peoples”. Human rights violations, however, have only increased throughout 1997 and 1998.

The SLORC hierarchy remains intact, as the same top four SLORC leaders are at the head of the SPDC. Furthermore, 13 of the 14 individuals who are members of the Advisory Group to the SPDC are former members of the SLORC.

The ruling military government strengthens its rule via a security apparatus led by the Directorate of Defence Services Intelligence (DDIS). The Government justifies its security measures as necessary to maintain order and national unity. Members of the security forces reportedly commit serious human rights abuses.

The present military regime took power in 1988, after a ruthless suppression of pro-democracy uprising. After two years of rule by martial law, SLORC permitted a relatively free general election on 27 May 1990, but did not honour the results, which reflected a rejection of military rule. The National League for Democracy (NLD) won 60% of the votes and 82% of the parliamentary seats. The government-sponsored party obtained only 10 of the 485 seats. The SLORC responded by attacking the coalition of winning parties and their leaders through intimidation, detention and house arrest.

To justify its dismissal of the 1990 election results, SLORC issued Declaration No. 1/90 which conveniently provided that the elected representatives' sole responsibility is the drafting of a new Constitution for a democratic Burma and not to take over power from SLORC. The Burma authorities have argued to the United Nations that the Constitutions of 1948 and 1974 had failed because they had not adequately addressed the aspirations of the national races, and that it was important to ensure that the future Constitution reflected those aspirations.

Declaration No. 11/92 created a National Convention to draft a new Constitution, which met for the first time in January 1993. Out of its 702 representatives, more than 600 were selected by SLORC. The National Convention convened again in November 1995, but the NLD boycotted the Convention out of protest for the lack of a democratic process in its procedure. The SLORC consequently banned the 86 NLD delegates from the National Convention. The National Convention has not convened since then.

## HUMAN RIGHTS BACKGROUND

During 1997 and 1998 the military government continued to seriously violate human rights. Arbitrary detention, serious restrictions on the freedom of expression, assembly and association, extrajudicial killings, disappearances of political opponents and torture all occurred frequently.

The number of arrests and detentions increased during 1997 and 1998, apparently in order to undermining the NLD and the student movement. A large number of elected NLD members were arrested and tried without legal counsel and sentenced to harsh prison terms.

On 12 December 1997, eight detained members of the NLD were all sentenced to long prison terms for attempting to organise a meeting for NLD leader Daw Aung San Suu Kyi earlier in October. Lawyers were refused access to the detainees.

In July and August 1998 Aung San Suu Kyi, the Secretary-General of the NLD, had several confrontations with the authorities when she tried to leave Rangoon for meetings with fellow NLD members. The conflict arose after the June deadline set by the NLD for the Government to reconvene the country's legislature by 21 August.

Furthermore, Burma's ethnic and religious minorities such as the Karen, Karenni and Shan tribes are involved in an internal conflict with the army and suffer severe abuses, including arbitrary arrest, killings and forced labour in the army.

The military government continues to use vaguely worded laws, such as the 1950 Emergency Provisions Act and the 1975 State Protection Law to arrest and sentence persons for their peaceful political activities. It is estimated that in 1998 there were approximately 1,200 political prisoners in Burma.

Human rights organisations or other civil liberties movements are not permitted in Burma. In addition, foreign human rights activists are banned from the country. On 15 May 1998, a British/Australian human rights activist was sentenced to five years imprisonment and a US \$7,500 fine for entering the country illegally. In August, eighteen foreigners were sentenced to five years hard labour for allegedly inciting unrest. They were arrested for handing out leaflets commemorating the 10th anniversary of a military crackdown on student protesters. Later, all the activists, including the British/Australian activist were deported from the country.

In 1992, the United Nations Commission on Human Rights created a Special Rapporteur for Myanmar to examine the human rights situation in that country. Since his appointment in 1996, the current Special Rapporteur, Mr. Rasjoomer Lallah, has sought the co-operation of the Government of Burma and has requested their authorisation to travel to the country but in

vain. Both the General Assembly and the Commission on Human Rights also called repeatedly on the Government to allow the Special Rapporteur to visit the country but thus far representatives of the Government have only expressed their disagreement with the assessments made by the Special Rapporteur and have stated that the Special Rapporteur will be authorised to visit the country at an "appropriate time".

The Special Rapporteur on Torture, in his report to the 1998 session of the UN Commission on Human Rights, endorsed the conclusions of the Special Rapporteur on Myanmar, in that

the practice of torture, portering and forced labour continues to occur in Myanmar, particularly in the context of development programmes and counter-insurgency operations in minority-dominated regions.

In his interim report to the 1998 session of the UN General Assembly, the Special Rapporteur discussed extensively the issue of forced labour in Burma, as this remains an area of grave concern, despite the fact that the country ratified the ILO Convention No. 29 against forced labour in 1955. In June 1996, the ILO Committee on the Application of Standards noted the persistent failure of the Government to implement the Convention. In March 1997, the ILO Governing Body decided to refer the complaints to a Commission of Inquiry. According to the report issued by the Commission of Inquiry on 20 August 1998

[t]he obligation to suppress the use of forced or compulsory labour was violated in Myanmar in national law as well as in actual practice in a widespread and systematic manner, with total disregard for the human dignity, safety and health and basic needs of the people. The Commission concluded that the impunity with which governmental officials, in particular, the military, treated the civilian population as an unlimited pool of unpaid forced labourers and servants at their disposal was part of a political system built on the use of force and intimidation to deny the people of Myanmar democracy and the rule of law.

In his conclusions, the Special Rapporteur stated with regret that the Government of Burma has so far ignored the resolutions of both the General Assembly and the Commission on Human Rights, and has showed a total lack of co-operation with the Special Rapporteur. Unfortunately, the conclusions drawn in his report to the 1998 Commission on Human Rights remain valid, as there has been no improvement in the situation in Burma.

The Secretary-General of the United Nations reported to the 1998 Commission on Human Rights, and to the 1998 General Assembly, on the 'good offices' mission to Burma. The Secretary-General's special envoy, Mr. Alvaro de Soto, visited Burma from 7-10 May 1997 and 20-23 January 1998. Before visiting Burma again, Mr. de Soto met with the Minister of

Foreign Affairs in New York. and subsequently left again for a three day visit to Burma on 27 October 1998. In his report the Secretary-General concluded that there is no

genuine, substantive progress on the part of the Myanmar Government in addressing the appeals to it in repeated General Assembly resolutions, notwithstanding my efforts. I am concerned at the deterioration in the situation and the tensions that have arisen. I believe such efforts should be intensified in the coming months.

## THE JUDICIARY

Burma's court system was inherited from the United Kingdom and was subsequently restructured. The rule of law in Burma has malfunctioned since the military government began its rule in 1988.

In September 1988, SLORC issued Law No. 2/88, the Judiciary Law, according to which there shall be a Supreme Court composed of a Chief Justice and "not more than five Judges". Lower courts, the State or Division and Township Courts, were to be formed by the Supreme Court. Military tribunals, established in 1989 for the purpose of trying martial law offenders under special summary procedures, were abolished in September 1992.

The SLORC, now the SPDC, appoints the judges of the Supreme Court. The Supreme Court selects judges for the lower courts, with the approval of the SPDC. The Supreme Court is further in charge of supervision of all courts. The Judiciary Law does not contain any provisions on security of tenure and protection from arbitrary removal, thus leaving such issues in the hands of the military government.

The administration of justice is based on several judicial principles; in section 2(a) of Law No. 2/88, justice is required to be administered "independently, according to law." In reality however, the judiciary is far from independent, due to the suspension of the Constitution and the numerous decrees that restrict freedoms.

In addition to the military government's unrestrained role in appointing judges to the courts, it also directly influences the administration of justice, reportedly by manipulating the courts to secure an outcome which will serve its political ends. This is particularly obvious in cases concerning persons alleged to be involved in political activities.

Without the permission of the intelligence organs, judges cannot even let the family and counsel of the accused know what sentence has been passed. In many cases, the accused is kept in ignorance of the section of law under which he is charged. There have been instances where the Military

Intelligence has passed sentences orally at the time of arrest, before any trial had taken place.

In his report to the 1998 Commission on Human Rights, the Special Rapporteur stated that although at first it seemed that a more positive attitude had begun to emerge with respect to restrictions on political parties, the change appeared to be only formal, as the authorities continued to have complete control over the meetings of especially the NLD. The Special Rapporteur stated in his report that Daw Aung San Suu Kyi, the Secretary General of the NLD, remained under serious restrictions and was constantly harassed and scandalised.

In his conclusions, the Special Rapporteur noted

with particular concern that the electoral process initiated in Myanmar by the general elections of 27 May 1990 has still, after seven years, to reach its conclusion and that the Government still has not implemented its commitment to take all necessary steps towards the establishment of democracy in the light of those elections.

The Special Rapporteur furthermore concluded that extra-judicial, summary or arbitrary executions, and the practice of torture continue to occur in Burma. With regard to arbitrary arrest and detention, the Special Rapporteur stated that he was convinced that

such violations take place on a wide scale if for no other reason than that an examination of the laws in place show that such violations are legal and may easily occur. At the same time, the absence of an independent judiciary, coupled with a host of executive orders criminalising far too many aspects of normal civilian conduct, prescribing enormously disproportionate penalties and authorising arrest and detention without judicial review or any other form of judicial authorisation, leads the Special Rapporteur to conclude that a significant percentage of all arrests and detentions in Myanmar are arbitrary when measured by generally accepted international standards. In this regard the Special Rapporteur expresses his deep concern at the continued detention of many political prisoners, in particular elected representatives and the continuing arrests and harassment of supporters of democratic groups in Myanmar.

The Special Rapporteur drew the general conclusion

... that there has been no change in the situation since his last report to the General Assembly and to the Commission on Human Rights. The resolutions of the General Assembly and of the Commission have gone largely unheeded by the



## Government of Myanmar.

### LAWYERS

When the SLORC seized power on 18 September 1988, activities of individual lawyers and the voice of the lawyers' associations in Burma were suppressed and silenced. Since 1989, the Bar Council has no longer been independent and is instead supervised by the Attorney-General and staffed by government officials.

Many of SLORC's original decrees remain in force today, including Order No. 2/88 which prohibits public gatherings of more than five people, and No. 8/88 which forbids public criticism of the military.

Some basic due process rights, including the right to a public trial and to be represented by a defence attorney, are generally respected except in political cases. Defence attorneys are permitted to call and cross-examine witnesses, but their primary role is to bargain with the judge to obtain the least severe possible sentence for their clients.

During the last several years many lawyers have had their licences withdrawn for their alleged involvement in politics. Although they may have been arrested, imprisoned or released prior to 1997, they remain unable to practise their chosen career at the time of this writing.

### CASES

**U Myint Aung** {lawyer, Licence No. 3277}: He was arrested and charged under Section 2(1)(a) Arms Act (Temporary). His trial was heard on 16-17 May 1990 at Rangoon Division Joint Magistrate Court No. 12 and he was sentenced to two years imprisonment with hard labour. He was prevented from practising law as of 4 November 1993, and his practising licence was withdrawn.

**U Toe Aung** {lawyer, Licence No. 1049}: He was charged under Article 5(j) of the Emergency Act 1950 Article 5(j) and sentenced to five years imprisonment on 7 February 1991. His practising licence was withdrawn.

**U Yan Aung** {lawyer, Licence No. 12169}: He supported the 'Fighting Lawyers Committee' during the 1988 uprising, and was a Rangoon NLD youth organiser. He was sentenced to 10 years imprisonment on 15 May 1991 under Section 5(a)(b)(j) of the Emergency Act and Section 17(1)(2) of the Unlawful Organisations Act of 1908. He was prevented from practising law and his practising licence was withdrawn.

**U Thar Bann** {lawyer, Licence No. 2024}: He was charged under Article 5(j) of the Emergency Act 1950 and sentenced to five years imprisonment on 30 May 1991. He was prevented from practising law as of 30 June 1993.

**U Bo Bo** {lawyer, Licence No. 2743}: He was charged under Section 5(j) of the Emergency Provision Act in 1994 at the Kyauktada Township Court and his licence was temporarily suspended on 6 January 1995.

**U Myram Boutler** {lawyer, Licence No. 3415}: He was arrested and charged under Section 5(j) of the Emergency Provision Act. His trial was heard in Myitkyniar Township Court and he was sentenced to five years imprisonment. He was prevented from practising law as of 6 October 1993, and his practising licence was withdrawn.

**U Maung Maung Gyi** {lawyer, Licence No. 1586}: He was arrested and charged under Section 5(j) of the Emergency Provision Act. He was sentenced to two years imprisonment with hard labour on 30 January 1990 at Meiktila District Court. He was prevented from practising law as of 4 November 1993, and his practising licence was withdrawn.

**U Khin Maung Gyi** {lawyer, Licence No. 17928}: He was charged under Article 5(j) of the Emergency Act 1950 and Section 17(1) of the Unlawful Organisation Act 1908 and sentenced to 10 years imprisonment on 24 November 1989. He was prevented from practising law as of 30 June 1993.

**U Win Hlaing** {Supreme Court lawyer, Licence No. 3277}: He was elected as NLD Assembly Representative from Tatgone constituency. He took responsibility in the Central Leading Committee as well as the Central Youth Affairs Committee of the NLD. SLORC military intelligence officers arrested, charged and imprisoned him under Section 58(a), (b) and (j) of the Emergency Provision Act for heading the central youth group. His practising licence was withdrawn and the election commission also disqualified him as Assembly Representative on 20 December 1991.

**Daw Khin San Hlaing** {Supreme Court lawyer, Licence No. 4023}: She was elected NLD Assembly Representative of Wet Let Constituency. Daw Khin San Hlaing attended the secret meeting to form an interim government at the house of Amarpura Constituency Representative U Bar Bwar on 29 September 1990 and was arrested by SLORC and charged under Article 122(1) of the Criminal Law Code.

Ms. Hlaing was sentenced to imprisonment under criminal law on 18 December 1990 and was prohibited from being a candidate in future elections. She was sentenced to 25 years imprisonment on 30 April 1991 but was released on 4 May 1992 from Insein Prison. However, her practising licence was withdrawn and she was expelled as a Supreme Court lawyer as of 30 June 1993.

**U Saw Hlaing** {Supreme Court lawyer, Licence No. 4666}: He was sentenced to nine years imprisonment for participating in the "Hmaing 100 years movement". He was released in 1980 under State Council's amnesty announcement and was elected as NLD Assembly Representative from Inn-dow constituency. He was again arrested for attending the secret meeting to form an interim government at the house of Amarapura Constituency Representative U Ba Bwar on 29 September 1990 and was charged under Article 122(1) of the Criminal Law Code and sentenced to 25 years imprisonment. He was released from Insein Prison on 27 May 1992 but the Election Commission disqualified him as an Assembly Representative on 23 December 1991 and also barred him from being a candidate in future elections. He was prevented from practising law and his practising licence was withdrawn as of 30 June 1993.

**U Nyunt Hlaing** {lawyer} and **U Thein Zan** {lawyer}: They were arrested in an incident which occurred on 30 January 1997. The SLORC accused the NLD of the Aung Lan township of instigating farmers to stand against the government programme. Five local leaders of the NLD, including the two lawyers, were arrested.

Mr. Zan was elected as an Assembly Representative from Aung Lan township constituency in the May 1990 election. On 7 January 1997, U Tein Zan was forced to resign. Mr. Zan was charged under Section 5(j) of the Emergency Provision Act on 24 February 1997, and sentenced to five years imprisonment.

**Daw Oo Oo Khin** {lawyer, Licence No.- 1559}: She was arrested and charged under Article 5(4) of the Government Secrecy Act of 1923. Her case was heard in the Mandalay Division Court on 14 October 1991 and she was sentenced to six months imprisonment with hard labour. She was prevented from practising law as of 11 March 1996, and her practising licence was withdrawn.

**Maung Maung Kyaw** {lawyer, Licence No. 945}: He was charged under Article 5(j) of the Emergency Act 1950 and sentenced to five years imprisonment on 15 May 1991. He was prevented from practising law as of 30 June 1993.

**Daw Ohn Kyi** {lawyer, Licence No. 6774}: She was elected as NLD Assembly Representative from Myint-Thar constituency. Daw Ohn Kyi attended the secret interim government meeting at U Bar Bwar's house in April 1991 and was arrested under Criminal Law Article 122(1) and imprisoned and disqualified as an Assembly Representative on 6 January 1992. She was released from Insein Prison on 4 May 1992, but later charged under Article 122(1) of the Criminal Law Code and sentenced to 25 years imprisonment at Rangoon Division Joint Magistrate Court No. 12 on 30 April 1994. She was prevented from practising law as of 30 June 1993.

**U Tin Aye Kyu** {lawyer}: He was General Secretary of the National Political Alliance Party. He was sentenced to nine years imprisonment for leading the 1976 “Hmaing 100 years” demonstration, and released in the 1980 amnesty. After being released from prison he studied and attained a higher legal degree. He was prevented from practising law as an advocate and had his practising licence withdrawn.

**U Maung Maung** {Supreme Court lawyer}: He was arrested on allegations of having connections with the BCP. His practising licence was withdrawn.

**U Sann Maung** {lawyer, Licence No. 3353}: He was arrested and charged under Section 5(j) of the Emergency Provision Act. He was sentenced to nine months imprisonment with hard labour on 24 May 1990 at West Bassein Township Court. He was prevented from practising law as of 7 October 1993 and his practising licence was withdrawn.

**U Tin Maung** {lawyer, Licence No. 1595}: He was arrested and charged under Section 5(j) of the Emergency Provision Act. He was sentenced to one year of imprisonment on 4 December 1991 at Yayazgyo Township Court. He was prevented from practising law as of 23 November 1993, and his practising licence was withdrawn.

**U Win Maung** {lawyer, Licence No. 4540}: He was arrested and charged under Section 5(j) of the Emergency Provision Act. He was sentenced to two years imprisonment with hard labour on 30 January 1990 at Meiktila District Court. He was prevented from practising law as of 4 November 1993, and his practising licence was withdrawn.

**U Nay Min** {lawyer}: He was arrested on the allegation of supplying false information to the British Broadcasting Corporation and sentenced to 14 years imprisonment on 21 October 1988. His practising licence was withdrawn.

He was also detained in Insein Prison in 1975 on suspicion of having contact with BCP.

**U Aung Myaing** {lawyer, Licence No. 3576}: He was arrested and charged under Criminal Law 366/109. He was sentenced to six years imprisonment with hard labour on 3 April 1992 at a military court. He was prevented from practising law as of 4 November 1993, and his practising licence was withdrawn.

**U Myo Myint** {lawyer, Licence No. 12998}: He was arrested and charged under Section 5(j) of the Emergency Provision Act. He was sentenced to one year of imprisonment with hard labour on 15 March 1993 at Mandalay Division’s Chan Aye Thar Zan Township Court. He was prevented from practising law and his practising licence was withdrawn.

**U Har Myint** {lawyer}: He was arrested and charged under Section 5(j) of the Emergency Provision Act. He was sentenced to 5 years imprisonment with hard labour on 3 October 1990 at Myitkyinar Township Court. He was prevented from practising law as of 5 August 1993 and his practising licence was withdrawn.

**U Thaug Myint** {Supreme Court lawyer, Licence No. 1640}: He was elected as NLD Assembly Representative from Khin-U constituency.

U Thaug Myint was arrested for attending the secret meeting to form an interim government at the house of Amarapura Constituency Representative U Ba Bwar on 29 September 1990. He was charged under Article 122(1) of the Criminal Law Code. He was sentenced to 25 years imprisonment but released from Insein Prison on 4 June 1992. The Election Commission disqualified him on 6 January 1992 and he was also prohibited from being a candidate in future elections. He was prevented from practising law and his practising licence was withdrawn as of 30 June 1993.

**U San Myint** {lawyer}: He was formerly imprisoned because of his involvement in 1975 U Thant's uprising. Following the 1988 popular democratic uprising, he took responsibility as the vice-president of the New Blood Party. He was arrested again and had his practising licence withdrawn.

**U Bo Ni** {lawyer, Licence No. 1783}: He was arrested and charged under Section 6(1) of the People's Property Protection Act. He was sentenced to six months imprisonment with hard labour on 15 March 1993 at Kungchangone Township Court. He was expelled as a lawyer as of 4 November 1993, and his practising licence was withdrawn.

**U Khin Maung Nyunt** {lawyer, Licence No. 3533}: He was arrested and charged under Section 5(j) of the Emergency Provision Act. His case was heard in Mandalay Division Court No. 4 on 3 January 1992, and he was sentenced to three months imprisonment with hard labour. He was prevented from practising law as of 7 October 1993, and his practising licence was withdrawn.

**U Tun Oo** {lawyer, Licence No. 11942}: He was charged under Article 5(j) of the Emergency Act 1950 and Section 17(1) of the Unlawful Organisation 1908 Section 17(1) and sentenced to 20 years imprisonment on 2 November 1989. Consequently, he was prevented from practising law.

**U Win Shwe** {lawyer, Licence No. 9123}: He was arrested and charged under Section 5(j) of the Emergency Provision Act. He was sentenced to 15 months imprisonment with hard labour on 20 October 1989 at Insein Township Court. He was prevented from practising law as of 23 November 1993, and his practising licence was withdrawn.

**U Tin Shwe** {lawyer}: He was an author and a member of an intellectual group headed by Ms. Suu Kyi. He played a leading role in the election campaign of 1990. He was charged under Article 5(a)(b) and (j) and the

Emergency Act of 1950 on allegations of forming a parallel government. He was initially sentenced for 10 years imprisonment on 15 May 1991, but his sentence was later increased to 15 years. Neither his family nor NLD received any information as to which prison he was detained in.

In April 1997 U Tin Shwe was suffering from serious heart disease and his family requested that he receive treatment in Rangoon General Hospital. The authorities did not accede to this request. The Chairman of the NLD wrote to General Than Shwe (Chairman of SLORC and current Chairman of the SPDC) urging that U Tin Shwe be allowed proper medical treatment. No response to this letter was ever received. U Tin Shwe died on 6 June 1997 of a heart attack at his cell in Insein prison.

**U Kyin Soe** {Supreme Court lawyer, Licence No. 9186}: He was arrested and charged under Section 5(j) of the Emergency Provision Act. He was sentenced to four years imprisonment by a military court on 7 May 1997. He was prevented from practising law as of 4 November 1993, and his practising licence was withdrawn.

**U La Than** {Supreme Court lawyer, Licence No. 2644}: He participated in the activities of the Rangoon Bar Association in the 1988 popular democratic uprisings. He was elected as a NLD Assembly Representative from Coco Island constituency and was Chairman of Kyemyindine NLD.

U Hla Than was arrested for attending the secret interim government formation meetings on 19 September 1990 (at the house of Amarapura Constituency Representative U Ba Bwar) and on 30 September 1990 (in Mandalay North-West township) and was charged under Article 122(1) of the Criminal Law for high treason. He was sentenced to 25 years imprisonment on 30 April 1991 and had his practising licence confiscated. He was prevented from practising law as of 30 June 1993.

U Hla Than died at Rangoon General Hospital on 2 August 1996 at 4 pm, while being detained.

**U Myo Thann** {Judicial Officer Grader}: He was the patron of the Bahmaw Student Union during the 1988 uprising. U Myo Thann was arrested on 15 January 1989 on charges of being involved with BCP movement. His practising licence was withdrawn.

**U Khin Maung Thein** {lawyer, Licence No. 2994}: U Khin Maung Thein was elected as NLD Assembly Representative from Khin U constituency. He worked as a lawyer in Mandalay.

U Khin Maung Thein was arrested for attending the secret meeting to form an interim government at the house of Amarapura Constituency Representative U Ba Bwar on 29 September 1990 and charged under Article 122(1) of the Criminal Law Code. He was released on 2 June 1992 but was disqualified as an Assembly Representative and also barred from

being a candidate in future elections. He was prevented from practising law as of 30 June 1993.

**U Thiha** {lawyer, Licence No. 7570}: He was charged under Section 5(j) of the Emergency Provision Act at Meiktilar District Court. He was temporarily suspended as a lawyer as of 4 November 1993.

**U Chit Tin** {Supreme Court lawyer}: He was elected as NLD Assembly Representative from Min-la constituency. He was arrested by SLORC as one of the 'six hard cores' who attended the interim government formation meetings on 19 September 1990 (at the house of Amarpura Constituency Representative U Ba Bwar) and on 30 September 1990 (in Mandalay North-West township).

He was charged under Article 122(1) of the Criminal Law Code for high treason and imprisoned. He was released on 29 June 1992 but his practising licence remained withdrawn as of 30 June 1993 and the Election Commission disqualified him as an Assembly Representative on 18 December 1991 and also prohibited him from being a candidate in future elections.

**U Tun Tin** {lawyer}: He was a member of the Secretary Board of the Sayakyi Tha Khin Ko-Daw-Hmaing-led World Peace Congress (Burma). In 1953, as Secretary of the delegation from Burma, he attended the World Peace Conference held in Vienna, Austria. He took responsibility as a member of the Secretariat of the Internal Peace Organisation from 1957 to 1964.

U Tun Tin was detained in 1959 for over one year on the allegation of contacting the Burma Communist Party (BCP), and further detained from 10 July 1967 to 2 March 1970.

He resumed work as a lawyer, following his release from prison and joined the NLD on 14 October 1988, becoming a central committee member. He was accused of having connections with the BCP and detained under Emergency Provision Act Section f(j) prior to the 1990 election. He was prevented from practising law and had his practising licence withdrawn.

**U Sein Nyo Tun** {lawyer}: He was arrested on allegations of contacting BCP underground people and had his practising licence withdrawn.

**U Te Tun** {lawyer, Licence No. 1946}: He was charged under the Foreign Exchange Rule Law Sections 5(19), 6(1), 24(1), 34 and sentenced to four years imprisonment. He was prevented from practising law as of 30 June 1993.

**U Aye Thwin** {lawyer}: He was the Mandalay Bar Association Treasurer during the 1988 uprising. He was imprisoned for 6 months for his involvement in "Hmaing 100 Years Uprising". U Aye Thwin was arrested on allegations of distributing anti-government leaflets and cassette tapes. His practising licence was withdrawn.

**U Zaw Myo Win** {lawyer, Licence No. 3104}: He was charged under Article 5(j) of the Emergency Act 1950 and Section 17(1) of the Unlawful Organisation Act 1908 and sentenced to eight years-imprisonment on 20 November 1989. He was expelled as advocate as of 30 June 1993.

**U Kyaw Win, U Aung Myin, U Than Pe, U Tin Ohn, U Tin Htut Naing** {judges in the Supreme Court}: They were "permitted" to retire from duties by SPDC Order 5/98 on the 11th Waning of Tazaungmon 1360 ME (14 November 1998) under the order/signature of SPDC Secretary-1 Khin nyunt Lieutenant-General.

It is widely believed that the judges were forced to retire because of cases submitted by the NLD pending before the Supreme Court, and the SPDC's uncertainty about how these judges would respond. It is unusual for such a large number of judges to retire at once, with no explanation given.

By the same order 5/98, four others were appointed as Supreme Court Justices: U Than Oo, U Kin Maung latt, U Khin Myint, Dr Tin Aung Aye.

**Daw Sann Sann Wynn** {Supreme Court lawyer, Licence No. 1551}: She was elected as NLD Assembly Representative from Ahlone constituency. She was arrested in April 1991 for attending the secret meeting to form an interim government at the house of Amarapura Constituency Representative U Ba Bwar. She was charged under Article 122(1) of the Criminal Law Code and sentenced to 25 years imprisonment on 30 April 1991. Her licence was confiscated. She was released from Insein Prison on 1 May 1992 but her practising licence remained withdrawn as of 30 June 1993 and the Election Commission disqualified her as an Assembly Representative and barred her from being a candidate in future elections.

**U Han Shin Wynn** {lawyer}: In June 1978, he participated in the Rangoon University boycott movement in commemoration of the Workers Strike of June 1974. He formed the Democracy Development Association of Yay-za-gyo. He was prevented from practising law and had his practising licence withdrawn.



# PAKISTAN

The 1973 Constitution of the Islamic Republic of Pakistan provides for a federal state and a parliamentary system. Federal legislative power is vested in the Parliament, which is composed of two houses: the National Assembly (lower house) and the Senate (upper house). The National Assembly is composed of 207 Muslim members and ten additional members of other religions, all elected for a five year term. The Senate is composed of 87 members, elected for a term of six years. The President is the Head of State. The Prime Minister, who is the Head of Government, is elected by the National Assembly in a special session. The Constitution permits a vote of "no confidence" against the Prime Minister by a majority of the entire National Assembly, provided that it is not during the annual budget session.

According to the 1973 Constitution, the President, after consulting with the Prime Minister, appoints Provincial Governors, who act on the advice of the Cabinet or Chief Minister of the Province.

Mian Muhammad Nawaz Sharif's Pakistan Muslim League (PML) won the elections on 3 February 1997, defeating Benazir Bhutto's Pakistan People's Party (PPP). The elections had been called after Ms. Bhutto's government had been removed in November 1996 on allegations of corruption and mismanagement.

In April 1997, the new Prime Minister revoked several provisions of the eight amendment to the Constitution, abolishing the power of the President to dismiss the Prime Minister. Later that year, the 14th amendment to the Constitution was passed, restricting the rights of the National Assembly and Provincial Assembly representatives to challenge their leaders.

Sectarian violence in the Punjab between Sunni and Shi'a Muslims and violence in the disputed territory of Kashmir remained areas of concern in 1997 and 1998. The province of Sindh also remained unstable because of ethnic violence which was mainly concentrated in Karachi. It was reported that more than eight hundred people died in 1998 in Karachi as a result of the violence.

In the course of 1997 and 1998, the corruption charges against the Bhutto family evolved, as the High Court of Lahore ordered in April 1998 the freezing of all assets belonging to the former Prime Minister and some of her family members. During the summer, the Bhutto family and their Swiss lawyer were indicted by a Swiss federal court on charges of money-laundering.

A series of nuclear tests by both India and Pakistan in May 1998 worsened relations between the two countries. The detonation of the bombs caused both countries to receive harsh criticism and condemnation by the UN Security Council. International pressure led to the start of talks between the Prime Ministers of India and Pakistan in July.

In May 1998, the Government declared a state of emergency for the whole of Pakistan as a result of the growing tension between Pakistan and India over the nuclear tests. The Supreme Court, however, ruled in June that the suspension of all fundamental rights by the State of Emergency Act was not allowed, as some rights cannot be derogated.

## **HUMAN RIGHTS BACKGROUND**

The human rights situation remained poor in 1997 and 1998, with ethnic violence especially in Sindh and Punjab, instability of the judiciary and religious discrimination. Prison conditions remained poor, and police arbitrarily arrested and detained citizens, committed numerous extrajudicial killings and tortured, abused and raped almost with impunity.

The blasphemy law is also a cause of great concern among human rights activists, as it is often used to persecute religious minorities. In May 1998, a Roman Catholic Bishop, John Joseph, committed suicide in protest of a death sentence given to a Christian for blasphemy. In September, a Shi'a Muslim was sentenced to death under the blasphemy law.

In 1998 the UN Special Rapporteur on the Independence of Judges and Lawyers expressed his concern about the high level of tension between the Executive and the judiciary and reiterated his wish to visit Pakistan.

The UN Special Rapporteur on Torture advised the Government that he continued to receive reports on the widespread use of torture in Pakistan. He also urged the Government to inform him about steps taken to implement the recommendations of his 1996 mission report.

In August 1998, the Prime Minister introduced a constitutional amendment allowing arbitrary interpretation of what is "wrong" or "right" under Islam to be made by the federal Government. The amendment overrides all constitutional protection and cannot be challenged in court.

In October, the National Assembly voted 151-16 in favour of a constitutional amendment to replace the legal system with Shari'a law. At the time of writing the Senate had not yet voted on the amendment; however, it was widely expected that they would not vote in favour of it.

Criticism of the amendment focuses primarily on the Article which gives the Government the right to "prescribe what is right and forbid what is wrong" according to Islam, as this gives the Government overbroad powers.

## THE JUDICIARY

The Constitution of the Islamic Republic of Pakistan provides for an independent judiciary; however, in practice the judiciary is influenced by the Executive.

### COURT STRUCTURE

The judicial system is composed of a Supreme Court of Pakistan, a High Court for each province and, at the lower levels, civil and district courts for civil proceedings, and magistrate and session courts in the criminal system. There is also a Federal Shariat Court and a Special Terrorism Courts.

The Supreme Court enjoys original jurisdiction in every dispute between the federal Government and the Provincial Governments and appellate jurisdiction "from judgements, decrees, final orders or sentences of a High Court". The High Courts' jurisdiction is extensively detailed in the Constitution.

### APPOINTMENT

The Chief Justice of Pakistan is appointed by the President. Other judges of the Supreme Court are also appointed by the President, after consultation with the Chief Justice. At any time when the office of Chief Justice of Pakistan is vacant or if the Chief Justice is absent or is unable to perform the functions of his office due to any other cause, the President shall appoint the most senior of the other judges of the Supreme Court to act as Chief Justice.

At any time when the office of a judge of the Supreme Court is vacant or the judge of the Supreme Court is absent or is unable to perform the functions of his office due to any other cause, the President may appoint a judge of a High Court who is qualified for appointment as a judge of the Supreme Court to act temporarily as a judge of the Supreme Court.

A judge of the High Court is appointed by the President after consultation with the Chief Justice, the Governor of the Province and the Chief Justice of the relevant High Court.

At any time when the office of Chief Justice of a High Court is vacant or the Chief Justice of a High Court is absent or is unable to perform the functions of his office due to any other cause, the President shall appoint one of the other judges of the High Court, or may request one of the judges of the Supreme Court to act as Chief Justice.

### QUALIFICATIONS

A person shall not be appointed as judge of the Supreme Court unless he is a citizen of Pakistan and has for a period of no less than five years been a judge of a High Court or an advocate of a High Court for no less than fifteen years.

A person shall not be appointed a judge of a High Court unless he is a citizen of Pakistan, is no less than forty years of age and he has been an advocate of a High Court or a member of a civil service prescribed by law for not less than ten years and has for a period of not less than three years served as District Judge in Pakistan or for not less than ten years held a judicial office in Pakistan.

### TENURE

The Chief Justice and the judges of the Supreme Court shall hold office until the age of sixty-five years at a maximum. A judge of a High Court shall hold office until he reaches the age of sixty-two years, unless he resigns earlier, or is removed from office.

The President may transfer a judge of a High Court from one High Court to another, but no judge shall be transferred except with his consent and after consultation by the President with the Chief Justice of Pakistan and the Chief Justices of both High Courts. The consent shall not be necessary if the transfer is for a period not exceeding two years time. A judge of a High Court who does not accept to be transferred to another High Court shall be deemed to have retired from his office.

### DISCIPLINE PROCEDURES

The Constitution created a Supreme Judicial Council of Pakistan, which consists of the Chief Justice of Pakistan, the two next most senior judges of the Supreme Court and the two most senior Chief Justices of High Courts. The Council, on the direction of the President, has the power of inquiry into the capacity or conduct of a judge. If the Council finds that a judge is not capable of performing the duties of his office or if he is guilty of misconduct, the judge may be removed from office by the President.

### FEDERAL SHARIAT COURT

The Federal Shariat Court has the power to examine and decide if a law or its provisions comply with the injunctions of Islam. In addition, the Federal Shariat Court may call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of Hudood. Appeals against the decision of the Federal Shariat Court are heard by a bench of the Supreme Court, known as the Shariat Appellate Bench.

The eight Muslim members of the Federal Shariat Court are appointed by the President for a renewable term of three years. The President has the power to "(a) modify the term of appointment of a judge, (b) assign a judge to any other office, (c) require a judge to perform such other functions as the President may deem fit".

The renewable term and ability to transfer judges violates the UN Basic Principles on the Independence of the Judiciary.

In April 1997 the National Assembly amended the Offence of Zina (Hudood) Ordinance 1997 to give the death penalty to persons convicted of gang rape. However, rape victims can still be tried for adultery if rape cannot be proven.

#### SPECIAL TERRORISM COURTS

In August 1997, the Government enacted the Anti-Terrorist Act (ATA). According to the preamble, the aim of the ATA is to "provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences and for matters connected therewith and incidental thereto". The opposition PPP, the Human Rights Commission of Pakistan and lawyers opposed the legislation because it violates the Constitution and international standards.

On 21 August the Government set up eleven courts under the ATA in Punjab and appointed presiding judges for these, after consultation with the Chief Justice of the Lahore High Court.

The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in his 1998 report to the UN Commission on Human Rights, informed the Government that she had received information indicating that, in Pakistan, death sentences may be imposed in trials which allegedly do not meet the minimum fair trial standards as required by international standards. In particular, the Special Courts set up under the ATA reportedly violate these standards as they do not respect the presumption of innocence.

In May 1998, the Supreme Court ruled that a number of provisions of the ATA are unconstitutional. These include: the lack of appeal in Anti-terrorism Courts, the far reaching powers of the police, and the right of the police to shoot to kill. At the time of writing, revisions to the ATA were pending.

#### MILITARY COURTS

Due to the ethnic violence in the province of Sindh, the Prime Minister dismissed the provincial government in October 1998, and imposed federal rule in Sindh, followed by the establishment of military courts in Karachi in November. Two people were sentenced to death by a military court in

Karachi in November; however, the Supreme Court decided in January 1999 to halt the executions pending the review of the legality of the establishment of these military courts.

In February, the Supreme Court ruled unanimously that the establishment of the military courts in Karachi were “unconstitutional, without lawful authority and of no legal effect” and that the pending cases should be transferred to anti-terrorist courts. The judgement was accepted by the Sharif Government.

### STATE OF THE JUDICIARY

As mentioned before, the judiciary suffers from executive influence which interferes with judicial independence. Backlogs in cases at all levels in the court system are enormous, causing long delays in trials and lengthy pre-trial detention. Furthermore, corruption and insufficient resources further damage the judiciary.

As an example of political influence, the Executive and the judiciary clashed in 1997 over who had the final say in the appointment procedure of five new Supreme Court judges. As a result, the President resigned in December 1997 and was replaced by Mr. Rafiq Tarar. The Chief Justice, Mr. Sajjad Ali Shah, was dismissed by the Supreme Court Judicial Council and also replaced.

In several other important cases in the course of 1997 and 1998, however, the Supreme Court ruled independently, for example, the May 1998 ruling by the Supreme Court regarding the unconstitutionality of several provisions of the ATA. As was already mentioned, at the time of writing, revisions to the ATA were pending.

### CASES

At least **seven judges** and **lawyers** who had provided legal aid to people accused of blasphemy were reported to have been targeted in drive-by shootings.

**Sixteen lawyers** were murdered in 1998 but the killers were never apprehended, according to the Lahore Bar President Zafar Iqbal Kalanauri in a meeting of the Bar’s general body to condemn Justice Bhatti’s death and to discuss the police’s refusal to register a complaint regarding the murder of a lawyer’s son. He expressed concern about “the precarious situation of law and order” in Pakistan.

**Rao Khalil Ahmed** [lawyer]: On 24 June 1997 he was shot dead on his way to Lahore High Court.

**Babar Awan** {lawyer}: Former Prime Minister Benazir Bhutto complained that the lawyers defending her and her husband were being harassed through abuse of law and police powers. Mr. Awan was arrested and sent to prison after being charged with trying to abduct a journalist under the ATA. In December 1998, his office was raided by the police.

**Atteq Ahmad Bajwah** {lawyer}: On 19 June 1997 he was killed in Vihari, Punjab. The police have not investigated the killing and no one has yet been arrested. It is widely believed that Mr. Bajwah was killed for being an Ahmadi.

**Justice Arif Iqbal Bhatti** {judge}: In October 1997 he was shot dead by an unidentified man at his Turner Road chamber, in what police initially believed could be related to a 1995 decision he pronounced as a judge in a blasphemy case. He acquitted two individuals accused in a Gujranwala blasphemy case. He had received threats by telephone and through letters.

**Ashfaq Ghumman** {lawyer}: He was taken into custody for raising a pro-Benazir Bhutto slogan in the Lahore High Court during proceedings. He was released after two hours.

**Asma Jahangir** {lawyer and chairperson of the Human Rights Commission of Pakistan} **Hina Jilani** {lawyer}: The two lawyers received several threats from a religious organisation because they defended Ms. Saima Waheed, whose marriage was challenged in court by her father, in 1996.

At the time of writing, the two lawyers had received death threats from religious extremists as a result of their defence of Ms. Samia Sarwar, who sought their help in divorcing her husband. Ms. Sarwar was shot dead by a hired gunman in front of the two lawyers in their office in Lahore. This so-called 'honour killing' was carried out on the orders of the family of Ms. Sarwar.

**Munir Ahmad Khan** {Justice}: This year, Munir Ahmad Khan was reportedly killed by terrorists. The police have sent the body for an autopsy; however, no case was registered.

**Haji Dildar Khan** and **Hanif Tahir** {lawyers}: The Lahore High Court convicted them of contempt of court. Both lawyers were counsel for Benazir Bhutto and it is believed that this was the reason behind their conviction.

**Justice Asif Khosa** and **Justice Saqib Nisar** {judges}: They were not confirmed as judges in the Lahore High Court despite recommendation for confirmation by the Chief Justice of the Lahore High Court and the Chief Justice of Pakistan.

**Mr. Muzaffar** {judge in an Anti-terrorism Court}: The judges of the Anti-terrorism courts set up under the Anti-Terrorism Act came under

considerable pressure from the Government in the first half of 1998 for allegedly slow disposal of cases. Mr. Muzaffar was forced to resign.

**Farooq Naek** {lawyer}: He was stopped from going abroad to consult his clients, Benazir Bhutto and Asif Zardari.

**Zulfiqar Naqvi, Ghulam Mustafa Jaffery, Kahlil Ahmed Khan, Mian Arshad, Hafiz Ghulam Muhammed Awan, Justice Arif Iqbal Bhatti, Syed Abid Hussain Bukhari, Syed Haider, Abbas Bukhari, Kamran Sohail, Javad Zaidi, Attiq Bajwa, Nadeem Iqbal Awan, Saeed Ahmed Khan, and Syed Aulaad Hussain** {lawyers}: These lawyers were killed in the province of Punjab in 1997.

**Dr. Khalid Ranjha** {judge of the Lahore High Court}: Threats were received by Dr. Ranjha, apparently for his decisions as a judge.

**Ashiq Husain Saqib** (Jhang) {lawyer}: He was reported to have given up practice after receiving persistent threats to his life and no proper protection from the authorities.

**Syed Haféez Shah of Taxila (his four-year old daughter was also shot dead along with him), Syed Intisar Husain Zaheer, member Bar Council, (Faisalabad), Rana Mohammad Yasin (Mamon Kanjan, near Lahore), Syed Ashiq Husain Bokhari (Kot Addu), Ijaz Ahmad Bashir (Pattoki, near Lahore), Mohammad Ajmal Bashir (Lahore), Mehr Rasheed Ahmad, former chief of the local bar (Kabirwala, near Multan), Nadeem Aslam, (Lahore), Hasnain Abbas Zaidi (Karachi), Ch. Khursheed Ahmad (Jhelum), Raja Sardar Khan, public prosecutor at ATA court (Karachi), Kazim Ali Shah (Gujrat). Anwar-ul-Haq (Sialkot), Syed Ansarul-Husain (Jhang), and Bakht Bedar (Swat)** {lawyers}: These lawyers were killed in 1998. Personal enmity was suspected as the motive in only a few of these murders. Most of the lawyers apparently became targets on account of their religious/sectarian associations.

**Mr. Mohammad Akram Sheikh** {Senior advocate, Supreme Court of Pakistan, and outgoing President of the Supreme Senior Court Bar Association of Pakistan}: On 19 November 1997 when Mr. Sheikh's car reached the outer checkpoint of the Supreme Court, about 250 Pakistan Muslim League Workers attacked his car.

He was also physically assaulted within the Supreme Court premises by two members of the Ruling Party, Senator Pervaiz Rasheed and Khawaja Mohammad Asif, and shouted at by many others while he was assisting the Supreme Court as *amicus curiae* in a contempt case against the Prime Minister of Pakistan and some other members of the Parliament.



## GOVERNMENT RESPONSE TO CIJL

On 2 July 1999, the Government of Pakistan responded to the CIJL's request for comments. The Government made a few editorial comments which were included in the chapter. The Government stated:

### *General comments:*

- The Constitution and the legal framework of the Islamic Republic of Pakistan guarantees basic human rights and fundamental freedoms of all its citizens and the government remains deeply committed to the realization and promotion of these principles.
- The Government takes a very serious note of any instances of coercion and threats which violate the basic human rights and fundamental freedoms of any segment of the society, and takes necessary action in this regard.
- The ugly menace of terrorism has afflicted our society for a number of years. Curbing this trend and protecting the ordinary citizens from this menace has required tough actions on the part of the Government, and prompted it to set up Anti-Terrorism Courts. The objective has been to deal with terrorism expeditiously and thus provide protection and assistance to ordinary citizens who are the victims of terrorism.

### *Specific comments:*

- On para 4: It was not the Prime Minister who revoked the provision of the 8th amendment to the Constitution. The decision to revoke the 8th amendment was taken by the Parliament which passed the 13th amendment, whereby the powers of the President to dissolve the National Assembly were revoked. The 13th amendment actually restored the Parliamentary system of Government. The 14th constitutional amendment was adopted at a time when members of the Parliamentary Parties were indulging in frequent changes of loyalties or floor crossings. This was causing dismay and great frustrations amongst the public, who was demanding steps to be taken to check this trend, which was eroding the foundations of a democratic parliamentary system. The 14th amendment restrains the Members of the elected Assemblies from changing loyalties from the party on whose ticket they were elected.
- In para 13-15: The proposed 15th constitutional amendment (sharia law), does not provide for arbitrary interpretation. In any case, this is an amendment which has not yet been adopted.
- Para 16: Both Judiciary and the Executive are the principal organs of the State. They operate in cooperation and coordination with each

other. The independence of the Judiciary is ensured through appointment, security of assignment and financial independence.

- Para 38-39: The judiciary in Pakistan is free from the pressure of the executive branch. This examples of the independence of the judiciary have been quoted in the report itself. Mr. Justice Sajjad Ali Shah was not dismissed by the Supreme Judicial Council, he retired after attaining the superannuation age of 65 years.
- Para 41: The federal and provincial governments are employing all their resources to ensure security of life of the Judges and Lawyers, quite a few have been provided with round the clock security.

# PALESTINE

In January 1996, following the Oslo Agreement, signed in September 1993, the Palestinians in the West Bank, East Jerusalem, and the Gaza Strip elected, for the first time, their representatives for the 88 seats in the Palestinian Legislative Council. Yasser Arafat was elected President of the Palestinian National Authority (PNA); he has been the Chairman of the Palestine Liberation Organisation (PLO) since 1968. According to international observers and local NGOs, these elections saw a high level of participation, and no significant pressure or interference from the Palestinian side with the electoral process or result were reported. Violations were reported in East Jerusalem due to Israeli interference.

The majority of the West Bank, including East Jerusalem, and the Gaza Strip remains under Israeli occupation and Israel continues to commit serious violations of human rights in these areas. Freedom of movement of Palestinians and their goods to the various areas of the West Bank, including East Jerusalem, and the Gaza strip continues to be severely restricted due to the lack of implementation of the signed agreements.

On 23 October 1998, the Wye River Memorandum was signed. It included a three month timetable for an Israeli re-deployment in the West Bank, thus following the Interim Agreement signed on 28 September 1995. The Occupied Territories were categorised into three zones: Zone A fell under the control of the Palestinian National Authority with regards to civil affairs and security; in Zone B, security issues were shared by the PNA and Israel, while the PNA retained control over civil affairs; and finally in Zone C, which constituted the largest portion of the land, the PNA held some jurisdiction pertaining to civil affairs. Re-deployment of the Israeli forces fell short of the Wye accords, thus putting a halt to the peace process, pending the 1999 Israeli elections. In addition, the agreement included many provisions that hamper Palestinian human rights such as those on the surrender of suspects.

The Palestinian Basic Law, in its third draft, was passed by the Legislative Council on 2 October 1997, but has yet to be enacted by the President. The Basic Law seeks to ensure the integrity of the separation of powers and submit the executive power to the will of the people through the Palestinian Legislative Council, while safeguarding the rule of law through an independent judiciary.

## HUMAN RIGHTS BACKGROUND

During 1997 and 1998, the Palestinian Security Forces continued their crackdown on Islamist groups, mainly *Hamas* and *the Islamic Jihad*, as well as other opponents to the peace process. Arrests have reportedly been

conducted without arrest warrants, and sometimes legal procedure has not been respected in dealings with prisoners. Torture is a common practice and confessions, often coerced, are often the sole basis for convictions. Defence lawyers are frequently not allowed to meet with their clients, who in turn are held without charge or trial for long periods of time. Prisons are overcrowded and there have been several cases of death in detention.

An elaborate security apparatus has been established under the PNA. It is composed of nine competing and often uncoordinated forces with wide powers.

The judicial system has been seriously undermined. Court decisions, particularly concerning the release of certain detainees, have not been enforced; this undermines the efficiency, the credibility, and the independence of the Palestinian judicial system. For instance, the release of Dr. Abdel Aziz Al-Rantisi, a *Hamas* official, was ordered by the High Court of Justice on 4 June 1998. However, by the end of 1998, Dr. Al Rantisi was still held in detention.

Other violations include the curtailing of the right of free assembly, freedom of expression and opinion, the closure of licensed civil institutions, massive waves of arrests.

### **PRESIDENTIAL ANTI-INCITEMENT DECREE No. 3/1998**

In implementation of the Wye River Memorandum, President Arafat issued Decree No. 3 on 19 November 1998. The Decree specified a number of acts illegal and punishable by law. These acts include: incitement to racial discrimination, encouraging violence, offending religious sensibilities, incitement to division and incitement to breach agreements that have been signed with other states. In addition to its vague language, most of these acts were already outlawed by the law enforced in the Palestinian areas. Moreover, no similar law was issued or required by Israel under the Wye River Memorandum. The manner in which the Decree was issued undermines the authority and the jurisdiction of the Palestinian Legislative Council.

### **THE JUDICIARY**

There are two parallel and different sets of systems of justice that have jurisdiction over the West Bank and the Gaza Strip. This is due to the fact that each region has evolved independently from the other since 1948. There is also a system that deals with Palestinians and another one that deals with Israeli settlers. The system of justice that applies to Palestinians is composed of civilian courts as well as military courts and tribunals. Israel

has extended the application of its own justice system extra-territorially to apply to settlers (*see chapter on Israel*).

The PNA inherited a court system and legal codes that derive from British mandates, as well as Egyptian and Jordanian administration. However, the body of law in the Occupied Territories has been substantially modified during the Israeli occupation. A complex and overlapping mixture of jurisdiction and responsibilities was created by Israeli military orders that will remain in force in the Palestinian areas, unless they are explicitly repealed by the complex mechanisms created by the Israeli-Palestinian agreements.

The civilian justice system in the PNA territories is composed of three types of courts: the regular, religious, and special tribunals. The regular courts are granted jurisdiction over all civil and criminal matters. The religious courts deal with all issues of personal status. The special courts deal with specific issues, such as security issues, municipal laws and regulations.

In the West Bank, the regular courts deal with criminal and civil matters. They consist of two levels: magistrate and first instance, and appeal. There is no court of cassation. Currently there are eight magistrate courts in the West Bank, and three courts of first instance. Each court is composed of a president and a number of judges.

There is one Court of Appeal, which currently sits in Ramallah. It has jurisdiction to hear appeals from the courts of first instance in civil and criminal matters. It sits in panels comprised of three judges. It now also acts as a high court of justice in limited matters.

In the Gaza Strip, the judicial system follows the structure established during the British mandate. It is composed of magistrate courts, district courts, criminal courts, land courts, and a High Court.

The courthouses are scattered throughout the West Bank and Gaza Strip, concentrated in the largest cities and towns. Added to this, courthouses are sparsely staffed and consequently, the case load is quite heavy. Judges and staff are overloaded with work, underpaid, and suffer from lack of training and expertise. All judges are appointed by the Ministry of Justice for a period of ten years.

Despite its harsh working conditions, the Palestinian judiciary has demonstrated its independence on several occasions by ruling against the Executive. The Executive, however, has refused to enforce these orders.

#### STATE SECURITY COURT

The Palestinian State Security Court was established by presidential decree in February 1995, mainly following Israeli and American pressure to swiftly halt violent acts perpetrated against Israelis. The State Security

Court tries cases involving internal and external security issues, and is presided over by three military judges. This court rules as a final resort and there is no right of appeal. The head of the Palestinian Authority has the right either to ratify or to repeal the verdict.

According to credible reports, trials are sometimes concluded in very short periods of time, ranging from a few hours to several days; trials are held in secret, and death sentences are imposed. Death sentences are swiftly carried out, either the same night or the next day. Coerced confessions have often been the sole basis for convictions, and the defendants are made aware of the court session only a limited time before it is held, leaving no time to prepare a proper defence.

## CASES

**Qusay Al Abadlah** {judge, Chief Justice of the Palestinian High Court}: The head of the General Personnel Council in the Palestinian Authority decided to relieve Judge Al Abadlah of his functions. Mr. Al Abadlah was notified of his dismissal in a letter dated 17 January 1998, stating that since he was over the age of retirement, (60 years old), he was obliged to resign his post. It should be noted that Judge Al Abadlah was appointed to his post when he was already over 60. This dismissal appeared to be due to an interview in which Judge Al Abadlah criticised the interference of the executive authority in the work of the judiciary. The position of Chief Justice remained vacant throughout 1998.

**Fayez Abu Rahma** {Attorney General}: In May 1998, Mr. Abu Rahma resigned from his post in protest of the PNA's undermining of his authority. His resignation came 78 days after the dismissal of Chief Justice Qusay Al Abadlah. Mr. Abu Rahma justified his decision to resign because his decisions as the Attorney General were not respected by the executive authority, and a large amount of his prerogatives were diminished.

**Mahmoud Ayyach** {lawyer}: On 2 June 1997, Mr. Ayyach was verbally and physically assaulted by Bethlehem police officers, and obstructed from conducting his professional duty in the defence of one of his clients. Mr. Ayyach was prohibited from visiting his client without legal justification.

**Mossa Khalil Hussein Makhamra** {lawyer}: On 8 December 1997, Mr. Makhamra was insulted and obstructed from carrying out his function as a lawyer; furthermore he was thrown out of the Al-Khalil police station by Major General Tarek Zeid, and consequently banned from re-entering the police station in the future. Mr. Makhamra was presenting, for the second time, a motion for release on bail for one of his clients; the motion was immediately denied without being even read.

**Raji Sourani and Iyad Al Alami** {lawyers}: On several occasions, the police denied both lawyers access to visit their clients, Dr. Abdel Aziz Al-Rantisi and Dr. Ibrahim Al-Maqadma, despite special permission issued by the Palestinian Attorney General. This constituted a clear violation of due process, as well as Articles 1 and 16 of the United Nation's Basic Principles on the Role of Lawyers.

**Ahmad Yassin** {lawyer}: On 2 September 1998, Mr. Yassin was summoned to the General Prosecutor's office and charged with obstructing justice. The charge was apparently related to the fact that in July, Lawyer Yassin had published an article in *People's Rights Magazine*, which is issued by LAW, complaining about police intimidation and harassment. Mr. Yassin was taken before a judge who ordered his detention for two weeks. He was then held in the court's cells. It seems that, contrary to established norms, the Palestinian Bar Association was not informed of these measures. His first request for release on bail was unsuccessful; his second request, which was submitted by LAW on 3 September, succeeded in securing his release.

# PERU

**D**emocratic institutions and the rule of law continued to deteriorate in Peru during 1997 and 1998. The Constitution of 1993, a landmark on the way back to democracy after the *coup d'état* in 1992, provides for a set of institutions that guarantee human rights and the rule of law, but the current political practices run contrary to their declared purposes. In the period under analysis, very serious violations of constitutional norms and international standards on human rights have occurred. The power of the military, its courts, and intelligence service, which has been questioned severely by human rights defenders and international organisations, has increased. Independent institutions have seen their powers curtailed or diminished, or their work otherwise obstructed or interfered with. The effectiveness of the judiciary as a guarantor of legality and human rights has been severely undermined by laws extending the jurisdiction of the military courts to civilians, as well as the implementation of an administrative reform that affects jurisdictional functions, carried out by an administrative body that enjoys exceptional powers and benefits from the fact that approximately 80% of serving judges are temporary (*see below*).

The 1993 Constitution gives more powers to the President than the previous Constitution. President Alberto Fujimori has been in office since the general election in 1990 and was re-elected in 1995, with a comfortable majority in Congress. The President governs through a Council of Ministers headed by a Council president. Peru is not a parliamentary democracy, which means that ministers and the president of the Council of Ministers are appointed and dismissed by the President of the Republic without the intervention of Congress.

The Constitution also provides for a 120-seat Congress and an independent judicial branch encompassing the Public Prosecutor's Office and two autonomous institutions: the National Council of the Magistracy and the Academy of the Magistracy. Since 1995 the judiciary has undergone a process of reform (*see below*). As part of the efforts for modernisation in the legal system itself, a new Code of Criminal Procedure, which incorporates important features of an adversarial system and is more protective of human rights, has been prepared and submitted for promulgation by the Government with the consent of Congress. However, the Government has postponed indefinitely the entry into force of the new code, reportedly due to strong opposition from the military and the police.

## HUMAN RIGHTS BACKGROUND

During the period under analysis, serious threats and violations of human rights occurred. According to the UN Committee Against Torture, which examined Peru's report in May 1998, allegations of torture are very



frequent. Most instances of torture occur during the long periods of investigation or incommunicado detention. Prisons are overcrowded and do not meet the minimum requirements of international standards. The Government holds those imprisoned for terrorism and treason in Maximum Security Penitentiary Establishments, two of which are located over 4,000 metres above sea level, where prisoners remain isolated from their families and lack adequate medical attention. Sometimes persons imprisoned in these centres are awaiting trial, but their attorneys cannot meet them because of the distance. The most notorious of these centres are Challapalca and Quencoro. Human rights defenders have urged the Government to close these centres and to treat prisoners in a manner consistent with international standards.

According to a statement by the Ombudsman's Office, at least 5,228 people, most of them peasants, have outstanding arrest warrants issued under anti-terrorist laws that give the police discretionary power to issue the warrants. It is presumed that many of the warrants are unjustified, as they are based on declarations obtained from informers and through torture.

There have been serious threats to the exercise of the right of freedom of expression. Journalists were persecuted or harassed because they publicly denounced cases of corruption and abuses of power by public officers. What is most regrettable is that lenient judges are participating in the harassment by initiating judicial proceedings against the journalists.

Although terrorist and security forces' activities have substantially diminished, Peru is still suffering the consequences of that difficult period. In April 1997 the hostage-taking by the MRTA guerrillas in the Japanese ambassador's residence (see *Attacks on Justice 1996*) was ended by a military operation that rescued the 72 hostages left and killed all the guerrillas. Supreme Court Judge Ernesto Giusti was the only hostage killed during the operation.

Impunity continues to be an institutionalised practice. The Amnesty Laws enacted in 1995 (see *Attacks on Justice 1996*) are still in force. In November 1997 the Inter-American Court of Human Rights, in a landmark decision, ruled against Peru in the cases of Ernesto Castillo-Paez and Maria Elena Loayza-Tamayo. In November 1998 the Court ordered reparations to be made to Ms. Loayza-Tamayo. The Court decided *inter alia* that "the Peruvian state should investigate the facts of the instant case, identify and punish those responsible and adopt the necessary domestic legislation to ensure compliance with this obligation". Among its considerations, the Court reminded the state of its obligation, under Article 25 of the American Convention of Human Rights, "to guarantee every person access to justice, in particular, to a simple and prompt recourse to achieve, among others, that those responsible for human rights violations be tried and to obtain reparation for the injury suffered" (paragraph 169). The Court considered that "states cannot invoke, to justify its non-compliance with international

obligations, provisions of its domestic law, as in the case of Amnesty Laws that, in the Court's opinion, hinder the investigation and the access to justice" (paragraph 168). The Court also ordered the state of Peru to pay reparations and to bring its internal legislation into accordance with the American Convention of Human Rights (*see below*).

Important cases of human rights abuses involving members of the security forces were transferred to military courts for trial, even though the crimes were not related to on-duty functions. Civilian courts do not have jurisdiction in most cases involving security issues or military personnel. For example, Mr. Gustavo Cesti, a retired military officer, was working as a civilian for the armed forces when he was arrested and tried in a military court. A civil court passed a petition of *habeas corpus* in his favour but the military justice system rejected the order to release Mr. Cesti. In its 1997 report the Inter-American Commission of Human Rights has reported continuing allegations of interference with the judiciary by the armed forces and military courts. So far, all conflicts of jurisdiction between civil courts and military courts have been decided in favour of the military courts by the Supreme Court.

## THE JUDICIARY

### STRUCTURE

The Peruvian judicial system is composed of the court system, the Public Prosecutor's Office, the National Council of the Magistracy and the Constitutional Tribunal. The Constitution recognises the military as an independent jurisdiction (Article 139.1). The Courts are organised on five levels according to the Organic Law of the Judiciary (*Ley Organica del Poder Judicial*): the Supreme Court with nation-wide jurisdiction; High Courts (*Cortes Superiores*) in each of the 26 judicial districts; specialised and mixed judges serving within the judicial districts; and finally, justices of the peace. The Organic Law differentiates between administrative functions and jurisdictional functions, and creates a special body, the Executive Council of the Judiciary, to perform all administrative tasks. When in 1995 a programme of reform was initiated, a provisional body, the Executive Commission of the Judiciary, was created to perform these tasks.

The Office of Control of the Magistracy, an organ within the judiciary, is in charge of discipline and sanctions, with the exception of demotion and dismissal, which can only be applied by the National Council of the Magistracy (*see below*).

The Public Prosecutor's Office (*Ministerio Público*) is the autonomous institution in charge of prosecuting crimes and defending society. It has the burden of proof in criminal proceedings and is in charge of the investigation.

Its head is the Prosecutor-General (*Fiscal de la Nación*); there are also public prosecutors in each jurisdiction. Since 1995, the Public Prosecutor's Office has also been undergoing a process of reform with a specially appointed body to carry out that process, the Executive Commission of the Public Prosecutor's Office (*Comision Ejecutiva del Ministerio Publico*). Consequently, the Prosecutor-General has almost no role to play in the reform.

The Constitutional Tribunal is the guardian of the Constitution, with powers to decide on the constitutionality of laws, and to review human rights remedies in the last instance (*habeas corpus* and *amparo*). In May 1997 three of the seven judges of the Constitutional Tribunal were dismissed by Congress on charges of usurpation of functions. The CIJL intervened before Peruvian authorities on the grounds that these judges were reportedly dismissed because of a prior decision they had taken on the constitutionality of a law allowing President Fujimori to run for a third term in office. The three judges dismissed had ruled that the law in question was inapplicable (*see Cases below*). Appointment to the Constitutional Tribunal requires the favourable vote of two thirds of the members of Congress, a threshold that is unlikely to be reached without a political bargain with the parliamentary opposition. The tribunal continues to function with only four members; however it is unable to perform its function as guardian of the Constitution and test the conformity of laws with the Constitution, since to take any decision on that subject requires six out of seven votes.

#### REFORM OF THE JUDICIARY

Since 1995, the judiciary, including the Public Prosecutor's Office, has been undergoing a process of reform (*see Attacks on Justice 1996*). After three years of reform the achievements are very limited. Some progress has been observed regarding administrative issues: an improved physical infrastructure, better assignment and distribution of administrative personnel, improved remuneration for judges as well as an improved capacity to deal with the backlog of cases, namely an increase in the number of judges and courts, including courts functioning in detention centres. Other services closely related to the jurisdictional function have also been improved, such as the system of notification and the registry.

Nevertheless, as a whole, the balance is far from being positive. The reform achieved in administrative matters is ineffective if the judiciary does not enjoy autonomy and independence. Most criticism of the process has focused on reported practices of the executive branch and Congress, which attempt to influence the Executive Commissions on both the judicial power and the Public Prosecutor's Office in the appointment of lenient judges and prosecutors. The enactment of Laws 26.898 and 26.933 seems to confirm these reports.

Law 26.898, enacted in December 1997, provides that judges appointed temporarily by the Executive Commission shall enjoy the same rights and

duties as tenured judges (Article 2). Article 3 enables the Executive Commission of the Public Prosecutor's Office to appoint provisionally as many prosecutors as considered necessary, and Article 4 entitles these temporary prosecutors to the same rights and duties as those of tenured prosecutors. Article 4, modifying the Organic Law of the Public Prosecutor, provides that the Prosecutor-General shall be elected jointly by temporary and tenured supreme prosecutors. The provisions of this law are reportedly aimed at ensuring that those temporary judges and prosecutors (the vast majority actually in service) can elect and be elected and by these means ensure political control of these branches of the judiciary. Moreover, it was reported that all of this is also aimed at political control of the National Electoral Board (*Jurado Nacional de Elecciones*), the body that will ultimately decide whether President Fujimori can legally run for a third term. A good number of the members of this board are elected from among judges and prosecutors. Furthermore, Law 26.933 curtails in fact the powers of the National Council of the Magistracy to make Supreme Court judges and prosecutors destitute.

Certain acts performed by the Executive Commission of the judiciary have also affected basic principles of justice. Besides appointing temporary judges, the Executive Commission has also opened and closed courts by simple administrative resolution. Cases being dealt with by certain courts were transferred to new ones, affecting seriously the right to a natural judge as well as the right to be tried by a court previously established by law. The Executive Commission has resorted frequently to new courts or judges in cases involving security and political issues very important to the Government.

In May 1998 the UN Committee Against Torture, in its concluding observations on Peru's Report, expressed its concern regarding "the laws passed between 1995 and 1998, that can be analysed as aimed at challenging the independence of the judiciary", among them: Law 26.546 creating the Executive Commission of the judiciary, Law 26.623 reorganising the Public Prosecutor's Office and creating an Executive Commission for that Office, Law 26.695 establishing provisional Chambers in the Supreme Court and "High Tribunals", and Law 26.933 limiting the National Council of the Magistracy's powers. The Committee recommended that Peru bring these laws into conformity with its international obligations.

#### THE NATIONAL COUNCIL OF THE MAGISTRACY AND THE APPOINTMENT PROCEDURE

The Constitution (Article 150) provides for an independent body in charge of selecting and appointing prosecutors and judges: the National Council of the Magistracy. According to the Constitution, (Article 154), this body should not only appoint judges and prosecutors but also confirm them every seven years, apply the sanction of dismissal to Supreme Court judges

and prosecutors and, under request by the Supreme Court and the Board of Supreme Prosecutors, apply the same sanction to judges and prosecutors of the lower levels. Decisions on dismissal are taken after a hearing and may not be appealed.

In March 1998 Congress passed Law 26.933 that curtailed substantively the powers of the National Council of the Magistracy to dismiss Supreme Court judges and prosecutors. This law establishes that any proceeding for dismissal of Supreme Court judges and prosecutors can only be started with the administrative bodies' approval and after an impeachment process is held in Congress. This law clearly subjects decisions on dismissal to the control of bodies which by nature are either administrative or political. As a reaction to the enactment of this law the seven members of the National Council of the Magistracy resigned, and the World Bank reportedly suspended and then cancelled a loan to support the reform of the judiciary, as the Government's commitment to that reform is unclear. In September 1998, Congress passed another law supposedly aimed at restoring powers to the National Council, but in fact this law only gave the National Council the right to be informed on decisions taken by the administrative bodies.

The National Academy of the Magistracy, the institution in charge of preparing candidates for appointment by the National Council and of providing continued education for judges and prosecutors, has also had its work interfered with. The National Council of the Magistracy can only appoint judges and prosecutors who have completed a training period in the Academy. This institution started its work in 1997; in 1998 the first group of candidates for appointment was supposed to be ready. However, the preparation programme for candidates, which was planned to last for six months, was unexpectedly extended to up to two years.

The actual outcome of all these changes is the present inability of the National Council of the Magistracy to discharge its duties. Since the suspension of constitutional order in 1992, and the consequent large scale dismissal of judges, no new tenured judges have been appointed. According to official figures distributed in August 1997, out of 1,445 judges only 392 are tenured; the rest are serving on a temporary basis. Recent limitations of the power of the National Council and the work of the Academy of the Magistracy seem to be aimed at perpetuating the *status quo*, with most of the judges appointed temporarily and by the administrative bodies.

## RESOURCES

The budget of the judiciary is handled by the Executive Commission, the administrative body. It prepares and negotiates annual assignments in Congress.

Resources for the judiciary have increased as a consequence of the reform programme. The World Bank approved a loan that was reportedly cancelled afterwards, as a result of the above mentioned changes.

#### MILITARY COURTS AND ANTI-TERRORIST LEGISLATION

Military courts are constitutionally autonomous and try on-duty offences committed by military personnel. The Supreme Council of Military Justice (*Consejo Supremo de Justicia Militar*) is at the highest level in the structure. According to Article 173 of the Constitution, only death sentences passed by these courts can be reviewed by the Supreme Court in cassation (there is no review of the findings but only of the applicable law and due process). Other sentences are not subject to ordinary judicial review in the Supreme Court. Article 173 also provides for application of the Military Code of Justice to civilians in cases of treason and terrorism, dangerously extending military jurisdiction to civilians and severely undermining the rule of law and the protection of human rights. These constitutional provisions served as a basis for Law 25.659 regulating the crime of treason, as well as others extending military jurisdiction to civilians; these laws contravene the principle of the natural judge as enshrined in international instruments signed by Peru, such as Article 8 of the American Convention of Human Rights, and Article 14 of the International Covenant of Civil and Political Rights.

Although some progress was made in October 1997 by allowing the norm instituting faceless tribunals for trying terrorist cases to lapse, anti-terrorist legislation is still in force and many of its features affect the independence of the judiciary, the right to a fair trial and due process of law (*see Attacks on Justice 1996*).

Legislation on terrorism has negative effects not only with regard to the protection of personal rights to defence but also with regard to the judiciary and the legal profession. Decree Law 25.475 permits the police to detain suspects incommunicado and to move the detainee without a warrant properly issued by a competent judge. By permitting this, the law is in fact depriving the judiciary of some of its powers. Furthermore, during detention and trial, lawyers, in spite of their legal rights, are reportedly not allowed to meet with their clients, have access to evidence or to cross-examine witnesses.

In its rulings on the Loayza-Tamayo Case, the Inter-American Court of Human Rights considered that Decree-Laws 25.659 (crime of treason) and 25.475 (crime of terrorism) were contrary to Article 8(4) of the American Convention on Human Rights (paragraph 68). Because of the implementation of Article 6 of Decree-Law 25.659, Loayza-Tamayo "did not have the right to file a petition for any guarantee to safeguard her personal liberty or challenge the lawfulness of her detention" (paragraph 52). Loayza-Tamayo "was tried and convicted by application of an exceptional procedure in which it is obvious that the fundamental rights embodied in the concept of

due process were greatly restricted. Those procedures do not meet the criteria of a fair trial, since the presumption of innocence was not observed; the defendants were not allowed to challenge or examine the evidence; the defence attorney's power was curtailed in that he could not communicate freely with his client or intervene in all stages of the proceeding in full possession of the facts" (paragraph 62). As a result of these and other considerations, Peru was found to have violated different parts of Article 8 of the American Convention. In a later ruling on reparations in the same case, the Inter-American Court ordered Peru to take adequate domestic legislative measures to bring the Decree-Laws mentioned above into conformity with the American Convention (Loayza-Tamayo case; Reparations Decision, paragraph 5). In spite of the ruling, those Decree-Laws are still in force.

In 1996, an Ad Hoc Commission was created to recommend cases for presidential pardon. As of December 1998, 438 individuals had been granted such pardons, but their situation continued to be precarious and the necessary reparations for the damage suffered had not been provided. Moreover, in spite of the recognition that "errors" were committed by arresting and sentencing these people under charges of terrorism without sufficient proof, the anti-terrorist legislation that provided the legal framework for these abuses to occur continues to be in force, and has even been reintroduced to fight cases of common delinquency.

The UN Committee Against Torture, in its concluding observations of June 1998, expressed concern about the continuing competence of military tribunals to try civilians and the continued growing jurisdiction of these courts at the expense of civilian ones.

#### DECREEES ON NATIONAL SECURITY

In May 1998, the Government issued a series of Legislative Decrees (promulgated under an authorising law by Congress) on national security. These laws were meant to counter the wave of common delinquency, to allow the police wider powers for detention, and to give the military courts jurisdiction over civilians accused of having committed such crimes. This legislative package has been widely criticised by human rights groups, as it is in overt contradiction to provisions in the American Convention of Human Rights and the International Covenant of Civil and Political Rights. Some characteristics of these laws include:

- Legislative Decree 895 loosely defines a new crime called "aggravated terrorism", which is in reality a common crime. This norm expands the jurisdiction of military tribunals over common crimes that affect property, individual freedom, health, life and public security, and contradicts the principle of legality *nullum crime sine lege* since the range of crimes covered is potentially vast. The same Decree provides for criminal responsibility for young people aged between 16 and 18 years, and subjects them to military courts which can pass penalties of up to 25 and

35 years in prison. It also extends the period of incommunicado detention to up to 10 days, obliges the military prosecutor to issue an indictment and the instructing military judge to open a trial and to issue a warrant for detention of the accused.

- Legislative Decree 905 creates the remedy of “military *habeas corpus*” (Article 5), whereby the jurisdiction of military courts is widened to enable them to decide on a petition of *habeas corpus*. In this way military jurisdiction is extended so far that constitutional remedies such as *habeas corpus* are also under its scope of action.
- Legislative Decree 900 modifies the competence of ordinary courts to admit petitions of *habeas corpus* and amparo. According to this norm, in the Judicial district of Lima and Callao, only specialised public law judges have jurisdiction to decide on those petitions, limiting seriously their effectiveness and promptness, since only two judges of that type existed in Lima at the end of 1998. Before this norm was enacted, petitions of *habeas corpus* (to protect individual liberty) could be lodged before any of the fifty criminal courts in the Judicial District of Lima and Callao.

## LIMITATIONS TO THE EXERCISE OF THE LEGAL PROFESSION

The Peruvian legal system, particularly the legal framework set up by laws on terrorism and treason, imposes severe limitations on the exercise of the legal profession. The CIJL has received allegations of illegal sanctions, and even ill-treatment of lawyers defending cases before military courts. They are allowed to examine neither the evidence nor the witnesses. The hearings are held inside the barracks and sometimes lawyers are not allowed to get in. They cannot object to judges and any attempt to appeal a resolution or sentence is deemed as contempt. In March 1998, eight lawyers defending cases of treason before military tribunals were detained and charged with treason (*see Cases below*). The Lima Bar Association appointed legal counsel for them, since they were not allowed the counsel of their choice, but the appointed legal counsel was sanctioned with suspension when he requested the declaration of one of the accused lawyers.

## CASES

**Manuel Aguirre, Delia Revoredo and Guillermo Rey Terry** (judges of the Constitutional Tribunal): They were dismissed in May 1997 by Congress under charges of usurpation of authority. The three judges, together with the President of the Tribunal who resigned on his own, had declared that a law allowing President Fujimori to stand for a third consecutive term in office



was inapplicable, thus barring Fujimori from running in the year 2000 elections. The Peruvian Constitution provides that for a law to be declared unconstitutional a majority of six out of seven votes is necessary. In the case of the law in question, the majority required to declare the law unconstitutional could not be reached, but three of the judges voting issued an interpretative declaration whereby they expressed their view that the law under examination was inapplicable. The Inter-American Commission of Human Rights recommended that the State of Peru reinstate the three judges in office. By the end of 1998, not one of them had been reinstated.

**Delia Revoredo** {lawyer, President of the Lima Bar Association until January 1999}: Delia Revoredo and her husband were granted asylum by Costa Rica in the middle of 1998. Delia Revoredo was one of the Constitutional Tribunal judges dismissed by Congress in May 1997 (*see above*). After her dismissal, she ran for the post of Dean of the Lima Bar Association and won. Shortly afterwards, Revoredo's husband began to be investigated under the charge of importing a car without paying customs taxes. The car of Mr. Mur, Revoredo's husband, was the only one being investigated out of thousands imported in the same period and under the same circumstances. Apparently all taxes were paid; nevertheless Ms. Revoredo and her husband were likely to face criminal and administrative charges. Fearing for their security, Ms. Revoredo and her husband sought asylum in Costa Rica, where they lived for some months until their return to Lima in December 1998, after being informed that criminal charges against Revoredo's husband were dismissed.

**Ricardo Alarco, Carlos Gamero Quispe, Luis Ramón Landaure, Ernesto Mesa Delgado, and Fabian Suarez** {lawyers in Lima}: They were arrested and tried in a military tribunal under the charges of treason in November 1997. However, the Supreme Council of Military Justice relinquished jurisdiction and sent the cases to the ordinary anti-terrorist court for trial. In this ordinary court the prosecutor has not found evidence to issue an indictment; nevertheless, the case is to be decided by the High Court for criminal matters. All of these lawyers were defending persons accused of terrorism and treason before ordinary and military courts respectively, and this has reportedly been the cause of the lawyers' detention. It is worthy of note that Luis Ramón Landaure is 71 years old and faces a probable penalty of 20 years in prison.

**Teodoro Bendezú Montes and Freddy Huaráz** {lawyers in Lima}: They were also arrested in November 1997 and tried in a military court. Their cases were afterwards transferred to an ordinary anti-terrorist court. They are charged with terrorism because of their defence of presumed terrorists and traitors. The prosecutor has requested a penalty of 20 years in prison; the hearings are due to be held in March 1999.

**Rodolfo Ascencios Martel and Magno Mariñas Abanto** {lawyers in Lima}: They were also arrested in February 1998 and tried in military courts

on charges of treason. The Supreme Council of Military Justice relinquished jurisdiction in their cases and sent them to the ordinary anti-terrorist courts. The anti-terrorist lower court has ordered the release of Magno Mariñas, but this order needs to be confirmed by the Higher Tribunal on anti-terrorist matters.

**Juan Cancio Castillo Vásquez, Elizabeth MacRae Thays and Sergio Salas Villalobos** (judges in the High Court of Lima): In mid-1997 they were removed from their posts shortly after being fined by the disciplinary body within the judiciary. They had been denounced by the president of the supreme council of military justice for acting against “the autonomy and independence” of the military justice system. In fact, their only action was to grant an *habeas corpus* petition in favour of Gustavo Cesti, a citizen who was being tried in a military court. The Inter-American Commission of Human Rights issued precautionary measures in their favour, and the case was afterwards closed by the prosecutor.

**Rubén Mansilla Novella** (judge in the higher civil court of Lima): In June 1997 this judge was transferred to an administrative post while dealing with President Fujimori’s divorce proceedings. The judge denounced pressure from the legal counsel for Fujimori to vote in his favour.

**Elba Greta Minaya Calle** (judge in a criminal court in Lima) (*see Attacks on Justice 1996*): In August 1997 the Ministry of Interior instructed the state-procurator to denounce Judge Minaya under the charges of abuse of power and terrorism. Judge Minaya had passed an *habeas corpus* petition in favour of a citizen who had been arrested without a proper warrant under the charge of terrorism. Due to public protest the Ministry of Interior revoked the order to the state-procurator and instead ordered a complaint be lodged against Judge Minaya before the body in charge of discipline within the judiciary. The Inter-American Commission of Human Rights issued precautionary measures in her favour and in September 1997 Judge Minaya was acquitted.

**Giulia Tamayo** (lawyer working for the NGO “Flora Tristán” in Lima): On 20 October 1998, Lawyer Tamayo’s apartment was broken into. Many of her working papers and files (relating to her investigations into a family planning programme allegedly conducted without respect for women rights) were stolen or tampered with. By the end of 1998, the prosecutor for the judicial district of Lima had not issued an indictment or identified the perpetrators.

# THE RUSSIAN FEDERATION

According to the 1993 Constitution, the Russian Federation consists of 89 territorial units which include 21 republics, one autonomous region, 49 administrative units, six provinces, ten autonomous districts and the cities of Moscow and St. Petersburg, which have federal status.

The legislative power is vested in the Federal Assembly which comprises two chambers. The lower house consists of 450 deputies, 50% of whom are elected in single mandate constituencies; the other 50% are elected by party lists. The Federation Council (upper house) has 178 members, half of whom are the chief executives of the regional administrations (many of whom have been appointed by the President) and the 89 chairpersons of the regional legislatures.

The Executive consists of an elected President who is the Head of State, currently Boris Yeltsin, and a government headed by a Prime Minister. The President is elected for a term of four years. The Prime Minister is appointed by the President with consent of the *Duma*.

The Constitution provides the President with substantial powers. According to Article 80, the President is the guarantor of the Constitution and of human and civil rights. Article 84 of the Constitution enables the President to introduce draft laws in the Duma and Article 90 empowers the President to issue decrees and executive orders. The Assembly cannot annul these decrees, it can only advise on them. The President may also veto legislation from the Assembly.

Moreover, Article 85 gives the President the right to suspend acts by organs of executive power if such acts contravene the Constitution of the Russian Federation and federal laws, the international obligations of the Russian Federation, or violate human and civil rights and liberties, pending the resolution of the issue in court.

The years 1997 and 1998 were turbulent, with economic and financial crises and political instability, as a result of *inter alia*, the health problems of the President, corruption, and growing violence. In the course of 1997 and 1998, several governments were reshuffled and entire Cabinets dismissed by the President. In September 1998, Yevgeny Primakov was appointed Prime Minister as a compromise candidate, after the *Duma* twice rejected President Yeltsin's candidate Viktor Chernomyrdin.

## HUMAN RIGHTS BACKGROUND

The human rights situation in the Russian Federation remained poor in 1997 and even deteriorated in 1998 as a result of the worsening economic situation. Ironically, President Boris Yeltsin labelled 1998 as the Year of Human Rights.

Although generally respected, freedom of expression was restricted in 1998 for those journalists who wrote on issues such as corruption. Some experienced harassment, threats, some were financially pressured or even murdered.

Freedom of religion was hampered by the Religion Law, adopted in September 1997, which led to the harassment of non-traditional i.e., non-Orthodox, religious associations. In addition, regional authorities continued to impose restrictions on the freedom of movement through residence registration mechanisms, despite a Constitutional Court decision.

There is still systematic and widespread use of torture and ill-treatment in the Russian Federation. Torture is not only conducted by security forces. Medical personnel often refuse to register the wounds of victims and in some penitentiary institutions they even reportedly participate directly in the torture of inmates. Police reportedly torture with complete impunity; investigations into torture are hardly ever taken up by the authorities.

The UN Special Rapporteur on Torture, in his report to the 1998 Commission on Human Rights, expressed his concern about the torturous conditions of detention in pre-trial detention centres. The conditions of detention, mainly pre-trial detention, are dreadful, with overcrowded cells, lack of oxygen and poor hygiene. Cases of death from lack of oxygen have taken place in almost all large pre-trial detention centres in Russia. Furthermore, the fact that the Procuracy remains responsible for both the prosecution of ordinary criminal suspects and the investigation of abuses committed by law enforcement officials, has diminished public confidence in the institution.

Violent and organised crime is widespread and growing in the Russian Federation and it affects the justice system. In order to fight this problem, the powers of security and law enforcement agencies were expanded by two presidential decrees, which seriously disadvantaged constitutional rights. A person suspected of a crime could be held for up to 30 days without access to a lawyer. In this particular context, members of ethnic minorities are particularly vulnerable. In June 1997, the two decrees were overturned by another presidential decree reducing the time a suspect can be held without seeing a lawyer to 10 days. However, this is still in violation of international standards.

The UN Working Group on Arbitrary Detention, in its report to the 1998 session of the UN Commission on Human Rights, raised the case of environmental activist Aleksander Nikitin, a retired naval officer who was arrested by the Federal Security Services (FSB) in February 1996, and charged with treason under Article 64 of the Russian Criminal Code. The case was taken up by the Working Group because the principle of due process had been severely violated, and the arrest occurred in a pattern of persecution of environmental activists of the Bellona Foundation. The government maintained that Mr. Nikitin was not charged with treason in rela-

tion to environmental issues but with state secrets. Pending the trial, Mr. Nikitin was released and the Working Group continued to monitor his case.

The European Union also expressed its concern about the Nikitin case and called for a fair trial. The Parliamentary Assembly of the Council of Europe appointed a Special Rapporteur, Mr. Erik Jurgens, to deal with this case and he expressed concern about the trial as well.

In November 1998 Galina Starovoitova, a deputy in the *Duma* and a human rights activist, was shot dead in front of her apartment in St. Petersburg. Ms. Starovoitova had been critical of the government policy regarding Chechnya and was investigating a corruption scandal at the time of her murder. The investigation into this murder was still pending at the time of writing.

## COUNCIL OF EUROPE

On 28 February 1996 the Russian Federation was admitted as a member of the Council of Europe. As all member states of the Council of Europe are bound by the European Convention for the Protection of Human Rights and Fundamental Freedoms, Russia signed the Convention and some its protocols on the same day. On 5 May 1998, Russia ratified the Convention and also recognised the right of individual petition and the compulsory jurisdiction of the European Court of Human Rights.

When it joined the Council of Europe in February 1996, the Russian Federation had to commit to the suspension of all executions, pending the full abolition of the death penalty within three years. On 16 April 1997, Russia signed the sixth Protocol of the European Convention on Human Rights which bans capital punishment. However, it was only on 12 February 1999, that a formal moratorium on the death penalty was issued by the Russian government, just two weeks before the deadline. At the time of writing the sixth Protocol had not yet been ratified.

In 1998, Russia complied with standards of the European Council by shifting the prison system from the Ministry of Internal Affairs to the Ministry of Justice. The Russian Federation also complied with the Council of Europe obligation to create a Human Rights Ombudsman. The *Duma* passed a law in 1997 providing for a Human Rights Ombudsman; however, the post remained open until May 1998 when Oleg Mironov, a Communist Party deputy for the *Duma*, was appointed.

The Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment provides for the setting up of an international committee empowered to visit all places where persons are deprived of their liberty by a public authority. Russia ratified the Convention on

5 May 1998, which was followed by the first mission of a delegation of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) to Russia from 16 to 30 November 1998. The CPT's delegation focused its attention on pre-trial detention and the treatment of persons deprived of their liberty by the Militia. In accordance with Article 11 of the Convention, the information gathered by the CPT during its visit to the Russian Federation and its consultations with the authorities are confidential. The CPT announced that it will carry out a second mission to Russia in 1999.

## THE JUDICIARY

Although the Constitution provides for an independent judiciary, in practice it has encountered difficulties securing its independence. While formal supervision of the courts is assigned to the Supreme Court of Justice, executive organs play an important role in relation to the judiciary and the judiciary remains subject to executive, military and private influence, and corruption.

The tradition of the Soviet period, which regarded the judiciary as an administrative function, continued to prevail. Changes in the 1990s have focused on strengthening the independence of the Russian judiciary. However, the system continued to permit significant political influence through the appointment of judges due to the lack of resources allocated to the judiciary. In addition, the judges themselves have as yet failed to understand the concept of judicial independence.

A 1996 law separated the courts from the Ministry of Justice and placed them within a separate part of the Judicial Department. The Ministry of Justice previously exercised extensive control over the judiciary. In the 1998 budget, this department was funded independently from the Ministry.

### COURT STRUCTURE

The Russian judicial system comprises courts of general jurisdiction, which include a Supreme Court and lower ordinary district and municipal courts (*rayoniye*) from which decisions are appealed to the regional and city courts (*oblastniye*). There are also arbitration courts that consider disputes between business entities and arbitration courts that decide on economic disputes brought against the Government.

Military courts are organised into a special branch of the judiciary. They are regulated by a special statute and were criticised in 1995 by the United Nations Human Rights Committee with regard to their jurisdiction over civil cases.

Article 125 of the Constitution provides for a Constitutional Court which consists of 19 judges. The judges are nominated by the President and then appointed by the Federal Council. The Constitutional Court of the Russian Federation reviews the constitutionality of the law applied in a specific case in accordance with procedures established by federal law. It interprets the Constitution of the Russian Federation and rules on requests of the Federation Council on compliance with established procedures when charging the President of the Russian Federation with state treason or other grave crimes.

The 1993 Constitution empowers the Constitutional Court to arbitrate disputes between the executive and legislative branches and between Moscow and the regional and local government. The court is also authorised to rule on violations of constitutional rights, to examine appeals from various bodies, and to participate in impeachment proceedings against the president. The July 1994 Law on the Constitutional Court prohibits the court from examining cases on its own initiative and limits the scope of issues the court can hear. The Constitutional Court has assumed a more active role in the judicial system since it was re-established in early 1995 following its suspension by President Yeltsin in October 1993 (*see Attacks on Justice 1996*).

The Supreme Court is established by Article 126 of the Constitution. The Supreme Court is the highest judicial body on civil, criminal and other matters heard by general jurisdiction courts, and has judiciary supervision over their activity in line with federal procedural forms; they also offer explanations on judicial practice. The Supreme Arbitration Court is regulated under Article 127 of the Constitution. It is the highest judiciary body resolving economic disputes and other cases considered by arbitration courts, and carries out judicial supervision over their activities in line with federal legal procedures and offers explanations of judicial practice.

#### APPOINTMENT, QUALIFICATION AND TENURE

In Russia there are about 15,000 judges in approximately 2,500 courts of general jurisdiction at the district, regional and federation level.

Article 128 of the Constitution and Article 83 state that judges of the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation, and the Supreme Arbitration Court of the Russian Federation are appointed by the Federation Council following nomination by the President of the Russian Federation.

Judges of other federal courts are appointed by the President of the Russian Federation in accordance with procedures established by federal law. On 4 December 1996, the Federation Council did not approve the Constitutional Law on the Judicial system of the Russian Federation, which would have, *inter alia*, given the President the power to appoint all federal judges (*see Attacks on Justice 1996*).

According to Article 119 of the Constitution a judge must be at least 25 years old, must have a higher education in law, and must have at least five years experience in the legal profession. The federal law may establish additional requirements for judges in the courts of the Russian federation.

The Law on the Status of Judges then requires a judicial candidate to take a qualifying examination administered by the Examination Commission, which is composed of executive appointees who are approved by the Qualifying Collegium of Judges. The Qualifying Collegium is charged with reviewing applications of candidates for posts in federal courts; if they approve a candidate, the application is reviewed by the President for final approval or rejection. The President thus has the power to veto candidates selected by the Qualifying Collegium.

Judges on the Supreme Court are required to have ten years of experience and are selected directly by the President of the Russian Federation. His nomination is then confirmed by the Federation Council.

Courts of first instance in civil and criminal matters consist of one professional judge and two so-called "people's assessors", who have all the powers of the professional judge. They are elected for a term of two years and they cannot be called for more than two weeks during the year.

## DISCIPLINE

The Qualifying Collegia are in charge of the discipline and supervision of the judiciary. The Qualifying Collegia are composed of judges elected by the Congresses of Judges at the district, regional and federal level. The Constitution establishes that a judge may not have his powers terminated or suspended except under procedures and on grounds established by federal law. Articles 13 and 14 of the Law on the Status of Judges establishes the conditions for suspension of a judge, as well as the grounds for removal.

Article 13 of the Law on the Status of Judges establishes that a judge may be suspended for involvement in criminal activity, undertaking activities incompatible with his post, or medical reasons. Suspensions may be appealed.

## RESOURCES

Low judicial salaries contribute to the corruption crisis in the judiciary. Although President Yeltsin ordered a 65% increase in judicial salaries in July 1997 in an attempt to attract new judges, the salaries remained low. During 1997 and 1998, almost 1,500 judicial posts remained vacant due to low salaries.

Despite this increase in salaries, the 1998 state budget included a 26% cut for the court system. In response, the Supreme Court challenged the



budget before the Constitutional Court, and on 17 July 1998 the provision to reduce spending on the judicial system was struck down.

According to the Constitution, the courts should be financed by the federal Government. However, due to budget cuts, the courts are often dependent on funding from local governments, which increases the risk of improper political influence. The lack of resources is so overwhelming that it prevents the judiciary from working properly. There are reports of courts functioning without telephone, electricity, and other vital services.

## CASES

**Several judges** have been murdered in Moscow, Irkutsk and Yekatarinburg reportedly out of anger for judgements issued. As a result, since January 1998, judges have been allowed by decree to carry firearms. In addition, defence lawyers have been targeted by the police, and beatings and arbitrary detention of lawyers have been frequently reported.

**Oleg Kolesnikov** {lawyer}: In September 1997, Mr. Kolesnikov was attacked in the hallway of the Vykhino regional court in Moscow. The attackers were reportedly policemen, who were involved in a property scam. Mr. Kolesnikov was then taken to police headquarters for interrogation. Pressure was put on him to testify against his client. After his release, Mr. Kolesnikov went into hiding. The case is currently being investigated by the Kuzminsky Procurator's office.

**Sergei Pashin** {judge of the Court of Appeal}: Judge Pashin headed the presidential department for judicial reform, which was closed in December 1998. The Moscow City Court tried to take power from Judge Pashin apparently as a reaction to Pashin's frequent acquittal of defendants for lack of sufficient evidence. Pashin also pushed for judicial inquiries into acts of torture by the police.

**Oleg Pazura** {lawyer}: Mr. Pazura was arrested on 26 May 1997 after he gave a speech at a meeting of the governor of the Murmansk region and human rights activists. In his speech, Mr. Pazura had drawn attention to violations of due process in the local courts and corruption in the Prosecutor's Office. He was released in November 1997 under an amnesty law.

**Vasiliy Rakovich** {human rights lawyer and chairperson of Krasnadar Regional Association for Human Rights}: Mr. Rakovich was arrested in April 1997 after an article written by him criticising the performance of the local Prosecutor's Office appeared in a newspaper. The charges against him were changed several times, from theft of a television to illegal possession of weapons, then to rape and later seduction of a minor.

Mr. Rakovich was attacked and severely beaten on 23 October 1998. At that time Mr. Rakovich was appearing as defence council in the trial of Vasiliy Chaikin, a human rights activist, before the City Court of Stanitsa Leingradskaya, in the Krasnodar region. It is suspected that the attacks were linked to the Chaikin case, as Mr. Raskovich had called for a criminal case to be opened into allegations that witnesses' testimonies were obtained under duress by the chief investigator, Mr. Tsureyan. The Leningradksy District Department of Internal Affairs has opened a criminal investigation into the attack on Mr. Raskovich.

**Yuri Shadrin** {human rights advocate, public defender and law student}: On 29 November 1996 he was arrested in Omsk on the orders of the Regional Procurator. Mr. Shadrin was charged with violating the rules of traffic safety and operation of transport vehicles. During the arrest, Omsk authorities violated a number of procedural norms, including rules regarding *habeas corpus*. It is widely believed that Mr. Shadrin's arrest was provoked by his legitimate work as a human rights defender. Mr. Shadrin was released on 31 December 1996 but remains subject to arrest and trial.

**Rafael Usmanov** {public defender}: He was arrested on 25 March 1997 and charged with libel, apparently because he criticised the Constitutional Court in an article. He was released two weeks later and the charges were dropped.

# SPAIN

The Kingdom of Spain is a parliamentary monarchy. Its Constitution, adopted in 1978, places Spain under the rule of law and provides for the separation of powers. The 1978 Constitution has paved the way for the successful democratisation of the country.

The King is the Head of State, but the executive branch is headed by the President of the Government. The current President is Mr. José Maria Aznar, who was elected in 1996 when his Popular Party won the general elections.

Different political events have affected the recent evolution of the Spanish legal system and the role of the judiciary. One such event is the long-standing political violence in the northern part of the country, the Basque region. Additionally, in recent years, the legal system has had to respond to the problem of illegal immigration into Spain.

The Constitution grants a set of rights to the Autonomous Communities (regions with administrative and political autonomy) within Spain, including the right to self-governance. The Parliament (*Cortes Generales*) holds legislative power, but can delegate to the Autonomous Communities the power to enact such legislation as it considers necessary, within the framework of the national legislation. Thus, although the regions have a good deal of autonomy, the legal system and the judiciary for all the regions are part of the common structure of the whole country.

Investigating Judge (*Juez de Instrucción*) Baltasar Garzón continued his investigation into the fate of Spaniards who disappeared and were killed in Chile and Argentina during the period of military rule during the 1970s and 1980s. After Interpol issued an international arrest warrant, in October 1998, the British authorities detained General Augusto Pinochet, former dictator of Chile.

## HUMAN RIGHTS BACKGROUND

Although human rights are generally respected in Spain, the enjoyment of those rights by certain minority groups and illegal immigrants has been the subject of special concern in recent years. Amnesty International recently expressed concern over the tendency of some police officers to assault and mistreat persons of non-European ethnic origin. Instances of arbitrary detention and mistreatment of persons belonging to minority groups have also been denounced by human rights organisations.

Police torture and ill-treatment of detained persons also remain a continuing problem, along with the long-standing practice of detaining suspects of very grave offences incommunicado. Human rights organisations are

concerned that during prolonged incommunicado detention suspects are more likely to be tortured and mistreated. It is also cause for concern that very often those responsible for these human rights violations are not prosecuted or are given only administrative sanctions.

On 19 May 1998, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) issued its report following a visit to Spain in April 1997. During its visit, the CPT visited several detention centres for illegal aliens in Málaga, Ceuta, and Melilla, and expressed concern over the living conditions of illegal aliens detained in those centres, as well as for the treatment aliens incur once they have received an expulsion order. The CPT verified many instances of harassment and recommended a series of measures to improve the situation. The CPT has paid two additional visits to Spain in the last two years.

Reports say that minority groups and illegal immigrants are the main victims of arbitrary detention and torture, and often lack sufficient legal counsel during investigation or trial. These problems compound already existing conditions which adversely affect these groups' human rights.

The United Nations Committee Against Torture examined Spain's implementation of the Convention Against Torture in November 1997. In its concluding observations, the committee observed that:

- long delays in criminal proceedings for torture, both at the investigation and trial stages, were absolutely incompatible with the promptness required under the Convention (paragraph 8).
- the practice of extended incommunicado detention, "during which the detainee cannot have access to counsel of its choice" facilitates the practice of torture (paragraph 12).
- judges, while rejecting declarations obtained by torture as proof against those who made them, accept those declarations as a basis to incriminate other co-accused (paragraph 13).

The Basque Fatherland and Freedom Organisation (ETA), a violent separatist group, continued its activities, including summary executions of political leaders and town authorities. In September 1998, ETA declared a unilateral cease-fire and pledged to hold a political dialogue with the Government. However, ETA's overtures of peace have not been taken seriously by the authorities.

During the reported period, criminal proceedings commenced against members of the previous Gonzales administration; they were charged with alleged involvement with Anti-terrorist Liberation Groups (GAL), which use illegal methods to fight terrorism.

## THE JUDICIARY

The structure and functions of the judiciary are set out in the Constitution (Title VI, Articles 117-127) and further elaborated in the 1985 Organic Law of the Judiciary (LOPJ), as amended in May 1995, December 1997, and July 1998.

Although the Spanish Constitution grants wide autonomy to the Autonomous Communities they are not entitled to organise their own court system; instead, there is a centralised court structure with jurisdiction over the entire country. The principle of jurisdictional unity is recognised as the basis of the organisation and operation of the courts (Article 117.5 of the Constitution).

### STRUCTURE

The judiciary consists of a court system, the General Council of the Judiciary (*Consejo General del Poder Judicial*), the Office of the Public Prosecutor, and the Constitutional Court. The Constitution also provides for a High Tribunal, which heads the judicial structure in each of the Autonomous Communities. In addition, there is a separate military judicial system, which is structured on a hierarchical basis. Its decisions are reviewed by a chamber of the Supreme Court when necessary.

The court system is comprised of justices of the peace, courts of first instance and investigating judges (in criminal, labour, juvenile and administrative-contentious matters), Provincial Courts (*Audiencias Provinciales*), Autonomous Communities' High Tribunals, the National Court (*Audiencia Nacional*) and the Supreme Court (Article 26. LOPJ). Their territorial competence is defined by law.

The Supreme Court sitting in Madrid has jurisdiction over all of Spain, and includes specialised chambers on criminal, civil, labour and administrative matters. The Autonomous Communities' High Tribunals are the highest judicial authority in the autonomous communities in matters related to the application of community legislation. The various first-instance courts have jurisdiction over districts. Justices of the peace are located in municipalities where there are no first-level courts.

The National Court also has jurisdiction over the whole country; however, this jurisdiction is limited to certain matters of exceptional importance, namely criminal matters such as offences against the Crown and the form of Government, money counterfeiting, drug trafficking, and crimes committed outside Spanish territory (over which Spanish courts have jurisdiction under international treaties). Within the National Court there are various chambers as well as a Central Investigating Court in charge of examining cases to be tried by the criminal chamber of this body. Provincial Courts sitting in

provincial capitals have jurisdiction over certain matters of regional importance.

The General Council of the Judiciary is in charge of the administration of judicial resources as well as the training and selection of judges.

The power to initiate preliminary investigations on crimes rests with the Public Prosecutor. The investigating judge will then conduct the investigation and the gathering of evidence.

#### APPOINTMENT AND TENURE

Judges and Magistrates are independent. They are not subject to transfer and accountable only to the law and the Constitution (Article 1 LOPJ). They may only be dismissed, suspended, transferred or retired on the grounds, and subject to the guarantees, provided by law (Article 117.2 of the Constitution).

The General Council of the Judiciary is the body empowered to select and appoint judges of all ranks, except those of the highest levels. It is also in charge of training, promotion and discipline within the judiciary. Furthermore, the General Council nominates the President of the Supreme Court, as well as its own Chairman, who is appointed by the King with the consent of Parliament.

#### RESOURCES

The General Council of the Judiciary is empowered to prepare its own budget, as well as manage its execution. The central Government, along with the heads of the autonomous communities, maintains substantial powers in the allocation of financial and auxiliary personnel to the judiciary.

#### THE REFORM OF THE LEGAL SYSTEM: GUARANTEEING THE RIGHT TO A FAIR TRIAL

The Spanish criminal system is slowly changing to conform with international standards of fair trial. The Code of Criminal Procedure (*Código de Enjuiciamiento Criminal*) was changed by Organic Law 7/1988 of December 1988. This law provides for the creation of criminal courts with jurisdiction to also try offences carrying less than a five year term in prison. Prior to this reform, it was the investigating judge who investigated and tried such offences. However, in June 1988, the Constitutional Tribunal deemed this practice in opposition to the objective impartiality of the judge. In accordance with the new law, investigating judges merely investigate the matter; they then issue an order charging the accused. The criminal court then decides on the merits of the case. The Criminal Code itself was changed in 1996.

However, the reform of the criminal code does not eradicate the controversial institution of the investigating judges. The main function of the investigating judges is to assess the evidence and circumstances of a case and to determine whether there is sufficient evidence to justify the opening of criminal proceedings against the suspect. If so, the judge formally formulates charges through an order, (*auto de procesamiento*), which will also open the criminal proceedings. Although the investigating judges no longer try the case, they still maintain certain jurisdictional functions. For example, when formulating charges against a suspect, they can also order the arrest and detention of the accused pending trial. Concern has been repeatedly expressed that this jurisdictional function would not be carried out impartially by investigating judges since they are also in charge of the investigation and gathering of evidence. The investigating judge thus, in part, plays both the role of the prosecution and the role of a pre-trial chamber, halfway between an inquisitorial criminal system and an adversarial one.

On 28 October 1998, the European Court of Human Rights issued a judgement in *Castillo Algar v. Spain* (79/1997/863/1074). In its opinion, the Court found that Spain had violated Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, providing for the right to a fair hearing in an impartial tribunal. The case, which involved the Spanish military system of justice, had been brought to the attention of the Court in 1997. The Court found that the fact that two judges who heard an interlocutory appeal against the order by which the accused was charged, (*auto de procesamiento*), and had upheld the order, and then were later part of the bench that tried the case, opened the impartiality of the trial court "to genuine doubt". The court found also that "the applicant's fears in that regard could be considered objectively justified" (paragraph 50).

Proposals to further reform the Spanish civil and criminal procedures are pending in Parliament and are the subject of heated debate. Law 5/1997, amending the Organic Law of the Judiciary, introduced an additional provision to ensure the impartiality of judges. Article 219 provides that when a judge or magistrate "has occupied a public post where he could have formed his opinion...on the object of litigation, the parties to the case and their counsel and representatives", his decision may be challenged.

#### THE JUDICIARY AND THE SITUATION IN THE BASQUE COUNTRY

The work of judges and lawyers has remained under pressure in the Basque country, as a result of threats issued by violent separatist groups in recent years.

During the last months of 1998, this situation became more serious as the harassment of judges who do not speak the Basque language increased. According to news sources and the General Council of the Judiciary, a **number of judges** received threats from radical elements in the separatist movement during January 1999. The identity of the judges was not revealed,

and measures to ensure adequate protection for them were taken by authorities. It was reported that these judges were not the only victims of such harassment, that harassment and threats against judges, prosecutors and lawyers are frequent in the Basque country, and that the situation has escalated over time. The alleged reasons for the threats were administrative sanctions that the judges imposed on certain Basque-speaking lawyers who refused to defend their clients before a tribunal that does not speak Basque but uses interpretation services. The Constitution declares Castilian to be the official language of the state but also grants official status to regional languages in the autonomous communities (Article 3).

There were also reports of trials being suspended because translation into Castilian was not available, and the accused was a Castilian speaker. Moreover, free legal counsel for indigent people was scarce, and Basque-speaking lawyers refused to provide free legal assistance in a language other than Basque.

With regard to terrorism, Spain has passed special legislation to combat terrorism. This legislation contains provisions that may not be consistent with the rights of defence. According to Amnesty International's 1997 report, the definition of terrorism-related offences was very often wide, for example, "collaboration with an armed band", "belonging to an armed band", "defence of terrorism". Furthermore, prison sentences are reportedly not proportional to the offences committed.

#### ACCESS TO JUSTICE AND LIMITATIONS TO THE RIGHTS OF DEFENCE

The 1996 Law of Free Legal Assistance (Law 1/1996) elaborates upon the constitutional provisions of Articles 24 and 119. Article 24 establishes that every person has the right to obtain the effective protection of the judges and the courts and that "in no case may there be any denial of defence rights". The same Article establishes that "all persons have the right ... to the defence and assistance of a lawyer". Article 119 says that access to justice shall be free for those who have insufficient means to litigate. The conditions under which free legal assistance is provided, as well as the procedure and the organs administering these procedures, are set out in Law 1/1996. However, this law presents some unjustified departures from constitutional norms, and its practical application has proven to be insufficient.

Article 2 of Law 1/1996 sets out the scope *ratione personae* of the right to free legal assistance. This right is restricted to "Spanish citizens, nationals of other member states of the European Union and foreigners with legal residence in Spain". This norm limits considerably the scope of the constitutional provisions granting the right to legal assistance to "all persons", including free legal assistance when a person is indigent (Article 24.2). All persons who do not have a legal permit to live in Spanish territory, for whatever reason, are excluded from the enjoyment of this right.



Law 1/1996 establishes a Commission of Free Legal Assistance to oversee the programme and deal with petitions for legal assistance (Article 9). The operational tasks are left to local Bar Associations, which will decide in the first instance. The Bar Associations also provide a list of attorneys available for nomination as free legal counsel (Article 11).

However, the implementation of this provision has not always been efficient, especially with regard to the provision of legal assistance to individuals already in prison. Some Bar Associations have not created lists of attorneys who can provide assistance to inmates. Sometimes the few attorneys who are assigned to provide legal service in prisons do not receive all the necessary facilities and are not able to deal with all the cases. Article 253 of the Penitentiary Regulations grants inmates the right to challenge sanctions they are given before a special judge for prison supervision (*Juez de vigilancia penitenciaria*). The absence of a defence attorney to represent the inmates prevents them from adequately protecting their rights.

There are also reports of serious limitations on the availability of legal counsel for certain minority groups. Almost 40% of inmates are immigrants, mainly from the Magreb, a disproportionately high percentage when compared with the entire composition of foreign populations living in Spanish territory. Many of these immigrants have entered Spain illegally and face the possibility of expulsion. The expulsion proceedings follow an administrative procedure. The detention of illegal immigrants in special Centres for Administrative Confinement is ordered by the political authority and can be appealed to a judge on administrative-contentious matters. However, the appeal does not stop the execution of the decision, and many persons are expelled before their case is decided by law. According to a study issued in January 1999 by the Madrid Bar Association, the Centres for Administrative Confinement, which were created to give illegal immigrants different treatment than that given to common criminals, owing to their special status as persons whose legal situation has yet to be ascertained, permitted in fact a lower level of protection of the rights of the detainee. Even when the detainee is assigned legal counsel, the latter faces a visit regime that effectively restricts the rights of the defence. The legal counsel is allowed to meet the detainee only a few times and in tightly monitored conditions. This regime has been considered to differentiate between the treatment afforded to detainees and common criminals. On many occasions the person arrested as an illegal immigrant is not informed of his situation, the reasons for his detention, his right to plead his case before a judge, or the term of his confinement.

# SUDAN

**S**udan is the largest country in Africa and one of the poorest in the world. It has a population of around twenty-six million, of which an estimated seventy percent are Sunni Muslim, inhabiting mainly the northern two-thirds of the country. The southern part of the country is inhabited by pagan and Christian African tribes. The most commonly spoken language is Arabic, although there are over 100 dialects and languages in use.

The modern history of Sudan has been marked by political turmoil and a lack of democratic stability. Since its independence from Britain in 1956, Sudan has been governed by military regimes, interspersed with short-lived parliamentary systems. The current military regime came to power through a *coup d'état* in June 1989.

Another important feature of Sudan's modern history has been the continuing strife between the largely Arab north and the African tribes in the south. A few months before gaining independence, Sudan was ravaged by an internal conflict which erupted between the north and the south, developing into a full-scale civil war. Former Sudanese President Jaafar Numeiri granted autonomy to the south in 1972, resulting in a nine year period of relative peace. In 1983, however, Numeiri withdrew the autonomous status from the south. In the same year, he also introduced Shari'a law to quell opposition. The cease-fire ended and the fighting intensified. Since 1983, the Sudan People's Liberation Army (SPLA), headed by Colonel John Garang, has led southern resistance against the successive Sudanese governments, demanding southern autonomy within a federalist or confederalist state. The SPLA has since broken up into several warring factions. In addition to the serious human rights violations committed by the Government, grave human rights violations have also been committed by the SPLA and other groups in the course of the on-going conflict, including summary execution and torture.

## HUMAN RIGHTS BACKGROUND

The human rights situation in Sudan has been a cause for grave concern, especially in view of the apparent lack of commitment by the Sudanese Government to honour its obligations under the various international human rights and humanitarian law instruments to which Sudan is party, and thus bound. For instance, Sudan is a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child, as well as the Convention on Slavery. Sudan has also signed the United Nations Convention against Torture, and is a High Contracting Party to the Fourth Geneva Convention.

In 1985, General Numeiri was ousted by a civil uprising and a democratic government was elected. However, democracy did not last in Sudan. In 1989, a *coup d'état* was staged; the current Sudanese Government was born of that *coup*. Upon seizing power, the military junta suspended the country's Constitution, dissolved all governmental and non-governmental institutions, banned all political parties and declared a state of emergency over all the country. In addition, the judiciary has been affected by a series of dismissals of judges and the formation of exceptional courts.

The civil war that has already consumed hundreds of thousands of lives has also caused the displacement of millions of civilians. A serious humanitarian crisis erupted in 1998, with widespread famine plaguing the civilian population in the south. Humanitarian relief agencies were faced with serious difficulties as a result of a lack of co-operation from both the Government and the rebels.

Recruitment of child-soldiers under the age of 16 has been very frequent, both by the Government and the SPLA factions.

There are also serious allegations of slavery. Widespread abductions of women and children, mainly committed by local militias, as well as the Popular Defence Forces (PDF), loyal to the Government of Sudan, are reported. The persons kidnapped are held under harsh conditions until a ransom is paid.

## THE PRESENT MILITARY REGIME

President Bashir has been in power since 1989. Some constitutional changes have been implemented, resulting in the holding of highly controlled elections. Two hundred and seventy-five of the 400 seats are now elected in a seriously deficient process. The government-led National Salvation Front dominates political life in Sudan.

Membership of both military and civilian government agencies has been dominated by members and activists of the National Islamic Front (NIF), who were also appointed to administer trade unions and other organisations.

The NIF's influence within government circles has grown such that Sudanese opposition groups now refer to the Government as the NIF regime. The NIF's influence manifested itself from the very beginning, when the Government declared its aim to restore the Sudanese national identity, which it considered to be based on Islam and Arab nationalism, as well as to apply Shari'a law.

In April 1998, the National Assembly adopted a new Constitution, containing a bill of rights, which was subsequently approved by referendum in June 1998. When signing the Constitution on 30 June 1998, the President

said that the new Constitution would open a wide door for power-sharing and would grant the citizens of Sudan more freedom and rights. The Government was widely criticised for having drafted the Constitution without real national representation. The Special Rapporteur of the UN Commission on Human Rights, in his 1999 report on Sudan, formulated some concerns over the wording and guarantees afforded by the new Constitution. He noted the absence of particular rights, such as the right to equality, regarding which the Constitution has taken a minimalist approach, and the vagueness and ambiguity in the wording of other rights, such as the term *Tawali* in reference to political associations. The Special Rapporteur expressed worry about the alignment of future legislation with those rights.

A controversial new law was passed in Sudan on 23 November 1998, creating a framework for the formation of new parties, thus ending a long ban imposed after President Al-Bashir seized power in 1989. This law on the regulation of *Tawali* was criticised by the opposition, on the grounds that the wording of the law was not clear enough, that it was based on a Constitution elaborated without consensus, and that it deprives the south, as well as other factions, of an equal opportunity to form parties. The law came into effect in the beginning of 1999; since then at least 30 new organisations, mostly pro-government, have been registered. Such traditional Sudanese political parties as the UMMA Party and the Democratic Union Party were not registered.

## THE JUDICIARY

The responsibility for the administration of justice falls under the control of the Judicial Authority. This authority is directly responsible to the Head of State and has its own independent budget which is authorised by the Head of State, upon the recommendation of the Supreme Judicial Council. There is serious governmental influence in the administration of justice.

The Supreme Judicial Council is composed of the Chief Justice, his deputies, presidents of the judicial branches, the Attorney General, the President of the Bar Association, and the Dean of the Law Department at Khartoum University. The Council is granted the responsibility to recommend to the Head of State the appointment, promotion, and dismissal of judges, as well as the budget of the Judicial Authorities. The Council is also to participate in drafting laws that concern the Judicial Authority.

### APPOINTMENTS

The Head of State has jurisdiction to supervise the Judicial Authority, to form the High Council of the Judiciary, and to appoint the Chief Justice,

his deputies, judges of the High Court, judges of the Courts of Appeal and judges of the criminal courts.

Recently, a number of judges were replaced by young fundamentalist graduates, some of whom had not even passed their bar examination.

The court structure is composed of the High Court and other courts, including civil, criminal, tribal, and family courts. The High Court is situated in Khartoum. The High Court also contains separate panels to hear appeals on civil, criminal and family matters for Muslims and non-Muslims, as well as a panel to hear administrative appeals. In addition, courts of appeal are set up in each federal state capital. In November 1998, a law was passed to establish a Constitutional Court to deal with requests to interpret constitutional provisions, as well as to hear appeals on the constitutionality of laws.

The judiciary is under the total control of the Government and only NIF supporters and members are appointed to it. Southern judges are discriminated against; they are repeatedly passed over for promotions, and transferred to lower or traffic courts.

## **SPECIAL PROCEDURES AND COURTS**

### **THE NATIONAL SECURITY ACT**

The National Security Act allows for the arrest and detention of persons on very wide grounds and without any judicial supervision. The Act only requires that after 90 days, a judge must issue a warrant for the authorities to prolong a detention.

The Act grants security forces virtual immunity from prosecution, and provides them with investigative powers that allow arbitrary arrests, incommunicado detentions, long detentions without judicial review, and arbitrary searches.

The National Security Act also allows for petitions by detainees to complain to the judicial authorities about their conditions of detention, but the Act fails to specify a mechanism through which to do so.

### **SPECIAL COURTS**

Decree No. 2 authorised the Revolutionary Council, or other bodies authorised by the Council, to establish special courts composed of military officers with full judicial trial powers to judge any person indicted under the emergency law. The Council may determine which criminal procedures to be applied, both in the investigation and in the trial.

The special courts held summary trials leading to the execution of several persons. Hundreds of other citizens were subjected to convictions and sentences of death, imprisonment and flogging, for offences ranging from opposition to the regime, to damage to the national economy, corruption, prostitution and drunkenness.

Furthermore, the High Court was deprived of its power to review death sentences issued by the newly established special courts.

The special courts were abolished on 27 September 1989 and replaced with Revolutionary Security Courts which enjoyed similar powers as their predecessors. A Revolutionary Security High Court was established to review cases from the lower courts. Accordingly, sentences of death or thirty years imprisonment had to be referred to the Revolutionary Council for confirmation. In December of the same year, the Special Courts were re-established; lawyers were allowed to give advice to their clients but were not permitted to address the courts directly or to present any arguments to the court in support of their client. A right of appeal to the Chief Justice, but not to a higher court, was granted.

#### PUBLIC ORDER COURTS

Public Order Courts have been established, by decree of the Chief Justice, to deal with cases the Government considers to be violations of public order. These courts try cases summarily; sentences passed by the Public Order Courts, such as flogging, can be executed immediately, regardless of whether or not an appeal is still pending.

#### THE LEGAL PROFESSION

Lawyers in general, and advocates in particular, were very active in the struggle that led to Sudan's independence from Britain in 1956. Since then, the formation of the Sudan Bar Association has given them an institutional framework that guarantees their independence.

During 1997 and 1998, the legal profession was affected by the dissolution of the Bar Association, its replacement by a government-controlled body and the subsequent holding of questionable elections, as well as the detention and harassment of numerous lawyers. Lawyers publicly called for the release of detainees, represented accused persons before special and emergency courts, and organised rallies and discussion groups on government policies. A number of bar members were subjected to harassment, detention and imprisonment by the security forces.

Unlike other associations and trade unions, the Bar Association was governed by its own special law, the Advocates Act of 1983, governing its

formation and organisation; the Bar Association can only be dissolved in accordance with the provisions of the Act. However, the Bar Association was in fact dissolved without regard to, and in violation of, the Advocates Act.

In 1993, the Government amended the Advocates Act of 1983. The amendment made the Bar subject to regulation by labour laws, and its elections subject to the Trade Union Act of 1992. This latter act deprives professional associations of their independence and subjects them to the direct control of the Minister of Labour and the Registrar of Trade Unions. This has caused members of the Sudanese Bar Association to be expelled from the Arab Lawyers Union, the African Lawyers Union, and other prominent organisations.

The Registrar of Trade Unions called for Bar Association elections to be held on 4 September 1997; no quorum was obtained, and the elections were moved to 5 September. On the day of the elections, a lawyer was caught trying to insert approximately 50 Islamic pro-government marked ballot tickets in the ballot boxes, and the elections were cancelled. The board already appointed by the Government remained in office.

Defence lawyers continue to face harassment and intimidation.

## CASES

**Sid Ahmad Alhisian** {lawyer} and **Abd Al Mahmoud Il Haj Salih** {former Minister of Justice and Attorney General}: On 30 June 1998, Mr. Alhisian and Mr. Salih were arbitrarily arrested, detained, and interrogated by security forces, allegedly in connection with bomb explosions in Khartoum. Mr. Alhisian and Mr. Salih were arrested along with 30 other political leaders and trade union members while the Government was celebrating the introduction of the Constitution.

**Ali Al-Sayyed** and **Khalid Abul Rus** {lawyers}: On 8 May 1998, Lawyers Al-Sayyed and Abul Rus were arrested by the Sudanese police, who searched their homes and offices. They were taken to an unknown destination. The arrests were made while a referendum on the new Constitution was taking place.

**Mostapha Abdel Gadir** {lawyer, human rights activist}: On 7 July 1998, Mr. Abdel Gadir was arbitrarily arrested, allegedly in relation to bomb explosions in Khartoum directed against the Sudanese regime; his detention was also reportedly aimed at stifling protest over the arrest in late June 1998 of a number of political opposition leaders.

**Kamal Abdel Rahman** {lawyer}: On 7 June 1997, Mr. Abdel Rahman, along with various others, was arrested by Sudanese police. The detainees

have been accused and are reportedly held for having links with the National Democratic Alliance, as well as for alleged non-violent opposition to the Government.

**Mustapha Al-Tijani, Sayyed Ahmad Hussein, Ali Ahmad Sayyed, Mo'atasem Ibrahim, Hashem Awad Abdel Majid, and Mustapha Abdel Gadir** {lawyers}: During the second half of January 1997, the Sudanese police arrested and detained at least six Sudanese lawyers, and held them in unknown locations. These lawyers have been arrested without warrants, and they have not been allowed access to legal counsel, or permitted family visits.

**Ihsan Fakhry** {first woman judge in the civil judiciary}: Judge Fakhry was dismissed because of her gender.

**Zeinab Ali Al Oumda, Salwa Saeed, Siham Adam, Amima Ahmed Al Moustafa, and Amani Ousman** {lawyers}: All five lawyers were arrested, tried, fined, and flogged, in total disregard of the Sudanese Penal Procedures and the laws organising the legal profession.

**Zaka Mansour, Badr El Dine Mohammad Ahmed, Kassem Ousman, Omar Hamed Al Jablabi, Gheith Haidar, Souhair Mohammad Abdallah, Elham Abdel Aziz Krar, and Yasser Awad Kamel** {lawyers}: In 1997, these lawyers were all arrested and detained, on different occasions, by the Sudanese police.

**Ghazi Souleiman** {lawyer}: In 1995, Mr. Souleiman created a forum for the restoration of democracy. He was first targeted and arrested on 20 January 1998, then judged and found to be guilty; he was sentenced to five months imprisonment and fined 500,000 Sudanese pounds by the public security tribunal. The appeals court in Khartoum modified the sentence on 10 February 1998, in response to an appeal brought by at least 50 Sudanese lawyers.

## GOVERNMENT RESPONSE TO CIJL

On 6 July 1999, the Government of Sudan responded to the CIJL's request for comments. The Government stated:

Sudan is defined by the country's Constitution in its first article as an "all embracing homeland, wherein races and cultures coalesce and religions reconcile. Islam is the religion of the majority of the population and Christianity and customary creeds have considerable followers".

1) It is true that Sudanese post-independence history has been marked by political turmoil. This is the factor that necessitated that the current government takes power in 1989. To face a



deteriorating situation that threatened the existence of the country itself and the security of its people, the new government was obliged to take emergency measures including curtailment of some freedoms as was necessitated by the exigencies of the situation. The International Community was informed accordingly, in compliance with art. 4 of the International Covenant on Civil and Political Rights, to which Sudan is party. However, the Government embarked on a time table for the achievement of genuine democratic practice., The Revolutionary Council was dissolved and an interim civilian Legislative was appointed, followed in 1996 by the free election of a National Assembly and a President. These elections were witnessed by international observers, including the African Human Rights Commission.

2) The Armed Conflict in the South, has erupted in 1955 before Sudan's attainment of Independence and continued, with a hiatus of 10 years after the Addis Ababa Agreement. Its root causes lies basically on socio- economic elements including unequitable share of wealth and power, colonial legacy and foreign interference. The current Government has exerted relentless efforts to bring an end to the war, including the signing of the Khartoum Peace Agreement in 1997 with 7 of the 8 fighting factions in the Sudan, in which the government recognized both citizenship as the basis of rights and obligations and right of self- determination for the people of the South. The International Community have recognized this agreement in Human Rights Commission Resolution 15 / 1999. The Government has also pursued the negotiations with the remaining rebel faction, the SPLA, under the umbrella of the IGAD initiative. In this regard the Government accepted the Declaration of Principles (DOP) of IGAD which also includes right of self determination to the People of the South, as a basis for negotiations.

3) With regard to recruitment of children, the Government of the Sudan is committed not to recruit children below the age of 18 years. This is clearly stipulated in article 7 of the National Service Act of 1992 which states that National Service is required by every Sudanese who is 18 years of age and does not exceed 33 years of age. It is to be recalled that the Government of the Sudan has confirmed this commitment to the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict. CHR Resolution on Sudan welcomed this commitment and demanded the same commitment be made by the rebels.

4) Allegations of slavery are unfounded and has been circulated by certain quarters. The Government has received reports of abductions that takes place in some areas of the armed conflict and the Minister of Justice has established on the 15th of May 1999 a Committee for the Eradication of Abductions of Women and Children with full powers to investigate, trace, free any abductees, unite them with their families, prosecute perpetrators and recommend ways and means to eradicate the practice. The Committee is cooperating and coordinating with the International Community in carrying out its mandate. This cooperation includes the UNICEF.

5) The 1998 Constitution of Sudan has been welcomed by the Human Rights Commission in its Resolution on the Sudan in April 1999, and also by the Committee on the Elimination of Racial Discrimination. The Special Rapporteur on the Sudan has praised the Constitution stating that the "new Constitution contains a bill of rights, thereby providing greater protection to the human rights of Sudanese citizens". He went on further to say "According to some observers, the constitution sparked new energy in the public debate and created a wind of renewal not to be missed".

6) The New "Political Association Law", has been enacted for the registration of political parties. Its objective is to insure the existence of healthy and democratic organizations. Any 100 citizens can register a party. The only requirement being is that its financial revenues should be declared and its leadership democratically elected. No citizens or group of citizens are excluded from the right to form a political association. 17 registered parties are now functioning, and a consultative assembly has been suggested recently by the President of the Republic consisting of the leadership of those parties so that they may directly contribute to the governing of the country.

7) The recruitment of judges is bound by the Judiciary Act of 1,986, which was enacted before the current Government came to power. No judge could be appointed if he or she has not passed the bar exams. The allegation of discrimination against judges is not true. The High Court contains Southern non-Muslim judges like Justice John WOL MATEG, the High Court Judge and Head of Urban and Rural Courts in the Southern States, and also Justice Makeir Cot AROR. One of the 7 Justices of the Constitutional Court is a Southerner, Justice John Wangi KASIA.

8) The Ministry of Justice and the National Assembly are embarked now on a process of amending relevant laws to con-

form with the 1998 Constitution. The National Assembly is now considering the necessary amendments. The Security Forces are accorded procedural immunity for functional necessities, but not impunity. The Special Rapporteur, during his visit to Sudan, was shown cases of trial and punishment to security personnel who acted outside the law.

9) The revision of the National Security Act includes all matters of search, detention and interrogation, to conform with article 30 of the Constitution on "Immunity against Detention" which stipulates "A human being is free. He shall neither be arrested, detained, nor confined, save by such law that shall require stating the charges, the duration of detention, facilitation of release and respect for dignity in treatment".

10) CHR Resolution on Sudan has welcomed the release of all political prisoners in the country.

11) As regards to decree no. 2, to which the report was referring, the decree is no longer valid as it was repealed in accordance with article 137 (I) of the 1998 Constitution, which stipulates that "there shall be repealed as from the date of the Constitution coming into force all the Constitutional Decrees".

a) The Sudanese Bar association current Leadership was elected in conformity with the decision of the "Election Commission". The results of the election were not challenged before any court.

b) The following is information regarding alleged detention of lawyers:

c) Sid Ahmed Alhisain, detained in 1997 in accordance with the law and was released after completion of investigations

d) Abdel Mahmoud al Haj Salih, detained in 1997 in accordance with the law and was released after completion of investigations

e) Ali Al Sayyed, detained in 1997 in accordance with the law and was released after completion of investigations

f) Mustafa Abdel Gadir, detained in 1997 in accordance with the law and was released after completion of investigations

g) Khalid Abul Rus, was not arrested

h) Mutasim Ibrahim, was not arrested

- I) Kamal Abdel Rahman, was charged before a court under the 1991 Penal Code
  - j) Hassan Awad Abdel Magid, was not arrested
  - k) Elharn Abdei Aziz Kariar, was not arrested
  - l) Yasser Awad Kamel, was not arrested
- 12) As regards Judge Ihsan Fakhri, the report that she was dismissed because of her gender is not true as there are 5 female High Court Judges, currently, namely Farida Ibrahim, Rabab Mohamed Mustapha, Amira Youssif Bilal, Dr. Badria Hassouna and Sannia ElRashid.

# TUNISIA

According to Tunisia's Constitution, the President of the Republic is the chief executive of the country and has considerable powers over the Cabinet, Prime Minister, and armed forces. The President is elected for a five year term by universal and direct suffrage. Tunisia's Constitution was revised in 1988 to permit the President to serve for three consecutive five year terms. President Zine El Abidine Ben Ali, who has been in power since 7 November 1987 was re-elected without opposition on 20 March 1994. The next elections are forecast to be held in November 1999. Under the current Constitution, 1999 will be the last time President Ben Ali can stand for re-election. A new constitutional amendment has widened the possibilities for other individuals to run for presidential office. In practice however, the only eligible candidates are required to be the head of a party that has been represented in Parliament for five years. These conditions have so limited the field of potential candidates that, in practice, only two or three individuals in Tunisia would be eligible to run for President.

The President nominates the Prime Minister, and on his suggestion, the other members of the Government. The Government puts into effect the general policy of the nation, in conformity with the orientations and options defined by the President of the Republic. The Prime Minister directs and coordinates the work of the Government. The Executive Cabinet is appointed by the President and reports to the National Assembly.

The President of the Republic promulgates constitutional, organic, and ordinary laws and ensures their publication in the official journal of the Tunisian Republic. He exercises general regulatory power and may delegate all or part of his powers to the Prime Minister.

Legislative power is vested in the unicameral Parliament, which is composed of 163 members who are elected every five years. Parliament is purportedly a pluralistic institution whose members represent five different parties. In reality, elections to the Chamber of Deputies (*Majlis al-Nuwaab*) were last held on 20 March 1994. The results demonstrate that politics in Tunisia are still dominated by a single party, the Democratic Constitutional Rally (RCD), which has ruled, under various names, since independence. At the last election, the RCD won 144 seats, while the other 19 seats were split among the four opposition parties.

## HUMAN RIGHTS BACKGROUND

Although Tunisia has ratified several international human rights treaties, such as the International Covenant on Civil and Political Rights, the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the African Charter of Human and Peoples Rights, it systematically violates its commitments.

Torture and ill-treatment remained common practices in Tunisia during 1997 and 1998. Courts continued to fail to investigate allegations of torture and ill-treatment and accepted coerced confessions as the sole evidence in trials. Several defendants have been convicted despite the fact that no convincing evidence was produced to confirm the charges. Requests for medical examination are routinely rejected.

Prison conditions remained poor and crowded. Moreover beatings, denial of adequate medical care, and other forms of ill-treatment are increasingly reported in prisons.

Hundreds of prisoners of conscience, including human rights defenders and individuals suspected of supporting unauthorised political opposition groups, have been arrested. A large number of individuals have been imprisoned on politically motivated charges.

On 19 November 1998, upon its examination of Tunisia's report, the United Nations Committee against Torture concluded that

A wide gap between law and practice with regard to the protection of human rights exists in Tunisia.

In a summary of their findings, the experts concluded that

[t]he committee is particularly disturbed by the reported widespread practice of torture and other cruel and degrading treatment perpetrated by the security forces and the police that in certain cases resulted in death in custody. Furthermore, it is concerned over the pressure and intimidation used by officials to prevent the victims from lodging complaints. And the committee feels that by constantly denying these allegations, the authorities are in fact granting those responsible for torture immunity from punishment, thus encouraging the continuation of these abhorrent practices.

The Committee further urged Tunisia to take the following measures:

- to reduce the police custody period to a maximum of 48 hours;
- to amend the relevant legislation to ensure that no evidence obtained through torture shall be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

In addition, there are still serious restrictions on freedom of expression. Further restrictions have been imposed on the activities of local and international human rights organisations. Tunisian NGOs are unable to communicate freely with the outside world, and their meetings and other public activities often face interference. This is the case for the Tunisian League for the Defence of Human Rights, an ICJ affiliate. The Government continued

to place serious impediments in the way of its effective operation, including ending meetings between the Government and the LTDH after the organisation was accused of giving inaccurate information to international human rights groups.

Several human rights defenders were detained and interrogated about their activities in Tunisia and abroad and about their contacts with human rights organisations. **Khemais Ksila**, prominent activist and the League's Vice President, was arrested in September 1997 on defamation charges after he circulated a communiqué announcing his intention to begin a hunger strike to protest government reprisals for his human rights activism. In the communiqué, Ksila also criticised the Government for restricting freedom of expression. Ksila was scheduled to be tried on 21 January 1998; the Government maintained that Ksila was being prosecuted in accordance with the law. On 11 February 1998, he was fined and sentenced to three years in prison. The ICJ observed his trial and concluded that it was unfair.

Moreover, individual lawyers and human rights activists who are known to be critics of government policy, including those who benefited from presidential pardons at the end of 1996, such as **Khemais Chammari**, member of the *Mouvement des Démocrates Socialistes* (MDS), are still subjected to harassment, threats, and surveillance. Others are subjected to short-term detentions and restrictions on travel.

## THE JUDICIARY

The Tunisian Constitution provides for the existence of an independent judiciary. In reality, however, the judiciary is strongly influenced by the executive branch which appoints, tenures, and transfers judges. The President is also the head of the Supreme Council of Judges. This situation places undue pressure on the work and independence of judges who render decisions in political cases. Judges fear transfer when they issue judgements conflicting with the interests of the Executive.

The Statute of the Judiciary (Law No 67-29 of 14 July 1967) regulates the judiciary. The court system is composed of regular (civil) and criminal courts, including the courts of first instance, the courts of appeal, and the Courts of Cassation, and exceptional courts such as the military tribunals within the defence ministry.

The military courts try cases involving armed forces and civilians accused of broadly defined national security crimes. A civilian judge from the Supreme Court and four military judges sit on a military court. Decisions rendered by those courts may be appealed to the Court of Cassation.

The appointment procedure of judges is influenced by the Executive. According to Organic Law No. 85-79 of 11 August 1985, the President of

the Republic appoints, by decree, the following key positions: the First President of the Court of Cassation, the Prosecutor General Director of Judicial Services, the Inspector General of the Ministry of Justice, the President of the Real State Tribunal, the First President of the Court of Appeal, and the Prosecutor General of the Court of Appeal. In other words, the President exercises direct control, and appoints the heads of the highest courts, as well as other senior judges, by decree. The President also appoints lower judges, upon suggestion of the High Council of the Judiciary. Appointment is regulated by Articles 10, 11, 12 and 13 of the Statute of the Judiciary.

Qualified judges are recruited from the Superior Institute of Judges. According to Article 31 of the Statute of the Judiciary, modified by the Organic Law No. 85-79 of 11 August 1985, the files of candidates to the judiciary are submitted by the Minister of Justice to the High Council of the Judiciary. The Council reviews the files and recommends the appointment to the President of the Republic. The judges are appointed for a probation period of one year. At the end of this probation period, the candidates are appointed for a life tenure, after consultation with the High Council of the Judiciary. Similar procedures are applied in transfers and promotions.

Each year, the High Council of the Judiciary examines the transfer of judges in relation to judicial vacancies. However, the Ministry of Justice can decide to transfer a judge because of professional or other reasons, and submit the question to the High Council of the Judiciary at a later stage. Since the Council does not meet on a regular basis, these sorts of transfers can be subject to serious abuse and unduly pressure judges.

## **LAWYERS**

Defence lawyers face several obstacles in the performance of their duties, including limited access to evidence or relevant documents, and a failure to give lawyers sufficient notice of trial dates or grant them enough time to prepare their cases. Detainees do not have the right to legal representation during pre-arraignment detention. Lawyers also complain that judges restrict access to court records, requiring in some cases that attorneys examine the court files in a very short period of time in judges' chambers. It was also reported that judges sometimes refuse to allow defence lawyers to call friendly witnesses to the stand or to question key government witnesses.



## CASES

**Alia Cherif-Chammari** {lawyer}: Ms. Cherif-Chammari is a human rights activist and the wife of former MDS opposition leader and former Parliament member, Khemais Chammari. In July 1998, an unidentified source sent out a four-page document, "*les Masques*", to attorneys and foreign embassies in Tunisia, insulting her and accusing her of prostitution. Government security sources wrote and circulated the letter after her husband organised a public meeting in France, at which the Tunisian Government's policies were criticised. Since then, her professional activities, as well as her client base, have been affected.

**Taoufik Bouderbala** {lawyer, President of LTDH}: On 19 February 1998, Mr. Bouderbala was summoned by the Tunisian *Procureur de la République*, and was questioned for an hour and a half regarding league members, human rights activists, and the 15 February 1998 communiqué of the national counsel of the LTDH. This communiqué expressed solidarity with Mr. Khemais Ksila, as well as with Ms. Radhia Nasraoui. The statement also reviewed the situation of human rights in the country. Mr. Bouderbala's office is still subject to constant police surveillance and harassment, thus affecting his professional activities.

**Mohammed Najib Hosni** {lawyer, human rights activist}: Mr. Hosni was arrested in 1994. He was sentenced to eight years imprisonment in January 1996 on contested charges of forgery and falsification of a land contract. No convincing evidence was produced to substantiate the charges. He was also charged in a separate trial with possession of arms and links with a "terrorist" group, but was later acquitted. Advocate Hosni was released on 31 December 1996. However, his release was conditional and he remains barred from resuming his work as a lawyer; furthermore, his passport remains confiscated. He has been subjected to intense harassment and constant surveillance since his release. After many well-wishers had contacted him from Tunisia and around the world following his release, Mr. Hosni's telephone and fax connections were cut off. Everyone who visits him at his home in Kef is questioned about their visit, and Advocate Hosni is followed by police officers wherever he goes.

**Hechmi Jegham** {lawyer, President of the Tunisian Section of Amnesty International}: Mr. Jegham was arrested on two occasions without a warrant on 8 and 9 March 1997, and detained for several hours. Mr. Jegham was questioned about his contacts with social, humanitarian and judicial organisations abroad. He was also questioned about an international lawyers' conference to which he had been invited, and which was to have taken place in Tunisia but was subsequently banned.

**Abdelkarim Kahloul** {lawyer}: In the course of his defence of a client, Mr. Kahloul used a proverb in court, implying that a Tunisian national had little or no recourse when the state was against him. In January 1998, the

Tunisian Government pressed defamation charges against Mr. Kahloul. He was acquitted of all charges by the court of appeal, thus overturning a criminal court ruling which had convicted Mr. Kahloul, sentencing him to three months in prison.

**Anouar Kousri** {lawyer, human rights activist}: Due to his activities in support of human rights, Mr. Kousri's home and offices are under constant police surveillance, and he is reportedly followed wherever he goes.

**Radhia Nasraoui** {lawyer, human rights activist}: The offices of Ms. Nasraoui and her colleagues **Sabiha Fourati** and **Zeinab Ben Yousef** were broken into late in the evening of 29 April or early in the morning of 30 April 1997. Her files were thrown onto the floor and her computer and three telephones were taken. This is not the first time Advocate Nasraoui has been harassed. According to CIJL information, Ms. Nasraoui was prevented from leaving Tunisia on October 1994, when she was scheduled to attend a human rights conference in Berlin. Since then, Ms. Nasraoui has frequently been under surveillance, reportedly by security agents, and her mail has been intercepted. In early 1995, the main door to her house was set on fire, her briefcase stolen, her office broken into, and her equipment stolen. Although Ms. Nasraoui filed a complaint, it seems that no investigation was undertaken.

More recently, the homes of Ms. Nasraoui's clients have been searched by police officers, and her clients themselves have been summoned by police and questioned about Ms. Nasraoui's activities. Moreover, in the early hours of 11 February 1998, at about 3:00 a.m., the offices of Advocate Nasraoui were violently broken into. The entire contents of the offices, with the exception of a desk and two shelves, were taken. Her case files, law books, chairs, computer, phones, and fax were all stolen. Upon discovering the theft the following morning, Advocate Nasraoui's associates informed the police. The police arrived at the scene, and obtained evidence, including fingerprints. No conclusive investigation was carried out.

The latest harassment of Ms. Nasraoui occurred when, in early February 1999, she received the sudden news of the death of her mother-in-law, who lived in another district. Advocate Nasraoui apparently telephoned the office of the *juge d'instruction* informing him of the situation and of her need to travel outside the three authorised districts to attend the funeral. A restriction order had been issued against her, which prohibited her from travelling outside the country, and limited her right to move inside Tunisia to only three districts. Advocate Nasraoui was convicted for defying the restriction order and was sentenced to two weeks imprisonment and a fine. She was represented by about 100 lawyers at her trial.

**Mokhtar Trifi** {lawyer, LTDH member, AI Tunisia member}: Mr. Trifi, a lawyer involved in politically sensitive cases, has been under continuous police surveillance. His law offices are systematically observed and his

phone and fax lines are tapped, thus preventing him from conducting his job in the best way possible.

**Najet Yacoubi** [lawyer, human rights activist]: Ms. Yacoubi is a member of the Tunisians Association of Democratic Women and a member of the Young Lawyers Association. In the course of her defence work in a battered women case, and after a professional comment she made in court, the general prosecution pressed charges against Ms. Yacoubi. On 4 April 1998, Ms. Yacoubi noticed that she had been placed under surveillance and that she was being tailed by different cars and motorcycles. In June 1998, the Young Lawyers Association was able to give the numbers of the cars' license plates to the Minister of the Interior. No arrests or convictions were made. Ms. Yacoubi's son, a ten year old, was approached by the police for information, another example of the continuing and systematic harassment perpetuated by the Tunisian authorities.

#### **TUNISIAN LAWYERS DEPRIVED OF THEIR PASSPORT:**

**Abdelhamid Abdallah**

**Saida Akremi**

**Yahia Assoued**

**Samir Ben Amor**

**Sonia Ben Amor**

**Ezzeddine Ben Rhouma**

**Nejib Ben Youssef**

**Jamaledine Bida**

**Noureddine Bhiri**

**Naziha Boudhib**

**Mohamed Bouthelja**

**Saida Chaouachi**

**Ayanchi Hammami**

**Leila Hamrouni**

**Nejib Hosni** (previously imprisoned)

**Anouar Kousri**

**Abdelfattah Mourou**

**Radhia Nasraoui**

**Mohamed Nouri** (previously imprisoned)

**Abderraouf Oba**

**Zine El Abidine Oueslati**

**Mohcen Rabia**

**Mohamed Rafai**

**Amor Raouani** (colleague of Nejib Hosni)

**Najet Yagoubi**

**Zouhour Kourda** had been deprived of his passport, but it was returned to him in March 1999.

# TURKEY

According to the 1982 Constitution, Turkey is a republic with a parliamentary form of government. The President is the Head of State and shares executive powers with the Council of Ministers, consisting of the Prime Minister and other ministers. The President is elected by the Grand National Assembly (GNA) for seven years and cannot be re-elected. National elections are held every five years in a system of proportional representation; every citizen 18 years and over has the right to vote. The GNA consists of 450 members and carries out legislative functions.

The 1982 Constitution was adopted during military rule by the last military regime which seized power in 1980. It established the National Security Council (NSC), which functions as an advisory body for the President and the Cabinet. According to Article 118 of the Constitution, the NCS is composed of the Prime Minister, the Chief of the General Staff, the Ministers of National Defence, Internal Affairs, and Foreign Affairs, the Commanders of the Army, Navy, and the Air Force, and the General Commander of the Gendarmerie, under the chairmanship of the President of the Republic.

In 1995, the Constitution was amended and the preamble, in addition to twenty provisions expressing the people's will to accept military rule, were abolished. In practice, however, the military in Turkey continues to have far-reaching powers and a tremendous influence on the Government.

Turkey is a State Party to several universal and regional human rights treaties, including the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the UN Convention on the Elimination of All Forms of Discrimination against Women, the UN Convention on the Rights of the Child, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

For more than a decade now, an armed conflict between the Government and the terrorist Kurdish Worker's Party (PKK) has been in effect in Turkey. The aim of the PKK is to establish a separate state, Kurdistan, in the south-east of Turkey. In October 1997, the state of emergency that was declared in nine provinces in south-eastern Turkey in 1987 was lifted for three provinces (Batman, Bingol and Bitlis), but remained in effect for the six others. The state of emergency gives the regional governor far-reaching powers, giving him authority over the ordinary governors of the provinces, the power to put restrictions on the press, and the ability to remove people from the province who are a threat to public order.

The year 1997 witnessed political turmoil in Turkey, as a result of the increasing tension between the military and the Government of Prime Minister Erbakan over the country's drift towards Islam. Finally, the

Erbakan Government was replaced in June 1997 by a new coalition headed by Mesut Yilmaz, leader of the secular conservative Motherland Party. On 7 July, Mr. Yilmaz presented his government to the GNA, forming a coalition government with the Democratic Left Party and the Democratic Turkey Party.

On 11 November 1997, the Constitutional Court began hearing a case which was aimed at dissolving the Welfare Party of Mr. Erbakan. The suit was filed by the Chief Public Prosecutor, on the grounds that the party had a hidden agenda to promote Islamic fundamentalism. In January 1998, Turkey's highest court decided to dissolve the Welfare Party, and banned Welfare's leader, Necmettin Erbakan, as well as several other politicians, from the Welfare Party, from politics for the next five years. In anticipation of the decision to ban the Welfare Party, a new Islamic party, Virtue, was formed.

Throughout 1998, Turkey remained politically unstable, as the minority coalition of Prime Minister Mesut Yilmaz collapsed after a no-confidence motion over corruption allegations and alleged links with organised crime. It was the fifth coalition government to collapse in three years.

Mr. Bulent Ecevit of the Democratic Left Party was then asked by President Demirel to form a new government. After he failed to do so, the independent deputy Mr. Yalim Erez was asked; he also failed to form a new administration. Consequently, Mr. Ecevit was asked again to try to form a coalition government; this time he succeeded in forming a minority administration with the backing of the majority of the Parliament. On 17 January 1999, the new government won a vote of confidence in the Parliament. This government is now to lead the country to the general elections in April 1999.

## **STATE OF EMERGENCY**

As was stated earlier, the state of emergency that has been declared in several provinces in the south-east of the country gives extensive powers to the Regional Governor of the State of Emergency, by decrees enacted under Law no. 2935 on the State of Emergency (25 October 1983).

Decree 285 (as amended by decrees Nos. 424, 425 and 430) modifies the application of the Anti-Terror Law in those areas which are subject to the state of emergency. Hence, the decision to prosecute members of the security forces is removed from the public prosecutor to local administrative councils. These councils are composed of civil servants under the influence of the regional or provincial governor, who is also the head of the security forces. Consequently, impunity of the authorities remains a major problem in the south-eastern provinces.

Article 8 of Decree No. 430 of 16 December 1990 provides as follows:

No criminal, financial or legal responsibility may be claimed against the State of Emergency Regional Governor or a Provincial Governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this decree, and no application shall be made to any judicial authority to this end. This is without prejudice to the rights of individuals to claim indemnity from the State for damage suffered by them without justification.

This Article enlarges the risk for impunity for the deeds of the governors. The governors have extensive power to evacuate villages, to impose resident restrictions and to enforce the transfer of people to other areas.

On 27 October 1995, Article 8 of the 1991 Anti-Terror Law was amended. Despite the amendment, the provisions still define terrorism in vague terms, and many of those accused before the State Security Courts are charged under it (*see Attacks on Justice 1996*). The amendment to Article 8 removed from the text the phrase 'regardless of method, aim and ideas behind them'. As a result, it is now necessary to prove before the court the intent to damage 'the indivisible unity of the State'.

Several provisions concerning the state of emergency in Turkey were the subject of review by the European Court for Human Rights in 1997 and 1998. In two cases, the court ruled that Article 5 (right to liberty and security) of the European Convention for the Protection of Human rights and Fundamental Freedoms was violated, although Turkey derogated from this provision under Article 15 (state of emergency). While recognising the difficulties faced by Turkey, the court affirmed that "Article 15 authorises derogations from the obligations arising from the Convention only to the extent strictly required by the exigencies of the situation".

Following the judgement of the European Court for Human Rights in the case of *Aksoy v. Turkey* on 18 December 1996, Turkey amended its detention procedures on 6 March 1997. This amendment was announced as a measure to combat torture and ill-treatment. The amendment reduced the maximum terms of police detention from 30 days to 10 days in provinces under state of emergency legislation, and from 14 days to seven days throughout the rest of the country.

The amendment also aimed at improving access to lawyers in accordance with the provisions of the European Convention of Human Rights. However, in state of emergency regions, this right only comes into effect after an extension from the judge has been granted, that is, after 96 hours (four days). Once a detainee has been charged with an offence, he or she has a right to meet with his or her counsel at any time. The new law in effect

amounts to a denial of the right to access to a lawyer (for up to 4 days) to detainees who have not yet been charged.

The European Court also criticised the village guard system. In provinces where the state of emergency legislation applies, a village guard system exists. The village guards are forces of Kurdish villagers armed and paid by the Government to fight the PKK. The local population in the south-eastern provinces are pressured by the Government to join the village guards, and face reprisals if they do not. On the other hand, the PKK punishes those who do join the village guards.

In *Akdivar v. Turkey* (16 September 1996) and *Mentes v. Turkey* (28 November 1997) the European Court of Human Rights condemned the Turkish Government for the actions of the security forces, which burnt houses to force the evacuation of villages in the south-east which refuse to join the village guard system. In 1998, the court condemned the Turkish Government in *Ergi v. Turkey* (28 July 1998) because it failed to protect a Turkish citizen's right in the context of an operation by the security forces, and subsequently, did not carry out an adequate and effective investigation.

## HUMAN RIGHTS BACKGROUND

Turkey has been a State Party to the European Convention for the Protection of Human Rights and Fundamental Freedoms since 1954, and on 22 January 1990 recognised the jurisdiction of the European Court on Human Rights. On 11 July 1997, Turkey ratified Protocol No. 11 to the Convention regarding the establishment of a new court system. The new European Court on Human Rights came into operation on 1 November 1998. This court is a single, permanent court, as opposed to the old system with the Commission on Human Rights and a part-time court. In addition, acceptance of the jurisdiction of the new court is compulsory for the State Parties to the Convention.

In 1997 and 1998, the 'old' European Court on Human Rights delivered 26 judgements regarding complaints lodged against Turkey. In 20 cases the court established that one or more violations of the convention occurred.

In the four cases in which the Government was found in violation of Article 3 (prohibition of torture), it was also established that the right to an effective remedy (Article 13) was violated. All the applicants in these cases are Turkish citizens either of Kurdish origin or living in the south-east of Turkey. The other cases where the right to an effective remedy was disregarded involved violations of Article 2 (right to life), Article 5 (the right to liberty and security) and Article 8 (the right to respect for private and family life).



Several international human rights delegations visited Turkey in 1997 and 1998. Three fact-finding missions of the Parliamentary Assembly of the Council of Europe have been made since April 1996, when the monitoring procedures on the honouring of obligations and commitments by member States of the Council of Europe were established.

The co-rapporteurs noted that a number of important amendments to laws, such as the Penal Code and the Prevention of Terrorism Act, have been prepared, but none of the amendments were yet enacted, nor was it sure if the amendments to the laws were final. If enacted, the amendments could improve respect for human rights in Turkey.

In 1997 and 1998, freedom of expression was severely restrained as numerous journalists and writers who wrote on issues such as Islam and the Kurdish problem were persecuted and/or had their publications confiscated under the Anti-Terror Law.

#### DISAPPEARANCES

In September 1998 the Working Group was allowed to visit Turkey, after several requests for a visit since 1995. The Working Group noted that the number of disappearances has dropped in recent years, and that most of the disappearances concern people of Kurdish origin and take place in the south-east of the country.

The Working Group welcomed the establishment in 1997 of a High Council for Human Rights to start a human rights reform process, several legal and administrative measures to comply with international human rights obligations, and the intention to establish a Human Rights Ombudsman.

The Working Group highlighted pre-trial and incommunicado detention in State Security Court cases and impunity as the main areas of concern, and recommended that the relevant legislation be improved.

#### TORTURE

Torture remains widespread in Turkey, despite the fact that it is prohibited by the Turkish Constitution. The Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) was set up under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and organises visits (periodic and random) to State Parties. In September 1996, the CPT carried out a three-day visit to Turkey and issued a public statement summarising the facts found during its visit, because the Turkish Government failed to acknowledge the gravity of the situation.

In October 1997, the CPT carried out its seventh visit to Turkey. The Turkish Government authorised publication of the CPT visit report

together with the interim response of the Turkish Government. Under Article 11 of the Convention, the information gathered by the CPT in relation to a visit, its report, and its consultations with the State concerned remain confidential. However, the State may decide to reveal the confidential information.

The 1997 mission focused on verifying whether recently adopted measures to combat torture and ill-treatment were being properly implemented. The CPT concluded that the Turkish authorities are "moving in the right direction", but much remains to be improved. Among the areas of remaining concern, the CPT highlighted the plight of persons suspected of SSC offences, who can remain for 4 days in police custody without access to a lawyer.

In January 1997, the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment reported that he continued to be concerned by the apparently widespread practice of torture of persons interrogated by the Anti-Terror Branch of the police and the gendarmerie, and persons involved in 'ordinary criminal cases. He sent five urgent appeals on behalf of 68 persons to the Government of Turkey. In his observations articulated in the report to the 1998 Commission on Human Rights, the Special Rapporteur refers to the change of the law on the protection of persons in detention by saying,

it is doubtful that, in cases where the law provides for a four-day delay before a detained person is brought before a magistrate, the relevant international standards are met.

The Special Rapporteur conducted a mission to Turkey from 9 to 19 November 1998. In his report to the 1999 session of the UN Commission on Human Rights, the Special Rapporteur emphasised that the mission had concentrated, due to time limits, on torture inflicted in custody, as the primary purpose of investigation.

The Special Rapporteur concluded that while torture was systematically practised in Turkey until the mid 1990s, notable improvements have occurred in 1997 and 1998. However, during incommunicado detention a high risk of torture remains. The Special Rapporteur also noted that the climate of impunity of law enforcement agents has slightly changed, but not sufficiently to resolve the problem.

In 1997 and 1998, the European Court for Human Rights found the Government in violation of Article 3 (prohibition of torture) of the European Convention of Human Rights in four cases. Moreover, the Court also established that in all four cases the right to an effective remedy (Article 13 of the Convention) was violated.

The UN Convention against Torture and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or

Punishment was ratified by Turkey in 1988. However, so far only the initial report was submitted to the Committee against Torture, the monitoring body of the convention. The Second and Third reports are long overdue.

Human rights attorneys and physicians who are concerned with victims of torture say that most persons detained for, or suspected of, political crimes usually suffer some torture during periods of incommunicado detention in police stations and Jandarma (gendarmerie) headquarters prior to being brought before a court. Government officials admit that torture occurs, but they explain that it is closely tied to the State's fight against terrorism.

Under the Administrative Adjudication Law, an administrative investigation into an alleged torture case is conducted to determine if there is enough evidence to bring a law enforcement officer to trial. Under the Criminal Trials Procedure Law (CMUK), prosecutors are empowered to initiate investigations of police or Jandarma officers suspected of torturing or mistreating suspects. In cases where township security directors or Jandarma commanders are accused of torture, the prosecutors must obtain permission from the Ministry of Justice to initiate an investigation.

Judicial authorities investigate very few of the formal complaints involving torture and prosecute only a fraction of those investigated. The Anti-Terror Law provides that officials accused of torture or other mistreatment may continue to work while under investigation, and may only be suspended if convicted. Special provincial administrative boards rather than regular courts decide whether to prosecute such cases. Suspects' legal fees are paid by their employing agencies.

One of the reasons for the continuing torture in Turkey might be the importance which is attached to the confession in Turkish criminal law. A confession in itself is sufficient for conviction of a suspect. Another reason is the absence of formal and safe procedures for complaints regarding torture to be investigated objectively.

#### SUMMARY EXECUTIONS

The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions transmitted urgent appeals regarding death threats, deaths in custody, attacks by security forces and expulsion and refoulement to the Turkish Government during the period of 2 November 1996-31 October 1997. The Special Rapporteur also transmitted allegations of the violation of the right to life of 23 persons to the Government. These allegations concerned people reportedly killed in custody by the police, by members of the armed forces, by village guards and by members of the Special Operations Team. With regard to the allegations of persons killed in custody the Special Rapporteur expressed in 1998 particular concern that

there is very little indication of effective action by the State authorities to bring to justice those responsible for this type of violation of the right to life and to compensate the families of victims.

The Special Rapporteur also expressed regret about the fact that an invitation to visit Turkey was not received despite several requests since 1992.

#### HARASSMENT OF HUMAN RIGHTS ACTIVISTS

Human rights defenders in Turkey continue to face numerous restrictions imposed by the Government. Organisations are harassed, persecuted and their publications are banned. In addition, international human rights organisations, journalists and local human rights associations are not allowed access to state of emergency regions. In May and June 1997, branches of the Human Rights Association (HRA) in Diyarbakir, Izmir, Mardin, Sanliurfa, Balikesir, Malatya and Konya were closed down without any court orders. Five of those have been re-opened, but the branches in Sanliurfa and Diyarbakir remain closed. Two court actions for closure were brought against HRA's headquarters: one is still pending and the other resulted in an acquittal.

On 22 May 1997, the Diyarbakir branch of the HRA was closed. The shut-down of the branch, carried out on the orders of the City Governor, followed years of harassment including arrest, bomb attacks and threats.

In June 1997, the President of the Ankara branch of the HRA and 72 others were detained while demonstrating against Turkey's attacks on the Kurdish people in Northern Iraq. Although the demonstration was non-violent, the detentions were carried out under the terms of the Anti-Terror Law.

In July 1998, Mr. Akin Birdal, President of the HRA and Vice-President of the International Federation of Human Rights (FIDH), was sentenced to one year of imprisonment for "inciting hatred"; many other cases regarding his work as a human rights defender are still pending.

#### THE JUDICIARY

The principle of judicial independence is laid down in Article 138 of the Constitution: "judges shall be independent in the discharge of their duties". The judicial system is composed of general law courts (civil, criminal and administrative courts), military courts, a Constitutional Court and State Security Courts.

## REGULAR COURTS

The competent authority to hear appeals of verdicts rendered by the civil and criminal courts is the High Court of Appeals. The Council of State reviews decisions and judgements made by administrative courts.

According to Article 148 of the Constitution, the Constitutional Court examines the constitutionality of laws, decrees, and parliamentary procedural rules. However, it may not consider decrees issued under a state of emergency, martial law, or in time of war. The President of the Republic, members of the Council of Ministers and members of the judiciary shall be tried for offences relating to their functions by the Constitutional Court, acting as a Supreme Court.

Provincial administrative boards established under the Anti-Terror Law decide cases in which state officials are accused of misconduct. The Jurisdictional Conflict Court decides in disputes between general courts of law and administrative and military courts concerning their jurisdiction.

Article 139 of the Constitution provides for security of tenure but authorises exceptions made by law to regulate the removal of judges on three grounds: conviction for an offence requiring dismissal from the profession; inability to perform duties on account of ill-health; and unsuitability to remain in the profession.

The Supreme Council of Judges and Prosecutors deals with the admission of judges and public prosecutors to civil, criminal and administrative courts. It is also authorised to appoint, transfer, delegate temporary powers, and promote and discipline judges and prosecutors. The Minister of Justice serves as the President of the Council, while the three regular and three substitute members are appointed by the President of the Republic from a list of candidates nominated by the High Court of Appeals from among its own members. The remaining two regular and two substitute members are appointed by the President from a list of candidates nominated by the Council of State.

In addition to the Supreme Council, the President of the Republic also has the authority to appoint judges. The President appoints members of the Constitutional Court, one-fourth of the judges of the Council of State, the Chief Public Prosecutor and the Deputy Chief Public Prosecutor of the High Court of Appeals, the members of the Military High Court of Appeals, and the members of the High Military Administrative Courts of Appeals.

On at least two occasions, the European Court found the judicial system in the south-eastern provinces to be ineffective. In several cases, the Government pleaded before the Commission and the Court that the applicant did exhaust domestic remedies before filing the complaint. However, the Court was of the opinion in the cases *Mentes and Others v. Turkey and Selcuk and Aker v. Turkey* that

the rule of exhaustion of domestic remedies referred to in Article 26 of the Convention obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. However, there is no obligation under Article 26 to have recourse to remedies which are inadequate or ineffective. In addition, according to the “generally recognised rules of international law”, there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal; one such reason being the failure of the national authorities to undertake an investigation or offer assistance in response to serious allegations of misconduct or infliction of harm by State agents.

In several of the above-mentioned cases the court was of the opinion that special circumstances existed and that as a result the non-exhaustion of domestic remedies did not preclude the complaint procedure before the Commission and the Court. The court stressed, however, that this should not be interpreted as a general statement that remedies are ineffective in the south-east of Turkey or that applicants are absolved from the obligation under Article 26 to have normal recourse to the system of remedies which are available and functioning.

#### STATE SECURITY AND MILITARY COURTS

Military courts have jurisdiction to try military and non-military personnel for military offences. The Military High Court of Appeals reviews judgements issued by military courts. The High Military Administrative Court of Appeals shall be the first and last instance for disputes arising from administrative acts involving military personnel or relating to the military service.

State Security Courts (SSCs) are provided for in Article 143 of the Constitution. The SSCs are given jurisdiction over offences against the integrity or internal or external security of the State. The State Security Courts sit in eight cities and are composed of panels of five members: two civilian judges, one military judge and two prosecutors. State Security Courts' verdicts may be appealed to a specialised department of the High Court of Appeals.

Violation of Article 8 of the Anti-Terror Law, which outlaws any advocacy of “separatism”, is often grounds for cases before the SSCs. Cases in the courts often continue for several years due to the heavy caseload. Trials may be held in camera and confessions that were extracted under duress or torture are often admitted, forming grounds for conviction. In effect, there is no presumption of innocence; the burden is on the defendant to prove his or her innocence.

The SSCs' jurisdiction over civilians is a violation of international approved standards. The European Court of Human Rights has indeed ruled in two cases in 1998 that the composition of the State Security Court violates Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the cases *Incal v. Turkey* of 9 June 1998 and *Çiraklar v. Turkey* of 28 October 1998 the European Court found that

[i]t follows that the applicant could legitimately fear that because one of the judges of the Izmir National Security Court was a military judge it might allow itself to be unduly influenced by consideration which had nothing to do with the nature of the case.

In conclusion, the applicant had legitimate cause to doubt the independence and impartiality of the Izmir National Security Court.

There has accordingly been a breach of Article 6 para. 1.

## LAWYERS

In Turkey, the Bar Association must by law provide free counsel when such a request is made to the court. Costs are born by the association. Bar associations in large cities, such as Istanbul, have attorneys on call 24 hours a day.

Defence lawyers generally have access to the public prosecutor's file after the indictment and prior to trial. In cases involving violations of the Anti-Terror Law, insulting the President, or "defaming Turkish citizenship", defence attorneys have been denied access to files which the State claims deal with national intelligence or security matters.

Attorneys defending controversial cases face harassment. In addition, they cannot challenge testimonies provided by informers when they practice before State Security Courts. Lawyers in general fear that association with politically unpopular clients may lead to loss of business or to imprisonment. Therefore, the majority of lawyers are discouraged from representing politically unpopular clients.

In two cases before the European Court it was established that applicants or their lawyers have been harassed because of their submission of complaints to the Commission on Human Rights, and that therefore Article 25 (right to an individual petition) was violated. In the case of *Kurt v. Turkey*, the court stated that

it was not for the authorities to interfere with proceedings before the Commission which had been set in motion by an

applicant through the threat of criminal procedures against an applicant's representative. Even though there was no follow-up to the threat to prosecute the applicant's lawyer, the threat in itself must be considered an interference.

The Special Rapporteur on the Independence of Judges and Lawyers, in his report to the 1998 session of the UN Commission on Human Rights, again expressed his wish to visit Turkey. He referred to his request of 16 February 1996 to investigate allegations concerning violations of the independence of judges and lawyers. The Special Rapporteur had sent three urgent appeals concerning harassment of lawyers and one concerning a judge to the Turkish Government (see Cases below).

## CASES

**Gazanfer Abbasioglu, Sebahattin Acar, Abdullah Akin, Arif Altinkalem, Sedat Aslantas, Meral Danis Bestas, Mesut Bestas, Mehmet Biçen, Ferudun Celik, Niyazi Cem, Fuat Hayri Demir, Baki Demirhan, Tahir Elçi, Vedat Erten, Zafer Gür, Nevzat Kaya, Cabbar Leygara, Mehmet Selim Kurbanoglu, Hüsnüye Ölmez, Arzu Sahin, Imam Sahin, Sinan Tanrikulu, Sinasi Tur, Fevzi Veznedaroglu and Edip Yildiz** (the Diyarbakir 25 Lawyers' trial): In 1993, these lawyers were accused of anti-government activities in the province of Diyarbakir, after defending alleged members of the outlawed PKK. They were charged under the Anti-Terror Law with acting as couriers for the PKK. Originally 16 lawyers were indicted; the number was increased to 25. The first hearing was on 17 February 1994, followed by hearings throughout the year, and in 1995-1996. Subsequently, the number of lawyers indicted decreased to 20.

A hearing held on 21 January 1997 was adjourned to 8 April 1997 because the military judge of the court had been replaced and his successor was not yet familiar with the case. On 8 April 1997, the hearing was again adjourned because four defendants were added to the list. They were: **Abdullah Akin, Edip Yildiz, Fevzi Faznedaroglu and Cebbar Leygara**. The trial is still pending.

Sixteen of these defendants submitted applications to the European Commission of Human Rights in relation to complaints of torture while in detention (*Elci and Sahin v. Turkey*, application No. 23145/93). An admissibility hearing was held *in camera* on 2 December 1996 and the applications were declared partially admissible. All of the applicants' complaints in relation to the lawfulness of their detention have been declared admissible. In those cases where a breach of Article 8 and Article 1 was argued, the Commission declared the complaints to be admissible. Nine complaints in relation to ill-treatment were admissible. The seven others were inadmissible



because the information was not submitted within the six months time limit (*see Attacks on Justice 1996*).

**Ganzerfer Abbasioglu, Sababattin Acar, Arif Altinkalem, Meral Bestas, Mesut Bestas, Niyazi Cem, Fuat Hayri Demir, Baki Demirhan, Tahir Elçi, Vedat Erten, Nevzat Kaya, Mehmet Selim Kurbanoglu, Hüsnüye Ölmez, Arzu Sahin, Imam Sahin, Sinasi Tur, Ferudun Celik, Zafer Gür, Mehmet Biçcen, Sinan Tanrikulu, Edip Yildiz, Abdullah Akin, Fevzi Veznedaroglu, Sedat Aslantas and Hasan Dogan** {lawyers}: On 21 May 1997, the Special Rapporteur on the Independence of Judges and Lawyers sent an urgent appeal to the Government of Turkey concerning these lawyers, as it was alleged that they had been brought to trial on charges relating to one or more of the following situations:

- (a) Lawyers who repeatedly conduct defences before the State Security Court, in which case they are equated with the defendant's cause and, as such, are termed "terrorist lawyers" by the police, the public prosecutors and by the courts;
- (b) Lawyers appearing in trials before the State Security Courts in cases of torture and extrajudicial killings and who have been qualified as "public enemies";
- (c) Lawyers who publicly comment on the human rights practices of Turkey; and
- (d) Lawyers who comment on the Kurdish situation.

It was further alleged that these lawyers were tried under emergency legislation which allows for incommunicado detention for a period of up to 30 days. It was also said that the lawyers have suffered economic sanctions and/or have been pressured, harassed, tortured, or become potential targets for killings by unknown perpetrators.

**Ilknur Aksu, Yüksel Hos and Gülizar Tuncer** {lawyers}: They were defending individuals accused of killing Nihat Uygun, former Chairperson of the MHP Maltepe District Organization, Istanbul, on 2 February 1997, and of being members of the Revolutionary Communists Union of Turkey (TIKB). The lawyers were attacked and insulted during and after the hearing by MHP followers at the Istanbul State Security Court on 15 August 1997. Two MHP followers were detained, but were released after a short time.

**Yusuf Alatas** {lawyer}: Mr. Alatas was threatened by police officers while he was entering the building of the Ankara State Security Court on 12 December 1996; he was put on trial on charges of "insulting the police". During the hearing in September 1997, Presiding Judge Ihsan Akçin withdrew on the grounds that he could not make an impartial judgement because he had been one of those who approved the permission given by the Department of Punitive Affairs of the Ministry of Justice for Mr. Alatas'

prosecution. On 2 December 1997 Mr. Alatas was sentenced to two months in prison; the prison term was later commuted into a fine and temporary suspension.

**Firat Anli** {lawyer, provincial leader of HADEP and member of HRA Diyarbakir} and **Sinan Tanrikulu** {lawyer and member of HRA Diyarbakir}: On 27 February 1995, these two lawyers were detained with nine others, and arrested on 9 March 1995. Mr. Tanrikulu represents Mahmut Sakar, Abdullah Cager, Nimetullah Gunduz, Halit Temli, Hayri Veznedargoglu and Huseyin Yildiz against charges in connection with HRA's publication of the state emergency report in 1992. Each of the eleven detainees were held incommunicado in Diyarbakir gendarmerie for ten days before being brought before the State Security Court on 9 March 1995. At the hearing, Mr. Tanrikulu claimed he was being prosecuted because he was a defence advocate in the State Security Court. All were accused of being members of the PKK and of criticising the state by sending false petitions to Europe and to the United States of America. They were kept in custody until 1 May 1995. Bail was granted, but by the end of 1995 the trial was still in process. Sinan Tanrikulu lodged a case with the European Commission of Human Rights alleging violation of Articles 3, 5, 6, 10, 13, 14, 18 and 25.

**Sedat Aslantas, Kamil Atesogullari, Meral Bekar, HRA Chairperson Akin Birdal, Lutfi Demirkapi, Erçan Dermir, Selahattin Esmer, Gurseli Kaya, Eren Keskin, Nazmi Gur and Mahmut Sakar** {eleven members of the Human Rights Association (HRA)}: In 1996, the Human Rights Association organised a public rally where human rights in the country were discussed. Thereafter, all of the members mentioned above were charged with crimes against the state. The officers of the HRA were allegedly charged with organising events in violation of the Laws on Associations during Human Rights Week, 10-14 December 1996. The prosecution included a call by the prosecutor for the court to order the closure of the organisation. The hearing was to be held on 25 December but was postponed until 23 February 1997. Finally, on 24 February, the Human Rights Association was informed that the trial against the eleven executive board members of the Human Rights Association had resulted in an acquittal. The court rejected the request for closure of the HRA at the trial hearing on 23 February.

Related to that case, the house of Nazmi Gür, Secretary General of the Human Rights Association, was raided by a group of policemen on 22 February 1998. The police searched his home, and detained him by order of the Public Prosecutor. He was held under incommunicado detention for two days, and on 24 February, was brought before the State Security Court's Public Prosecutor; he was later released.

**Sedat Aslantas and Husnu Ondul** {lawyers, members of HRA}: The two lawyers were arrested for publishing "A cross-section of the burned villages", which allegedly contained separatist propaganda. They were tried on 19 December 1994 and acquitted on 11 January 1995. The State Security

Court in Ankara asked for a retrial, but the acquittals were confirmed in May 1995. The prosecution filed a complaint under Article 159 of the Turkish Penal Code, claiming that security officers had been insulted by statements made in the book. Mr. Aslantas has brought the case before the European Commission of Human Rights in Strasbourg; it was declared admissible on 15 September 1997.

**Efkan Bolaç, Metin Narin and Alper Tuaga Saray** {lawyers}: These lawyers were detained by the police, along with their office staff, on 7 January 1997. The lawyers were accused of "aiding an illegal organisation". The accusation was based on the testimony of Mustafa Duyar, a member of the Revolutionary People's Liberation Party-Front (DHKP-C), and one of the assassins who killed Özdernir Sabancı, a leading businessman of the country; Haluk Görgün, an executive of his company; and secretary Nilgün Hasefe on 9 January 1996. In addition, the houses of the lawyers were raided. The detainees, except Narin, were released later and an arrest warrant in absentia was issued for Lawyer Ahmet Düzgün Yüksel. Narin was released on 3 June 1997. Later, Metin Narin was put on trial under Article 169 of the TPC and accused of "aiding an illegal organisation." Ahmet Düzgün Yüksel is in Germany and his application there for refugee status has been accepted.

**Ahmet Bozkurt Çağlar** {lawyer}: On 17 December 1997 Mr. Çağlar was subjected to ill-treatment by the Anti-Terror branch police when he went to the Supreme Court to attend, as a lawyer, the hearing of a trial against some university students sentenced to heavy prison terms for opening a placard in the National Assembly in protest of the student fees. The police reportedly came to the court to intimidate him. He showed his lawyer-card to the police officers when they attempted to search him; however, they insulted and harassed him.

**Murat Çelik** {lawyer}: He was beaten by police officers during the funeral of Serpil Polat, who had set herself on fire at Sakarya Prison on 17 February 1999. On 18 February, while he had been carrying out the funeral proceedings, a police officer had taken both him and Doctor Ali Polat, the brother of Serpil Polat, to the office of Atilla Çınar, where the latter had punched him saying, "Why do you deal with these funeral things? Can a dead person have a lawyer?" Murat Çelik said that later seven or eight police officers inside the room, including Anti-Terror Branch Director Sefik Kul, had attacked them, and added that they had been taken out of the building while being beaten. Murat Çelik also said that they had received a medical report from Haseki Hospital and lodged an official complaint with Fatih Public Prosecution Office against the police officers.

**Mustafa Çinkiliç** {lawyer and Adana Representative of the Human Rights Foundation of Turkey} and **Kemal Kiliç** {lawyer from the Istanbul Bar Association}: A trial was launched against the two lawyers on charges of "aiding an illegal organization by acting as its couriers" under Article 169 of

the Turkish Penal Code. The lawyers had gone to prison on 19 October 1998 in order to see their clients; after they left an incident had broken out between the prison guards and the prisoners. Fourteen prisoners, two prison guards and one gendarmerie were seriously wounded. At the end of its investigation, the Ceyhan Public Prosecution Office claimed that "the incidents had been caused by the lawyers". Lawyer Mustafa Çinkiliç was kept in detention for one night in connection with the incident. The trial against the two lawyers is scheduled to start at Adana State Security Court on 23 March 1999.

**Ercan Demir** {lawyer, chairperson of the IHD Izmir Branch}: At least sixteen cases have been launched against Mr. Demir. He is accused of violating the law on public meetings and demonstrations in thirteen cases, as well as violating Law No. 2908 and violating the Anti-Terror Law in one case and in several official investigations. He was sentenced to one year and six months in prison on 10 September 1997 as a result of a press statement he issued concerning hunger strikes in prisons, which had caused the deaths of twelve prisoners in 1996.

**Hasan Dougan** {lawyer and chairperson of Malatya Provincial Organisation of the People's Labour Party (HADEP)}: On 6 May 1997, Mr. Dougan was detained when he answered a summons to appear before the State Security Prosecutor in Malatya, a provincial town in eastern Turkey and intervened with the Government of Turkey on 15 May 1997. He was held on suspicion of support for the Kurdish Workers Party (PKK), a violation of Article 169 of the Turkish Penal Code.

On 5 May, Mr. Dougan had been involved in a heated argument with a judge in the Malatya State Security Court while defending one of his clients, who had retracted a confession he claimed had been made under duress. The allegations against Mr. Dougan arose from the evidence of an informer, a convicted prisoner cooperating with the authorities in the hope of receiving more favourable treatment. According to Turkish law, "confessors" can obtain a reduction of sentence if they implicate others in their confessions. The allegations of being a member of the terrorist organisation PKK were based on the fact that Mr. Dougan is a lawyer defending clients politically unpopular with the Government.

The CIJL received a letter from the Permanent Mission of Turkey in Geneva, containing information on the case of Mr. Hasan Dougan. In addition to general information, the letter states that during the trial in May 1997, his client Mr. Ismail Yilmaz told the court that he wished to dismiss Mr. Hasan Dougan because the lawyer would constantly force him to deny his previous confessions made to the court, and suggested that he insist on being transferred to the dormitory of political and terrorist offenders. On the grounds of Mr. Yilmaz's testimony, the Public Prosecutor lodged an indictment against Mr. Dougan.

The Prosecutor's indictment asserts that Mr. Dougan is a member of the PKK terrorist organisation. It emphasises his services as a courier to the terrorist organisation, and also the fact that he provided shelter to members of the organisation. The indictment also establishes through testimonies of some of the prisoners who had been Mr. Dougan's previous clients, and through letters found on members of the PKK, that Mr. Dougan was paid by the terrorist organisation for his services in the court. Hearings on the case took place on 17 June 1997, 4 September 1997, 2 October 1997, 4 November 1997 and 2 December 1997. Mr. Dougan was released after a court hearing on 7 August 1997.

This is not the first time that Mr. Hasan Dougan has been harassed. He has practised law for more than 20 years, and during that time has been intimidated and received threats on several occasions. He has also been prosecuted on charges of supporting a terrorist organisation, and convicted for "insulting the legacy of Kemal Ataturk".

**Bettil Duran** {lawyer}: On 19 February 1999, a hearing took place in Izmir Heavy Penal Court in a case against Ms. Duran on charges of "insulting the members of the court board" for her words during a hearing held on 10 December 1997 during which she had said, "Torture has become an international problem. There are many provisions banning torture, but you do not apply them". The prosecution has asked for a sentence of between one and three years in prison for Ms. Duran.

**Meryem Erdal, Oya Ersoy and Ender Büyükçulha** {lawyers}: Two trials were launched against the lawyers for two articles published in a book, *Human Rights Panorama in Turkey*. The book was a compilation of messages, speeches and papers delivered during a conference held by the Human Rights Association (IHD), Ankara Branch on the occasion of Human Rights Week in 1995. The trial launched at the General Staff Military Court ended in "non-jurisdiction" on 9 December 1997. The military court decided that the offence fell under the scope of Article 159 of the TPC, and sent the case file to Ankara Heavy Penal Court. This trial on accusations of "insulting the security forces of the state" is still continuing. Another trial was launched against the defendants, for the same reasons, as well as against sociologist and writer Ismail Besikci who served nearly two decades in prison for his research on the Kurdish question, and Hatip Dicle, former MP from the no longer extant Democracy Party (DEP). The trial ended at the Ankara State Security Court on 8 October 1997. Besikci and Dicle were each sentenced to one year in prison, and fined on accusations of "disseminating separatist propaganda" under the Anti-Terror Law. The court did not punish the other defendants. The trial is still at the Supreme Court.

**Mete Göktürk** {Istanbul State Security Court Prosecutor}: A trial was launched against Mr. Göktürk because of his statements that the Turkish judiciary is not independent, published in the newspaper *Yeni Yüzyil* on 14

October 1996 as well as broadcast in a television program. An investigation was initiated by the Ministry of Justice with regard to his speech and article. Subsequently, the Chief Public Prosecution Office of the Supreme Court subjected him to trial, seeking a prison term of up to 12 years under Article 159 of the TPC, on accusations of "insulting the judiciary." The Supreme Court decided that it had "non-jurisdiction" on the grounds that his words were not related to his office, and therefore it should be considered a personal offence. The case file was sent back to Beyoglu Heavy Penal Court, which had conducted the first interrogation. On 26 September 1997, the court acquitted Mr. Göktürk on the grounds that his words about the judiciary were not beyond criticism, and that there was no deliberation of offence. Nevertheless, Mr. Göktürk was once again put on trial because of his statement; he was later acquitted.

**Fethi Gümüş** {former Chairperson of the Diyarbakir Bar Association} and **nine executives of mass organisations**: They were each sentenced to one year and eight months in prison. The trial launched against the executives of the mass organisations, who had taken part in the press statement issued by Hatip Dicle and Leyla Zana, former deputies for the Democracy Party (DEP) which was closed down by the Constitutional Court, in Diyarbakir on 21 March 1992, ended at the Diyarbakir State Security Court on 25 February 1997. In the trial launched on accusations of "inciting people to hostility with the State", the State Security Court decided to suspend the sentences.

**Mehmet Günsel** {lawyer at the Istanbul Bar Association}: He was detained by the police, who raided his house on the night of 13 June 1997. The police stated that he had been detained on accusations of "being a member of an illegal organisation" and he was taken into custody in the political department. Mr. Günsel was subsequently arrested and accused of "being an executive member of an illegal organization".

**Necati Güven, Mahmut Tuncer Caferoglu, Abdurrahim Firat, Giyasettin Kaya, Mehmet Emin Adiyaman, Eyüp Duman and Ali Demir** {lawyers from the Erzurum Bar Association}: These lawyers were put on trial in August 1994 under Article 168(1) of the Turkish Penal Code (TPC) on accusations of "being executive members of an illegal organization". Zülfiyar Çakici, the Director of Erzurum E Type Prison, and Ibrahim Diler, the chief guard, were also put on trial under Article 169 of the TPC and accused of "aiding an illegal organization". The trial ended in acquittals on 4 September 1997.

**Ercan Kanar** {lawyer and leader of the Istanbul Branch of HRA}, **Mustafa Ucdere** {lawyer and leader of the Contemporary Lawyers' Association} **Faysal Ozcift** {lawyer and Secretary-General of the Public Sector Workers Trades Union Confederation}: On 18 June 1996, these three lawyers were arrested by riot police, together with 29 other human rights activists and lawyers, when attempting to send telegrams to the Prime

Minister from Sirkeci Post Office, in order to protest against the ill-treatment of political prisoners in Turkish prisons; they were subsequently taken into custody.

**Ercan Kanar** {lawyer, chairperson of the IHD Istanbul Branch}: More than 30 cases have been launched against Mr. Kanar. At least 25 of the cases launched against him have ended in acquittals. He was sentenced to 10 months in prison under Article 159 of the TPC in two cases launched against him for two articles published in the newspapers *Ozgür Gündem* and *Yeni Politika* in 1994 and 1995. The prison terms given to him were suspended. He was also sentenced to six months in prison for a speech he made as a lawyer in a trial against sixteen police officers charged with killing four persons in Tuzla on 7 October 1988. This prison term was commuted into a fine.

**Turgut Kazan** {former Chairperson of the Istanbul Bar Association}: Mr. Kazan was put on trial in January 1997 on charges of insulting Justice Minister Sevkettin Kazan, who filed an official complaint against him. Turgut Kazan had referred to the minister's proposal that Turkey follow the Iraqi system of "pardoning the prisoners who memorised the Koran" as "small-mindedness". At his first hearing, Turgut Kazan defended himself, saying, "As a jurist and as the chairperson of the Istanbul Bar Association at that time, to criticise this statement is the most essential right and task of mine". Upon Turgut Kazan's remark, the court suspended the trial until "the permission that should be taken from the Ministry of Justice will be received in accordance with the Law on Lawyers". The trial ended because the ministry did not give permission for the trial.

**Eren Keskin** {lawyer and Deputy Chairperson of the Human Rights Association (IHD)}: She was sentenced to one year and 40 days in prison by the Istanbul State Security Court on 6 February 1997 for an interview published in the journal *Median Sun* in March 1995. She was accused of "making separatist propaganda" under Article 8 of the Anti-Terror Law.

**Kemal Kirlangıç** {lawyer}: The Izmir Public Prosecution Office launched a trial on 7 February 1999 against Mr. Kirlangıç, under Article 159 of the Turkish Penal Code, on accusations that he "insulted the laws" in his book "Sanik Yasalar" (Laws on Trial). The Izmir State Security Court Prosecution Office had previously launched an investigation against the book, and had decided not to prosecute. Meanwhile, Izmir Public Prosecution Office reportedly applied to the court to confiscate the book, but this demand was rejected.

**Tülay Odabas** {lawyer}: Ms. Odabas was assigned by the Istanbul Bar Association to help university students who were detained after they participated in a 25 January 1997 sit-in for relatives of missing people. Ms. Odabas was kicked by a police officer when she arrived at the police station on 26 January 1997; in addition, police officers also pushed her down the stairs. The Istanbul Bar Association lodged an official complaint against

the police officers, but the prosecutor's office decided that it had non-jurisdiction with regard to this case.

**Ahmet Zeki Okçuoglu** {lawyer}: Mr. Okçuoglu was imprisoned on 13 June 1997, because the Supreme Court upheld a 10-month prison term given to him by the Istanbul Heavy Penal Court No. 2 for an article he published in the newspaper *Azadi* in 1993. He was indicted for "insulting the state" under Article 159 of the Turkish Penal Code (TPC). He served the prison term and was then released.

**Hüsni Ondül, Cemal Emir, Meryem Erdal, Aysenur Demirkale, Celal Vural, Eren Keskin, and Ercan Kanar** {lawyers, IHD executives}: A trial was launched against the lawyers under Article 8 (1) of the Anti-Terror Law, after they undersigned a declaration to the United Nations in protest of the massacre during the Newroz celebrations in Sirnak in 1992. The trial is still pending at the Ankara State Security Court.

**Zeki Rüzgar** {lawyer}: On 8 September 1998 the trial against Mr. Rüzgar commenced. He had lodged an official complaint against police officers upon the killings of Mehmet Topaloglu (the Adana representative of the journal *Kurtulus*), Selahattin Akinci and Bülent Dil during a house raid in Adana the night of 28 January 1998.

The indictment prepared by the Ankara State Security Court Public Prosecution Office requested that Mr. Rüzgar be fined under the Anti-Terror Law on the accusations that he "in his official complaint, disclosed the identities of the people who served in the struggle against terrorism".

Thirty-two lawyers who have undertaken the defence of Zeki Rüzgar decided not to attend the hearings on the grounds that the State Security Courts are neither independent nor impartial courts. Later in the hearing, Zeki Rüzgar and his lawyers requested the court to issue a decision of non-jurisdiction. However, the presiding judge, Orhan Karadeniz, reminded them that the related article of the Anti-Terror Law sought only a fine, and said that the case could be sealed if Mr. Rüzgar would pay a fine of TL 100 million. Mr. Rüzgar rejected to pay the fine. The case is still pending before the Ankara State Security Court.

**Mahmut Sakar** {lawyer, vice-president of the Turkish Human Rights Association and president of its Diyarbakir branch}: On 27 May 1997, the Special Rapporteur on the Independence of Judges and Lawyers transmitted an urgent appeal to the Turkish Government because Mr. Sakar was reportedly detained and interrogated under the threat of torture. It was alleged that Mr. Sakar had been detained solely on account of his work as a human rights advocate.

**Senal Sarihan and Selma Çiçekçi** {lawyers}: According to a statement made by Aydin Erdogan, the Chairperson of the Contemporary Lawyers'



Association (ÇHD), both lawyers were attacked in a meeting held in Ankara on 2 July 1997, as a result of defending politically unpopular clients.

**Kamil Sherif** {judge}: Mr. Sherif resigned from a case on 6 November 1997 because of alleged intense pressure to influence the case, emanating from some foreign and Turkish institutions and politicians. The judge was presiding over the trial in the town of Afyon of nine police officers charged with the death of the journalist Metih Goktepe in January 1996. The Special Rapporteur on the Independence of Judges and Lawyers transmitted an urgent appeal to the Turkish Government concerning Kamil Sherif.

**Kamil Tekin Sürek** {lawyer}: He was expelled from the Bayrampaşa Security Directorate, by Security Director Kemal Yazici, when he went to meet his client, Sahin Bayar, a reporter for the newspaper Emek who had been detained on 29 July 1997. Mr. Sürek said that Kemal Yazici, who approached him while he was talking to his client, shouted at him "traitor, enemy of the state, separatist!" Mr. Sürek stated, "I am here because the Code of Criminal Procedures (CMUK) gives me the right to be here. It is my duty to come here." Mr. Sürek was forcibly driven out of the building by the Security Director; Mr. Sürek consequently lodged an official complaint against him.

**Cihan Tokat, Mustafa Ayzit and Hidir Çiçek** {lawyers from the Istanbul Bar Association}: They were put on trial in November 1996 by the Istanbul State Security Court Prosecution Office under Article 169 of the TPC on allegations that they were "couriers between prisoners and illegal organisations". The trial ended in acquittals on 27 October 1998. The prosecutors appealed to the Supreme Court, objecting that Cihan Tokat should not be acquitted.

**Burhan Veli Torun** {lawyer}: Mr. Torun was shot dead by unknown assailants on 14 May 1997 in Gaziantep. Mr. Torun, who was also responsible for a local newspaper named Metropol, had previously been the lawyer of Mehmet Ali Yaprak, the owner of a local television channel, Yaprak TV. In a television program, Mr. Torun had accused Ibrahim Sahin, the Deputy Chairperson of the Special Operations Units of the Security General Directorate, of kidnapping Mr. Yaprak on 25 April 1996.

**Gülizar Tuncer, Safak Yddu, Kamber Soyprak, Umit Yavuz and Filiz Kostak** {lawyers}: A trial was launched against these five lawyers on accusations of "resisting soldiers" at the Umraniye Prison, Istanbul, on 13 August 1997. On that day, the five lawyers had visited the prison to meet their clients after several prisoners fled from the prison. The trial began on 15 June 1998 at Usküdar Heavy Penal Court, Istanbul.

The lawyers pointed out that the prison administration had delivered only 14 permission cards to the entrance of the prison to be given to lawyers to visit their clients, even though there were hundreds of prisoners. They said that when they tried to meet the officer in charge at the entrance of the

prison to talk to him about the problem, they were met with insults and attacks by the gendarmes. They emphasised that their complaint about the soldiers had produced no result.

**Kemal Yilmaz** (lawyer): On 1 April 1998, at the Ankara State Security Court, a trial was launched against Mr. Yilmaz on accusations that he communicated information between some political prisoners in Yozgat Prison and the members of an illegal organization. Mr. Yilmaz denied the accusations, stating that he is neither a member of the Workers and Peasants Liberation Army of Turkey (TIKKO), nor does he concur with their opinions. Mr. Yilmaz stated that since he came from Tunceli and he defended the suspects caught by the police in its vicinity at Malatya SSC, the Tunceli Security Directorate incited a prisoner to testify against him.

**Esber Yagmurdereli** (lawyer by profession and a journalist, currently barred from practising because of previous conviction): Early on 20 October 1997, Mr. Yagmurdereli was arrested by police acting on court order. He was first taken into custody by the police while he was in the house of a relative in Ankara. He faces more than 17 years imprisonment for challenging the Turkish Government on the status of the Kurdish population in Turkey. He is to serve the remainder of a life sentence he received following his arrest in 1978, which had been suspended in 1991 on condition that he commit no more offences of a political nature. He was released on grounds of ill-health on 11 November, but an arrest warrant was issued again in February 1998.

The case of Mr. Yagmurdereli was raised in a joint communication of the Special Rapporteur on the Independence of Judges and Lawyers, and the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, to the Turkish Government on 7 October 1997.

**Ilknur Yöksek** (training lawyer, member of the "Young Lawyers Initiative" of the Istanbul Bar Association): She was detained by the police, who raided her house in Besiktas, Istanbul, on 24 May 1997. The police officials stated that she had been detained because her guest was wanted by the police.

# THE UNITED KINGDOM

**T**he United Kingdom of Great Britain and Northern Ireland (UK) is a constitutional monarchy with a democratic, parliamentary government. It operates without a written Constitution.

Executive power is vested in the Government while legislative power is vested in a bicameral Parliament comprised of the House of Lords, the upper legislative chamber, and the directly elected House of Commons, the lower legislative chamber. The House of Commons is the centre of parliamentary power, and is elected in periodic multi-party elections. The House of Lords consists of hereditary and life peers as well as senior judges and bishops of the Church of England. The Labour Party's manifesto for the 1997 elections included a commitment to abolish the hereditary seats in the House of Lords. A bill has since been introduced to abolish the right of hereditary peers to sit and vote in the House of Lords; in addition, a Royal Commission has been appointed to make proposals for the second stage of the reforms.

The Labour Party won the elections held on 1 May 1997 with an overwhelming majority. Tony Blair became the first Labour party Prime Minister in 18 years, ending a long succession of Conservative Party governments. Upon their defeat, William Hague was elected in June as the leader of the Conservative Party. The Labour victory had been widely anticipated but the margin of victory took many observers by surprise. Out of 659 seats in Parliament, Labour won 418 seats and the Conservative Party won 165 seats.

During 1998, legislation was passed creating a Scottish Parliament, and Assemblies in both Northern Ireland and Wales. Disputes will inevitably arise over the relative powers of the Parliament of the United Kingdom and of the subsidiary bodies. The legislation provides a special judicial procedure for dealing with these disputes.

The first elections of both the Scottish Parliament and the Welsh Assembly were held on 6 May 1999. In both bodies the Labour Party is the largest party but does not have an overall majority. The main opposition parties are the Scottish National Party in Scotland and Plaid Cymru in Wales. The new bodies are to commence their functions on 1 July 1999.

## **EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

In November 1998, Human Rights Act 1998 was passed. It incorporates the Articles of the European Convention on Human Rights and Fundamental Freedoms into British law. When it enters into force the Act will give the courts considerably extended powers to void secondary

legislation and executive actions, and to declare primary legislation incompatible with the European Convention on Human Rights. The Act is expected to enter into force by October 2000. The Government has sought to justify the delay on the grounds that all existing legislation will have to be scrutinised for compatibility with the Act. However, the length of the probable delay - more than two years since the passage of the Act - seems excessive and is cause for concern.

The Act, however, does not apply to Articles in the Convention to which the UK made reservations, e.g., Article 5 paragraph 3 regarding the right of a detainee to be tried promptly.

In January 1999 the Government of the UK signed the Sixth Protocol to the European Convention on Human Rights and Fundamental Freedoms regarding the abolition of the death penalty.

## THE JUDICIARY

The system of governance in the United Kingdom is based on the supremacy of Parliament. The judiciary is independent and provides citizens with a generally fair and efficient judicial process, protected by tradition. In recent years, however, several instances of miscarriage of justice have surfaced. These relate mainly to cases involving security questions.

The Act of Settlement of 1701 provides that judges are to be appointed upon good behaviour and their salaries are to be ascertained and established. However, upon the recommendation of both Houses of Parliament, it may be lawful to remove a judge. Despite this provision, historically the guarantee of judicial tenure has not been affected and is regarded as a fundamental constitutional principle.

In England and Wales, the most senior judges are appointed by the Prime Minister on the advice of the Lord Chancellor, the Government's chief law minister. All other judges are appointed directly by the Lord Chancellor. The Lord Chancellor also sits on the Appellate Committee of the House of Lords, the highest court of the land, but by convention he or she does not hear cases involving the Government.

The Appellate Committee of the House of Lords, (which consists of senior judges and is functionally distinct from the legislative arm), is the final court of appeal. For the first time, the House of Lords set aside its own decision in the case of General Pinochet of Chile, who was visiting the UK. A Spanish judge had requested the extradition of Pinochet to Spain to face trial for gross violations of human rights. After the Lords issued a first decision in November 1998 finding that Pinochet was not entitled to immunity from extradition as a former Head of State, Pinochet's lawyers claimed that the decision was improper because one Law Lord, Lord Hoffmann, was

connected with Amnesty International, an intervenor in the case. The House of Lords annulled its own decision and a new panel reconsidered the case.

The new panel rendered its decision on 24 March 1999, allowing extradition proceedings to proceed but on charges much reduced from those which had originally been presented. The case turned to a large extent on a technical issue concerning the meaning of the Extradition Act of 1989. Because of the split vote among the Law Lords, Pinochet's case presents little clear precedent on the immunity of former Heads of State from trial in a foreign country on charges of torture. The Law Lords who heard it were divided into three more or less equal groups: those who held that a former Head of State is entitled to permanent immunity on charges of torture; those who held that a former Head of State is never entitled to immunity on charges of torture; and those who held that a former Head of State is precluded from the immunity to which he would otherwise be entitled if the relevant states are parties to the Convention against Torture. Extradition proceedings against General Pinochet continue.

Charges of criminal offences in England and Wales are first tried either in magistrates' courts (which deal with minor offences) or, with a jury, in the Crown Court (which deals with more serious offences). There are rights of appeal to the Crown Court from convictions in magistrates' courts, with a further right of appeal (on a point of law only) to the High Court. Appeals from convictions in cases originating in the Crown Court go to the Criminal Division of the Court of Appeal. On cases which raise points of law of outstanding public importance may be appealed from the High Court or the Court of Appeal to the House of Lords. Different systems are in place in Scotland and Northern Ireland.

A Criminal Cases Review Commission (CCRC) was created on 1 January 1997 under the Criminal Appeal Act 1995 to investigate suspected miscarriages of justice in England, Northern Ireland and Wales. This body considers cases after the judicial appeal process has been exhausted and if serious new evidence presents the possibility that the conviction was in error. As an independent body, the Commission can bring a case to the appropriate appeals court after a decision of at least three of its members. The Scottish office has similar appellate procedures.

In *Findlay v. the United Kingdom*, the European Court of Human Rights decided on 25 February 1997 that a court-martial convened pursuant to the Army Act of 1955 did not meet the requirements of independence and impartiality set out by Article 6 paragraph 1 of the European Convention for Human Rights and Fundamental Freedoms. This decision was reached due to the central role the convening officer played in the prosecution; he was closely linked to the prosecuting authorities, was superior in rank to the members of the court-martial and had the power in certain circumstances, to dissolve the court-martial, as well as to refuse to confirm its decisions.

In the course of the case however, a new Armed Forces Act was enacted and entered into force on 1 April 1997. The new Act regulates the different functions of the convening officer, distributing them among three separate bodies. Furthermore, each court-martial must include a judge-advocate whose advice on points of law is binding on the court. The role of the convening officer has been abolished and a right of appeal to the Court-Martial Appeals Court has been introduced.

## ACCESS TO JUSTICE

In December 1998 the Government published a White Paper on the improvement of the legal aid system, in an effort to enhance access and end restrictive practices in the legal profession. The Access to Justice Bill contained major proposals on the establishment of a Community Legal Service for civil cases, and a Criminal Defence Service for criminal cases, with specialised lawyers appointed to both.

The Access to Justice Bill, which is currently being debated in Parliament and is likely to be enacted later this year, contains provisions which have been widely criticised as an attack on the independence of the legal profession.

The Courts and Legal Services Act 1990 conferred on the Lord Chancellor powers

- (a) to confer on any professional body the status of an "authorised body", with rights for its members to appear as advocates and conduct litigation,
- (b) to block certain changes in the rules of authorised bodies if unapproved, and
- (c) to revoke the status of an authorised body.

However, none of these powers may be exercised without the consent of all of the "designated judges," who hold the four senior judicial posts in England. The first and third powers also require the approval of Parliament.

The Access to Justice Bill adds a fourth power which will enable the Lord Chancellor to impose certain rule changes on the authorised bodies. This power requires parliamentary approval but not the consent of the designated judges. In addition, the Bill dispenses with the requirement that the designated judges consent to the exercise of the Lord Chancellor's existing powers.

There is widespread belief that these changes confer excessive powers on the Lord Chancellor, particularly since parliamentary approval would be largely a formality. During the course of the debate on the Access to Justice

Bill in the House of Lords, amendments were proposed which would have allowed the Lord Chancellor to exercise all four powers only with the consent of at least two of the designated judges. Although the amendment received widespread support in the debate, the Lord Chancellor could not be persuaded to accept it.

## **NORTHERN IRELAND**

The 20 July 1997 restoration of a cease-fire by the Irish Republican Army (IRA) led to the start of all-party political talks in September 1997. This has brought much hope for stability in Northern Ireland.

On 10 April 1998, the multi-party agreement on the future of Northern Ireland, known as the Good Friday Agreement, was signed in Stormont Castle, Belfast after long negotiations. The Agreement was signed by the Alliance Party, the Labour Coalition, the Progressive Unionist Party, Sinn Fein, the Social Democratic and Labour Party, the Ulster Democratic Party, the Ulster Unionist Party and the Women's Coalition, in addition to the British and Irish Governments.

On 22 May, voters approved the Agreement in a referendum held simultaneously in the Republic of Ireland and Northern Ireland. This was followed on 25 June by the election of the 108-member Assembly called for by the Good Friday Agreement. The Ulster Unionist Party won twenty-eight seats in the Assembly, the moderate nationalist party SDLP won 24, the Democratic Unionist Party, a hard-line Unionist Party opposed to the Good Friday Agreement, won 20, and Sinn Fein won 18. The remaining seats were split among the non-sectarian Alliance Party and other small parties.

The Assembly will, when its powers come into operation, enjoy executive and legislative authority regarding "those matters which are within responsibility of the six Northern Ireland Government Departments". However, the central Government of the UK continues to have power over taxation and security matters as well as a veto over legislation approved by the Assembly. The Assembly's powers were due to come into force in April 1999, but the transfer of powers has been deferred as a result of the Ulster Unionist Party's refusal to take part in an administration in which Sinn Fein is represented until the IRA starts to decommission its weapons.

The Agreement established several new bodies, including the Independent Policing Commission on Northern Ireland, the Human Rights Commission and the Criminal Justice Review Group. Christopher Patten, the last governor of Hong Kong, was appointed head of the Independent Policing Commission to advise on aspects of the reform process such as the revision of the Royal Ulster Constabulary, (RUC).

While the peace process slowly progressed, tension persisted in Northern Ireland, with bomb attacks carried out by opponents of the peace process such as the Omagh bombing in August which killed 28 people and injured 200, clashes among Protestants, Catholics, and the police over traditional Protestant marches, and anger over the prisoners' release program, which aims at releasing members of paramilitary organisations which have political representatives in the peace talks. The decommissioning of arms provided for by the Good Friday Agreement has not yet been implemented.

There is widespread concern over the continuing activities of both loyalist and republican paramilitary groups in enforcing control over their own communities. Methods used include beatings, maiming, forced exile and murder. These activities are directed against drug dealers and other known or suspected criminals, but may also be used against political rivals, or in support of the paramilitaries' own protection rackets or other criminal fundraising activities.

As a result of Omagh and several other bomb attacks, legislation was passed in September 1998 that makes it easier to convict individuals belonging to a terrorist organisation. The Criminal Justice (Terrorism and Conspiracy) Act has several controversial provisions including one that allows the introduction of the testimony of a senior police officer as *prima facie* evidence of a suspect's membership in such an organisation. Much criticism was expressed regarding the speed with which the Act was passed, as well as the power it gives to the authorities.

From 20 to 31 October 1997 the UN Special Rapporteur on the Independence of Judges and Lawyers carried out an official visit to the UK. In his report, the Rapporteur stated that he had received "numerous allegations concerning the pattern of abusive remarks made against solicitors in Northern Ireland, particularly against those who represent individuals accused of terrorist-related offences".

#### EMERGENCY LEGISLATION

In the 1996 edition of *Attacks on Justice*, the CIJL expressed concern regarding emergency legislation in Northern Ireland.

The Secretary of Northern Ireland, Marjorie Mowlam, announced on 1 October 1997 the Government's intention to significantly reform the RUC, eliminate indefinite internment without trial, narrow the scope of cases sent to "Diplock courts," meaning courts without a jury, and replace the Emergency Provisions Act (EPA) and Prevention of Terrorism Act (PTA) with one act.



The issue of emergency legislation in Northern Ireland was carefully investigated by the Special Rapporteur in 1997 and addressed in detail in his report. His report reveals four salient points:

- Northern Ireland's Criminal Evidence Order of 1988 permits a judge to draw adverse inferences from the silence of a detainee in several circumstances. The abolition of the right to silence where a defendant may otherwise incriminate himself violates international standards.
- The EPA's lower standard for admissibility of confession permits confessions obtained by psychological coercion; the burden of proof for *prima facie* evidence of maltreatment is on the accused.
- In Northern Ireland, certain offences under the emergency law are tried in what are known as Diplock Courts. The ruling by a single judge in tandem with the right to draw negative conclusions from the silence of the detainee has led to the public's lack of confidence in the independence and impartiality of the Diplock Courts.
- Closed visits are prevalent in England and Wales (*see the 1996 edition of Attacks on Justice*). These are visits which requires a glass screen to be installed between all prisoners in Special Secure Units, (prisoners perceived to be at high risk for escape), and their lawyers; this condition results in obstructed communication between lawyers and their clients.

With regards to these issues, the Special Rapporteur concluded that:

- The right to silence should be reinstated immediately. Neither judges nor juries should be permitted to draw adverse inferences at trial from a defendant's failure to respond to police questioning. Accordingly, Northern Ireland's Criminal Evidence Order 1988 should be rescinded.
- The permissive EPA standard for trial admission of confession evidence procured by psychological pressure, deprivation, or other non-violent forms of coercion should be abolished. The standard for admitting confession evidence should conform to Northern Ireland's Police and Criminal Evidence Order of 1989 (PACE).
- The right to trial by jury should be reinstated, with safeguards put into place to protect the integrity of jurors.
- Absent evidence that solicitors are abusing their professional responsibilities, the closed visits within the Special Secure Units constitute undue interference with the lawyer/client relationship and create unnecessary impediments for adequate trial preparation. At a minimum, the burden should be upon the prison officials to demonstrate that the closed visits are an exceptional measure necessary to maintain prison security on a case-by-case basis. Consequently, the Special Rapporteur recommended that practice of closed visits in England and Wales should be discontinued.

With regard to access to legal counsel, the Special Rapporteur recommended that the right to immediate access to counsel be respected and Section 14 of the PTA be amended to prohibit deferral of access. Furthermore, he recommended that the right to have a lawyer present during police interrogations be respected. Another important recommendation made by the Special Rapporteur is that audio/video taping of interrogations be installed in Northern Ireland, so that lawyers may investigate allegations of abuse.

#### HARASSMENT OF LAWYERS

The CIJL has reported on cases of systematic harassment of lawyers in Northern Ireland since 1989. After investigating this harassment, the Rapporteur expressed concern that the RUC has in fact identified lawyers who represent those accused of terrorist-related offences with their clients or their clients' causes, and further that they have interfered in the attorney/client relationship by questioning the integrity and professionalism of solicitors during the course of interrogations.

The Special Rapporteur concluded that there has been harassment and intimidation of defence lawyers by RUC officers. He also concluded that this harassment and intimidation has been consistent and systematic.

Lawyers explained to the Special Rapporteur that they almost never file complaints of harassment and intimidation because the investigation is carried out by the RUC, a group which is, in their estimation, untrustworthy. The Special Rapporteur called on the Government "to conduct an independent and impartial investigation of all threats to legal counsel in Northern Ireland".

The killing of prominent attorney Patrick Finucane has had a chilling effect on lawyers in Northern Ireland. Finucane was shot dead in front of his family on 12 February 1989. A loyalist paramilitary group claimed responsibility for his killing. Since his death, evidence has come to light that strongly suggests collusion between military intelligence agents and loyalist paramilitary organisations in his killing. British security forces appear to have had prior knowledge of the plan to kill Mr. Finucane. Revelations concerning the role of double agent Brian Nelson in Mr. Finucane's death have contributed to establishing this link. Further evidence emerged in 1998.

In April 1998, the UN Special Rapporteur issued a report in which he called on the UK Government to institute a judicial inquiry into Patrick Finucane's murder. The CIJL joined with other international human rights groups in support of the Special Rapporteur, and on 12 February 1999, the 10th anniversary of Patrick Finucane's death, more than 1,000 lawyers around the world signed a press advertisement supporting the Special Rapporteur, and calling for a full international independent judicial inquiry into his assassination.

## CASES

**Sixty-four** {barristers and solicitors}: These lawyers regularly experienced threats or harassment by the police while conducting their professional duties in the course of 1997-1998. Although the CIJL possesses the names of these lawyers, they are being withheld to ensure the safety of those concerned.

**Rosemary Nelson** {solicitor}: Ms. Nelson reported that within a four week period in early 1997, 12 clients held at the Gough Barracks Detention Centre had heard RUC officers state that she was going to be killed, presumably by loyalists. Similar threats were heard throughout October. Ms. Nelson lodged a complaint against the RUC. The US Department of State reported the same facts in their Country Report on Human Rights Practices for 1997.

In 1998, Ms. Nelson continued to receive death threats and suffered from harassment and intimidation. On 15 March 1999, Rosemary Nelson was murdered in a car bomb attack outside her home in Lurgan, County Armagh, Northern Ireland. Her murder has provoked worldwide condemnation.

## GOVERNMENT RESPONSE TO CIJL

On 2 July 1999, the Government of the United Kingdom responded to the CIJL's request for comments. The Government stated:

The Government of the United Kingdom is grateful to CIJL for the opportunity to comment on its draft report 'Attacks on Justice'. The United Kingdom wishes to make the following comment:

*European Convention for the Protection of Human Rights and Fundamental Freedoms*

- (i) The Human Rights Act 1998 will come into force on 2 October 2000. The Act is not coming into force until this date because Courts, Tribunals, and Legal Officers need to receive additional training to implement the new provision correctly.
- (ii) The Human Rights Act 1998 does not apply to Protocols to which the UK is not a party.

*The Judiciary*

- (i) Judges in the UK are appointed 'on condition of good behaviour'. The most senior judges in the UK are appointed by the Sovereign on the advice of the Prime Minister. All other

judges are appointed by the Sovereign on the advice of the Lord Chancellor.

(ii) There are rights of appeal to the Crown Court and the High Court from convictions in the magistrates courts.

(iii) The Criminal Cases Review Commission can consider any conviction or sentence, and in exceptional circumstances does not have to await exhaustion of the judicial appeals process. Reference to the appropriate appellate court occurs when a committee of at least three of the Commission's members considers there is a real possibility that a conviction or sentence would not be upheld because of an argument or evidence not previously raised in the proceedings. A similar Scottish Criminal Cases Review Commission began operations on 1 April 1999.

#### *Access to Justice*

(i) The White Paper published in December 1998 was called "Modernising Justice". It was not only about the improvement of the legal aid system but about the Government's overall approach towards modernising justice.

(ii) The provisions which the CIJL report discusses concern rights to conduct litigation and rights of audience. These provisions are aimed at realising the intention of the Courts and Legal Services Act 1990 of "achieving new or better ways of providing [legal services] and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice". The changes are narrow and proportionate. The Government does not accept that the rights of audience and right to conduct litigation are a matter for the judiciary, but rather for Parliament to decide.

(iii) The power to impose certain rule changes on the authorised body is restricted under the Access to Justice Bill which "unduly restrict the exercise of rights of audience or rights to conduct litigation". Effectively, the Lord Chancellor may liberalise rights of audience and rights to conduct litigation but may not make them more restrictive. The Government considers that this is an important safeguard.

#### *Northern Ireland*

(i) The Prisoner Release Programme aims at releasing those convicted of terrorist offences belonging to paramilitary organisations who are on cease-fire.

*Emergency Legislation*

(i) Marjorie Mowlam's correct title is the Secretary of State for Northern Ireland. However, it was the Home Secretary, Jack Straw who announced on 30 October 1997, the Government's intention to replace the Emergency Provisions Act and the Prevention of Terrorism Act by a single Act. The counter-terrorist legislation is under review.

(ii) In the Government's view, the continuing risk of intimidation of jurors means that the no-jury system (Diplock Courts) remains necessary for terrorist type offences. The Government does not accept that the standard of justice is in any way inferior because there is only a single judge presiding over such Courts.

(iii) The Secretary of State for Northern Ireland met with the UN's Special Rapporteur -Mr Dato' Kumaraswamy- on 14 April this year to discuss matters he raised in his second report on the alleged harassment and intimidation of defence lawyers. The meeting was constructive and both the Secretary of State and Mr Kumaraswamy found it beneficial.

(iv) The UK fully cooperates with all United Nations human rights mechanisms, including the Special Rapporteurs.

(v) Mr Kumaraswamy's report came in a week which had seen the appalling murder of Rosemary Nelson by terrorists. The attack gives even greater focus to Mr Kumaraswamy's latest report. But it is important that this is not to suggest that the RUC had any involvement directly or indirectly in the bombing.

(vi) The Government is seeking to introduce a new Police Ombudsman procedure; the Chief Constable of the RUC has introduced audio and video recording of all interviews in holding centres. Such video recording of terrorist suspects became mandatory on 10 March 1998. The Chief Constable has met the Law Society to discuss how complaints can be made via the Law Society. He has invited them to be involved in the training of criminal investigation department (CID) officers who conduct interviews. In addition, the Independent Commissioner for Police Complaints decided some months ago that it will supervise all complaints by solicitors and barristers.

(vii) Closed visits in England and Wales only apply in cases of prisoners who are classified as presenting an exceptional risk, and more rarely where activities such as drug smuggling may be suspected.

# VENEZUELA

The Constitution of Venezuela, a Federal Republic composed of 22 states, was adopted in 1961. The Constitution provides for separation of powers among the executive, legislative and judiciary.

Rafael Caldera, elected in 1994, remained in office until December 1998, when presidential elections were held in which Hugo Chavez, who had participated in a failed *coup d'état* attempt in 1992, was elected President for a five year term. Presidential as well as parliamentary elections took place in the midst of social unrest, due to the economic crisis and the ruling political party's inability to manage it. Chavez' platform offered radical changes and blamed the political parties traditionally in power for the crisis.

Chavez himself received 57% of the popular vote, but his political party, the Fifth Republic Movement, did not obtain the majority in Parliament, becoming instead the second largest party.

## HUMAN RIGHTS BACKGROUND

The situation in prisons remains poor, although the entry into effect of the new Code of Criminal Procedure may constitute an improvement. The *Programa Venezolano de Educación Acción en Derechos Humanos*, or PROVEA, a respected non-governmental organisation, documented 460 deaths inside prisons between October 1997 and September 1998. Most of these were perpetrated by other inmates, but there were also instances of deaths at the hands of wardens and as a consequence of illness due to the inadequate conditions and lack of medical attention.

Most human rights violations were allegedly committed by police personnel, be it the federal police or the state police. According to the NGO *Red de Apoyo por la Justicia y la Paz*, in the first trimester of 1998 alone 32 deaths occurred at the hands of police forces; 328 complaints of torture or ill-treatment at the hands of the police or military personnel were lodged in the first semester of the same year. There were also reports of extrajudicial executions perpetrated by police officers. The majority of the victims were "presumed" criminals or suspects. Every month, at least 10 people are killed by the police or military officers.

Human rights abuses are allegedly linked to the growing criminality in Venezuela's biggest cities. Reports say that more than 200,000 crimes are committed each year in Venezuela, and between 4,000 and 5,000 of them are homicides. To fight against common criminality, the police very often use disproportionate force and abuse their powers. PROVEA reported that 12,308 persons were arbitrarily detained during the frequent sweeps police forces carried out in impoverished areas of the main cities between October 1997 and September 1998. Some instances of lynching were also reported, as the judicial system is perceived to be inefficient and untrustworthy.

Instances of harassment of human rights defenders were also common. In the first part of 1998 alone, the Andean Commission of Jurists reported eight cases of harassment against human rights defenders who were investigating cases of abuses involving police officers.

Human rights violations generally go unpunished since the police are usually unwilling to investigate their officers and prosecutions rarely occur. In the few cases actually heard by the courts, the penalties imposed are very light and very few of those convicted spend any time in prison.

The suspension of some constitutional rights and freedoms in 16 districts near the Colombian border continued until the end of 1998. Security forces enjoyed broad power to arrest citizens without a warrant. On the other hand, the long criticised Law of Vagrancy was finally abrogated by a decision of the Supreme Court (*see Attacks on Justice 1996*).

## THE JUDICIARY

The judiciary in Venezuela is undergoing a far reaching programme of reforms. During the last two years, the reform has crystallised mainly in the enactment of new legislation introducing a series of institutions and principles to help ensure the rule of law and respect for due process of law in criminal proceedings.

The Venezuelan judiciary is composed of the Supreme Court, which is the highest tribunal in the country (Article 211 of the Constitution), and lower courts as established in the Organic Law of the Judiciary. Justices of the Supreme Court are appointed by the bicameral Congress, which also appoints the Prosecutor-General. Selection, appointment and discipline of the lower-level judges is the responsibility of the Council of the Judiciary. There is no separate organ for the control of constitutionality of laws and practices.

## RESOURCES

The provision of financial resources continues to be a source of pressure on the judiciary and ultimately on its independence. The economic crisis in Venezuela led to general cuts in public expenditure, and in particular affected the judiciary which was already working with a budget showing a deficit. The final cuts amounted to 10% of the judiciary's budget for 1998. Nevertheless, the judiciary's expenditure per capita is still one of the highest in the Andean Region: US \$10.70 in 1998.

The Organic Law of Reform of the Judiciary, enacted on 28 August 1998, addressed the chronic problem of lack of resources. Originally an initiative of the Supreme Court, the law reform was discussed in Parliament

but the outcome fell short of the proposals. While the original proposal sought to establish a fixed percentage of 6% of the national budget to be allocated to the judiciary automatically each year, the actual law does not provide for any fixed percentage, but grants the judiciary the power to prepare its own budget that will not be subject to any change during discussions in Congress.

During 1997 and 1998, continued strikes organised by the judicial staff rendered the work of the courts difficult and prompted the President of the Supreme Court to call the military to maintain order and ensure security of the judiciary's buildings.

### THE LAW OF THE JUDICIAL CAREER AND SECURITY OF TENURE

In August 1998 Congress passed the Law of Reform of the Judicial Career establishing a mandatory and more precise merit-based method of selecting judges. This method had been already established in the Judicial Career Law, (see *Attacks on Justice 1996*), but was systematically ignored in recent years, leaving room for the selection of candidates on the basis of political influence. The selection and appointment of five new Justices of the Supreme Court in April 1998 illustrated the lack of transparency and publicity in the process of appointment, and was the focus of much criticism. At that time Congress also approved the appointment of 15 new substitute Justices of the Supreme Court.

According to PROVEA, which cites official sources, there are 1,275 judges and magistrates, of which 433 judges are working on a temporary basis and 683 enjoy life tenure, while there are 159 public defenders working in the legal aid sector. Concern has been raised regarding the fact that 38.79% of judges are temporary, constituting an increase in relation to the 36.27% of temporary judges registered for 1996.

On 8 September 1998, Congress passed an amendment to the Organic Law of the Council of the Judiciary. This body is in charge of appointing, selecting, training and disciplining lower level judges. The new law raises the number of members of the Council from five members to nine, of which five are to be nominated by the Supreme Court, two by Congress and the remaining two by the President of the Republic. The new law offers no further provision to enhance the independence of this body through the appointment of its members.

The amending law of the Council of the Judiciary also introduced some provisions that may contribute to more transparent and faster disciplinary proceedings. During 1998 the Council of the Judiciary received 764 complaints against magistrates but declared 58.4% of them inadmissible. The President of the Supreme Court also expressed concern regarding the fact that around 12% of all judges are actually subject to disciplinary proceedings. Most of these disciplinary proceedings, including those involving



corruption, were carried out in camera and neither the public nor the public prosecutor, (in disciplinary proceedings against prosecutors), had access to them. The amending law provides for oral and public hearings in disciplinary proceedings against judges and magistrates.

### THE REFORM OF THE JUDICIARY

The judiciary continued the reform programme initiated with financial support from the World Bank during 1997 and 1998. One of the projects executed with this financial support, the Project of Supporting Infrastructure for the Judiciary (PIAPJ), continued at a slow pace to build new offices and adapt old ones, and to restructure the number and size of the courts in the country to the requirements of a modern judiciary. Major shortcomings are the lack of public information about the restructuring of courts and the possible impact that it will have on the working conditions of the judicial staff.

An important change in the authorities' behaviour resulted in the significant opening up of participation and dialogue with NGOs on the objectives and means to better implement the reform. Social participation was possible in areas such as training of the judiciary's administrative staff, dissemination of legislative reforms and proposals of new legislation. This was particularly possible within the framework of the PIAPJ and the Modernisation Project of the Supreme Court (PM-CSJ). Furthermore, in 1998, the Supreme Court approved two agreements with the Inter-American Commission on Human Rights and the Court of Human Rights to disseminate their jurisprudence on human rights among the judges.

A vast programme of reform of the prison system and judicial police, as well as the Office of the Public Prosecutor, was started with the implementation of a project sponsored by the Inter-American Bank of Development (BID). The agreement, which was to have been signed in August 1998, was called into question due to the Prosecutor-General's reluctance to undertake a series of changes to diminish violence in prisons. By year's end, the project remained under study.

### THE REFORM OF THE LEGAL SYSTEM

The reform of the legal system, with the introduction of elements of an adversarial criminal system of justice, is an integral part of the reform of the judiciary. The legal reform also comprises new laws aimed at clearing out the backlog of cases in the courts. In this regard, several important laws were enacted during the last two years.

One of the most significant of these laws is the new Organic Code of Criminal Procedure (COPP). This law was enacted in December 1997, and is to enter into force in July 1999 after a transition period aimed at

establishing the basis for the new largely adversarial criminal system. The COPP has already entered into force partially; on 25 March 1998 the authorities started to implement provisions regarding three important institutions: the ability to make reparation agreements, the establishment of the right to plead guilty and the publicity of the process partially eliminating the secret stage of the trial. The latter has been seen as one of the most important changes in criminal procedure, since it will guarantee not only publicity, but also the possibility to subject gathering of evidence in the pre-trial stage to the guarantees of due process of law.

However, the positive impact of the partial elimination of secrecy in pre-trial investigations was offset by the power granted to the Public Prosecutor to request that investigations be kept secret for a renewable period of ten days (Article 313 COPP). During this time, neither the accused nor his counsel can have access to the written proceedings (documents, evidence, etc.), constituting a serious limitation to their ability to prepare an adequate defence. This is further aggravated by the vague and general wording of this provision, which lends itself to possible abuse by the public prosecutor.

The success of the reform depends to a great extent on the commitment of different institutions related to the judiciary's work. One of them is the Office of the Public Prosecutor, whose role in the reform has been reported as not very constructive. In addition to his widely publicised refusal to be accountable to Congress in March 1998, the Prosecutor-General opposed some of the reforms, such as the elimination of the secrecy in pre-trial investigations. On 24 March 1998, an important newspaper reported that the Prosecutor-General had issued instructions to the lower-level prosecutors in which he advanced a narrow interpretation of the provisions in the COPP, partially eliminating secrecy in pre-trial investigations. The Public-Prosecutor was quoted as saying, "This procedural institution (secrecy of investigations) will be maintained in the new legislation although with some modifications and a new name, and in no case will it be implied that the accused or his counsel will have access to the proceedings but it will be the public prosecutor who will inform them about the proceedings". Several human rights organisations have expressed concern with regard to these statements reflecting the Prosecutor's unwillingness to respect the rights of the accused during the pre-trial stage.

The concern about the Public Prosecutor's behaviour is grounded on the existence of a vertical structure within the Office of the Public Prosecutor, consequently creating a lack of prosecutorial independence. According to Article 51 of the Organic Law of the Office of the Public Prosecutor: "the public prosecutors are obliged to...strictly comply with the instructions given by the Prosecutor-General". This provision has apparently been interpreted as giving the Prosecutor-General ample power to issue instructions to those he considers subordinates regarding the way legal norms should be interpreted and the method of prosecuting crimes. This provision undermines the

necessary independence that the Public Prosecutor should have when investigating or prosecuting crimes.

The new COPP, which is to replace the old Code of Criminal Procedure, provides also for a professional career within the prosecutor's office, and also for the appointment of regional prosecutors for each of the states on the basis of competitive examination. However, the Prosecutor-General appointed the regional prosecutors in May 1998 without following this method.

#### REFORM OF THE MILITARY JUSTICE SYSTEM

On 19 September 1998, a law amending the Code of Military Justice was passed. The old code had been severely criticised for its inconsistency with international human rights standards (*see Attacks on Justice 1996*). However, the amended code retains the principle of a commander structure within the military justice. According to this principle, the commanders on active duty, including the President of the Republic who is the Commander-in-Chief, are part of the military justice structure and may intervene actively in it. Without the commander's order, no investigation or trial can be held, and the President can order the suspension of a trial and even the non-execution of sentences (Article 593).

The public prosecutor is allowed very little participation in the proceedings and the main responsibility for the prosecution is left to military prosecutors, who are not independent, but subject to orders given by their superiors.

Furthermore, the amended Code of Military Justice does not incorporate a chapter on "principles and procedural guarantees" equivalent to the one in the COPP developing the main principles of due process of law. In this way, the military justice system remains largely a structure separated from the ordinary justice system, based on different principles and rules.

Article 123 of the Code of Military Justice reproduces the existing provision for trial of civilians in military courts in cases of armed subversion, and in all those cases involving military officers.

#### THE WORK OF LAWYERS AND THE RIGHT TO DEFENCE

The programme of free legal assistance remains underfunded and understaffed (*see Attacks on Justice 1996*). The number of lawyers working for the Service of Public Defenders, a branch of the Council of the Judiciary, was 159; the number of cases dealt with by each lawyer during 1998 reached an average of 398 per year. These figures show the necessity of improving legal aid services, which will play a much more important role once the new COPP enters into force in July 1999.

# YEMEN

The republic of Yemen was proclaimed on 22 May 1990, thus reuniting the two previous north and south Yemeni states. The situation of southern Yemenis in general deteriorated, in the sense the unification resulted in more severe restrictions against southern newspapers and political parties. In addition, they became underrepresented in decision-making positions and suffered reductions in their share of public goods and services. A brief but bloody civil war erupted in 1994.

The President of the Republic, Ali Abdullah Saleh, was elected in 1994 to a five year term; he has been in office since 1978. A new Constitution was also adopted in 1994, recognising the principle of the separation of powers. In reality however, most power is in the hands of the Executive. The President appoints the Prime Minister to form a government. The Prime Minister and the ministers are responsible to the President and the Parliament for the proper performance of their duties.

The Parliament is composed of a unicameral assembly of 301 members, elected through secret balloting for a four year term. The Parliament ratifies laws and oversees the Government's general policy. The President of the Republic has the right to dissolve the Parliament. Legislative elections were last held on 27 April 1997, from which the governing General People's Congress (GPC) emerged victorious.

The demarcation of the common border of Saudi Arabia and Yemen was the subject of negotiations and periodic clashes between both countries. Relations between them eased after Saudi Arabia resumed issuing visas allowing Yemeni nationals to work in the country.

## HUMAN RIGHTS BACKGROUND

Bombs and violence continued to erupt, especially in the former south Yemen. The Government response was very strong, and they cracked down on different opposition groups.

Tribal tensions in the country continued to mount. There were several cases of kidnapping of foreign nationals, the wide majority of whom were released unharmed. This practice seems to be aimed at attracting Government attention to certain needs of some tribes.

The situation of forced or involuntary disappeared persons in Yemen following the 1986 fighting between the two factions of the Yemeni Socialist Party in the former People's Democratic Republic of Yemen, and following the 1994 civil war, is still pending. In its 1998 report on the mission to Yemen, the United Nations Working Group on Enforced or Involuntary Disappearances expressed concern about cases of disappearance that occurred in the past and continue to occur. They also raised the issue of the

impunity enjoyed by law enforcement officials, and the existence of unrecognised places of detention where individuals are held in incommunicado detention for long periods of time.

Torture remains a problem in Yemen. There are regular incidents of torture occurring to extract confessions from arrested individuals. This could be due partially to the lack of training and legal awareness among security personnel and public prosecutors. Persons detained for political reasons, particularly those arrested by the Political Security Branch of the security forces, are often held incommunicado for prolonged periods, sometimes weeks or months, without access to lawyers and family members. Torture was said to be inflicted systematically against such detainees. Military intelligence, criminal investigation police and members of the armed forces also allegedly used torture on a widespread basis, against both political suspects and common law detainees. Officials carrying out torture were said usually to act with impunity, as few investigations of such officials had reportedly been carried out. Legal procedures tend to be quite lengthy, which often results in transgression of the legal limits for pre-trial detention. Bribery and the fact that the enforcement of court decisions can hardly be accomplished create a distrust in the system.

Shari'a law is strictly applied in the country; sentences of corporal punishment such as lashing, flogging, amputation and crucifixion are implemented. Since the establishment of the Republic of Yemen, a steady increase in the use of the death penalty has been observed. Hundreds of people were reported to be on death row.

## THE JUDICIARY

A judicial and legal reform program is underway in Yemen, which includes the discharge of several judges under allegation of corruption and incompetence. The number of judges on the Supreme Court was cut from 90 to 40. The aim of the program is to improve the efficiency of the system and increase judicial independence.

The judicial system in Yemen is composed of a court of first instance in each district, headed by a single magistrate; this number can be extended to three. They handle cases ranging from civil, criminal, and matrimonial to commercial law. There are also military courts.

A Court of Appeal, consisting of a bench of three judges, sits in each province, and looks into appeals against the decisions of the courts of first instance on points of law and fact.

At the top of the judicial hierarchy is the Supreme Court of the Republic, which sits in the capital, Sana'a. It hears appeals against the decisions of the

Courts of Appeal on points of law only. Among other things, it also adjudicates on the constitutionality of the laws.

## THE SUPREME JUDICIAL COUNCIL

The Law of Judicial Power gives the Executive power to appoint judges to the Supreme Court and other judicial positions; it also regulates transfers, salaries, and allowances of judges. The Articles of this law sometimes state “after approval of candidacy from the Supreme Judicial Council”; in reality, the Attorney General and the Supreme Court Judges are appointed by the Executive. Four of the eleven members of the SJC are appointed directly by the Executive, and the others are appointed either directly or indirectly by the Executive power.

The Supreme Judicial Council is the highest body that deals with matters concerning the judicial office. It is composed of the President of the Republic, the Chief Justice of the Supreme Court and his two deputies, the Attorney General, the Minister of Justice and his deputy, the Chairman of the Judicial Inspection Commission, and three senior Supreme Court Judges. Its tasks include taking disciplinary actions against judges, and examining cases referred to it regarding the appointment, promotion, dismissal, remuneration, and transfer of judges.

Although the Constitution grants the judiciary complete independence in its judicial, financial, and administrative tasks, this is not the case in practice. In most aspects, the judiciary depends on decisions taken by the Supreme Judicial Council, which is composed of members of the executive branch or members appointed by the Executive, which puts the SJC under the direct control of the executive power.

## CASES

**Bader Ba-saneed** {lawyer}: During the trial of Mr. Qassim Jubran ‘Ali, a client of Mr. Ba-saneed charged with alcohol consumption in Lahj, the court was reportedly filled with local armed security men. Mr. Ba-saneed, the defendant’s lawyer, had allegedly been physically harassed by security forces when he had met his client in detention, after having requested that the judge clear the courtroom to provide an atmosphere free from intimidation. Although the judge ordered the security personnel to leave, there were even more of them at the second hearing, some of them intimidating the defence lawyer. Mr. Ba-Saneed was allegedly attacked and flogged by an armed group, and the security forces did not intervene. Qassim Jubran ‘Ali was allegedly flogged in public without a court verdict.

**Mohammed Ismail al Haji** {President of the High Court of Yemen, Vice Chairman of the High Council of Judiciary of Yemen}: On 21 February 1998, Mohammed Abdallah al Haji, the 13 year old grandson of the judge, was kidnapped by the Hadda tribe in front of his school and was taken to the District of Thmar.

The kidnapping took place to put pressure on the Government not to execute three individuals who were convicted in October 1997 of raping a boy. The tribe of the convicted men rejected a conclusive judgement of death penalty pronounced by the High Court. The judgement was carried out on 1 December 1997, when one individual was executed and three others were imprisoned and lashed. As a result, the tribe committed four different acts of kidnapping that involved foreign tourists and foreign experts, in addition to the grandson of the President of the High Court.

After the kidnapping of the judge's grandson, the courts closed their doors in protest. The judges asked for adequate protection. Lawyers and prosecutors joined the judges in their protest. They organised a sit-in in the Ministry of Justice in Sana'a and its offices in the various departments, requesting protection from such illegal acts.

The President of the Sana'a Court of Appeal, Judge Hamoud Hattar, told the press that the judges asked the Government not to enter into a violent confrontation with the kidnapers without evacuating women and children from the area. He added that the Government understood the judges' call for protection and said that it would take practical measures to protect the judges.

On 25 February 1998, it was reported that President Ali Abdallah Salah appointed a new Governor for the District of Thmar in a step that was interpreted as taking strong measures to combat kidnapping.

Meanwhile, Government forces surrounded the area where the tribe lives. After an armed clash, the grandson was released on the evening of 24 February 1998. The judges continued their strike however, calling for protection and also requesting that the perpetrators of the kidnapping be brought to justice.

**Ali Mohammed Sarhan** {lawyer}: On 30 July 1997, and following a wave of arrests, MR Sarhan, along with 98 others, was arrested without judicial warrant, and was held without charge and without access to lawyers.

## ADDITIONAL CASES

### BOLIVIA:

**Waldo Albarracin Sánchez** {lawyer and president of the Permanent Human Rights Assembly of Bolivia}: Mr. Albarracin continued to receive death threats against his family and himself, presumably for his campaign for a thorough investigation and instigation of criminal proceedings against those responsible for his abduction and torture in January 1997 (*see Attacks on Justice 1996*).

A parliamentary commission that was convened to investigate the events did not reach any conclusions. On 25 January 1998, on the first anniversary of the incident, Lawyer Albarracin testified before the House of Representatives. In February, the parliamentary commission, which won a new majority as a result of the 1997 elections, finally issued a recommendation that several high-ranking police officers be criminally charged. In the midst of the parliamentary debate, anonymous flyers were circulated accusing Mr. Albarracin of drug-trafficking, and a video tape of a woman declaring that Lawyer Albarracin had raped her some years ago was distributed to the media as well.

In February 1997, days after the attacks on Lawyer Albarracin, the International Commission of Jurists sent an appeal to the Bolivian government.

### REPUBLIC OF CONGO (CONGO-BRAZZAVILLE):

**Zacharie Samba, Hervé Amdroise Malonga, and Nestor Makoundzi-Wolo** {Respectively, vice-president and members of the Constitutional Council}: Mr. Samba, Mr. Malonga, and Mr. Makoundzi-Wolo were arrested and placed in preventive detention. They were accused of complicity to commit genocide and war crimes for having reported the presidential elections on 19 July 1997, by decision of the Constitutional Council, thus maintaining the current President in office. Mr. Samba, Mr. Malonga, and Mr. Makoundzi-Wolo were arrested in relation to a decision taken pursuant to their functions, despite the fact that they enjoy total and absolute immunity in regards to their opinions and votes in the Constitutional Council.

### DJIBOUTI:

**Aref Mohamed Aref** {lawyer, human rights activist}: On 5 May 1999, Mr. Aref's conviction was confirmed, imposing a five year prohibition on his ability to practice law. He was imprisoned in February 1999 on charges of alleged attempted fraud. Procedural irregularities were noted both before



and during his trial. Furthermore, his confiscated passport has not yet been returned. Mr. Aref is being harassed because of his professional activities, which have included representing individuals whose human rights have been violated.

## IRAN:

**Mohammad Assadi** {lawyer}: Mr. Assadi was executed on 9 August 1997 after his appeal was rejected by the Supreme Court and no pardon by the Leader of the Islamic Republic of Iran was granted to him. The exact charges against Mr. Assadi remain unknown but are believed to be political-motivated.

**Hojatoleslam Sayyid Mohssen Saeidzadeh** {legal scholar}: On 30 June 1998, Mr. Saeidzadeh, a cleric trained in Islamic law, was taken into custody. The arresting officers entered his home, without a warrant, and cited his article in the *Jam'eh* newspaper, in which he espoused progressive legal arguments related to Islamic law; no charges against him were made public. While in detention, Mr. Saeidzadeh was denied access to counsel; he was later released at the end of November 1998.

## LEBANON:

**Mohammed Mugraby** {lawyer, human rights activist}: In 1997, Mr. Mugraby was prosecuted for actions and statements directly related to his role as a defence attorney. The CIJL is aware that the government has requested the Beirut Bar Council for permission to prosecute Dr. Mugraby on three occasions. Each request has been denied.

The first request pertained to a July 1994 case where Dr. Mugraby argued on behalf of his clients who were being prosecuted under Article 278 of the Lebanese Penal Code. Dr. Mugraby argued that in the absence of legislation naming the State of Israel as an enemy of Lebanon, or a formal declaration of war against Israel, the term "enemy", as used in the Lebanese Penal Code, could not apply to Israel and consequently, his clients could not be prosecuted under that section of the Penal Code.

The second request occurred after Dr. Mugraby alleged his clients, who were being prosecuted before military courts, had suffered human rights violations.

The third request came in the course of Dr. Mugraby's representation of clients who lay claim to land in the old city of Beirut. The interests of those clients are at odds with those of a corporation known as "Solidere".

**Waeel Kheir** {lawyer, human rights activist}: Mr. Kheir was arrested and detained in late December 1998, following a statement he issued with regards to the bombing of a Syrian bus in Lebanon, in which he exposed the massive round-up and mistreatment of suspected individuals. Mr. Kheir was released after national and international pressure were exerted.

## **LESOTHO:**

**Haee Edward Phoofolo** {lawyer}: Mr. Phoofolo was handling a conspiracy and treason case on behalf of two police officers when he was arrested and charged for treason himself. He has been released on bail pending the commencement of the trial. Mr. Phoofolo was denied access by the Attorney-General to evidence that might prove his innocence.

## **LITHUANIA:**

**Gintaras Malciauskas** {Chief Prosecutor}: On 5 February 1998, Mr. Malciauskas, the official who assumed the murdered prosecutor Gintautas Sereika's post in the organised crime and corruption investigation division in Panevezys, was challenged by death threats in his office. He found a letter saying, "Give up your position, or you will die." Urgent actions were taken to ensure the protection of Mr. Malciauskas and his family.

## **MAURITANIA:**

**Mohamedine Ould Ichidou** {lawyer, human rights activist}: On 16 December 1998, Mr. Ould Ichidou was arrested without a warrant along with two others. They were detained incommunicado; access to their lawyers and families was denied. Mr. Ould Ichidou was released two days later, and he was banished to a remote area of the country.

**Brahim Ould Ebetty and Fatimata M'Baye** {lawyers}: On 17 January 1998, Mr. Ould Ebetty was arrested along with two others, at their homes in Nouakchott. They were held incommunicado, without access to families or lawyers for four days, and faced charges relating to their non-violent activities in the defence of human rights. Their arrest was reportedly carried out without any warrant, and appears to have been prompted by a television program on slavery broadcast on 15 January 1998. They were charged with creating a non-authorised association. Lawyer Fatima M'Baye was part of their defence team when she was arrested on 5 February 1998. In a trial marked by procedural irregularities, they were all convicted on 12 February and sentenced to 13 months imprisonment. On 24 March 1998, Mr. Ould

Ebetty and Ms. M'Baye were granted clemency by President Maaouiya Ould Sid'Ahmed Taya and were released from prison.

### PARAGUAY:

**Elixeno Ayala and Raul Sapena** {Judges of the Supreme Court}: On Wednesday, 27 January 1999, unknown persons threw molotov cocktails and shot at the homes of Supreme Court President Raul Sapena and Supreme Court Judge Elixeno Ayala. Suspects are supporters of General Lino Oviedo, the former chief of the army who participated in a previous attempt at a *coup d'état*. The attack is apparently due to the Supreme Court's decision declaring unconstitutional the Presidential Decree pardoning General Oviedo. The Court ordered the General to return to jail.

This attack follows a series of previous attacks on the premises of the Supreme Court, as well as threats against Supreme Court Judges. General Oviedo himself has demanded the resignation of Judges Ayala and Sapena.

### PHILIPPINES:

**Nicolas Ruiz** {lawyer}: On 12 July 1997, Lawyer Ruiz and his driver were abducted by unidentified armed men, while they were at a restaurant in Manila. Their relatives have not heard from them since. A petition of *habeas corpus* made by the families was unsuccessful; the authorities denied any knowledge of Lawyer Ruiz's whereabouts. However, the relatives and colleagues suspected the Intelligence Service of the Armed Forces, together with other security services, of being responsible for Mr. Ruiz's abduction.

Mr. Ruiz has been a subject of government surveillance for his alleged participation in the production and sale of drugs. Human rights organisations and Mr. Ruiz's colleagues in the Bar believe that he has been harassed solely because of his work as counsel for persons accused of drug-trafficking. On 24 July 1997 the integrated bar of the Philippines organised a boycott of the courts in protest of the authorities' failure to protect lawyers working on sensitive cases.

**Romeo T. Capulong, Marie Yuviengco, and Rolando Rico Olalia** {lawyers}: The three lawyers were harassed because they filed a murder complaint against several former and current high-ranking military officers, who were also members of the Reform of the Armed Forces Movement, on 2 January 1998. The case that the lawyers brought concerned the murder and torture of labour leader Rolando Olalia in 1986. It seems that former soldiers have recently admitted their participation in the killing of Mr. Olalia and his driver.

In February 1998, the offices of the Public Interest Law Centre were broken into, locks were smashed, inner doors to the offices of Attorney Capulong and another lawyer were forcibly torn down, filing cabinets containing case files as well as file boxes were forcibly opened and files were tampered with, and the central processing unit of a computer was taken, together with 1,700 pesos in cash.

Previously, in January 1998, the three lawyers received phone calls in their homes from unidentified persons asking information about their daily routine. Their office has also been visited by suspicious looking individuals, purportedly claiming to seek their services for various kinds of cases.

### **SRI LANKA:**

**Mr. Kulatilaka** {judicial officer}: Mr. Kulatilaka was a judicial officer serving under the Judicial Service Commission. From 1979 until 1981 Mr. Kulatilaka was a Primary Court judge and from 1981 until 1 October 1993 he was a Labour Tribunal President.

He was forced to retire at the age of 45 after a decision by the Judicial Service Commission, an administrative body dealing with the appointment, transfer and disciplinary actions regarding certain judicial officers. The usual retirement age is 60 years. There is no appeal possible against a decision of the Judicial Service Commission.

Mr. Kulatilaka filed a complaint against his compulsory retirement with the District Court of Colombo, where it was still pending at the time of writing. Mr. Kulatilaka had requested that a judge not under the supervision of the Judicial Service Commission would deal with his case. However, this request was refused.

**Mr. Mahanama Tilekaratne** {High Court judge}: He was suspended and prosecuted in September 1998. Fear was expressed that his suspension might discourage other judges from taking decisions which are not wanted by the Government.

### **ZIMBABWE:**

On 26 January 1999, **300 lawyers** defied a police order and marched to parliament, demanding an end to state torture. They were dispersed by riot police with batons, dogs, and tear gas.

## ANNEX I

# THE 1985 UN BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

The Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985 adopted the Basic Principles on the Independence of the Judiciary by consensus.

The Congress documents were "endorsed" by the UN General Assembly (A/RES/40/32, 29 November 1985) which later specifically "welcomed" the Principles and invited governments "to respect them and to take them into account within the framework of their national legislation and practice" (A/RES/40/146, 13 December 1985).

**Whereas** in the Charter of the United Nations the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

**Whereas** the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

**Whereas** the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

**Whereas** the organisation and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

**Whereas** rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

**Whereas** judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

**Whereas** the Sixty United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

**Whereas** it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

#### INDEPENDENCE OF THE JUDICIARY

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all government and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or communication by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

#### FREEDOM OF EXPRESSION AND ASSOCIATION

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
9. Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

#### QUALIFICATIONS, SELECTION AND TRAINING

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointment for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.
11. The terms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office where such exists.
13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.
14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

#### PROFESSIONAL SECRECY AND IMMUNITY

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.
16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

#### DISCIPLINE, SUSPENSION AND REMOVAL

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential unless otherwise requested by the judge.
18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.
20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

## ANNEX II

# THE UN 1990 BASIC PRINCIPLES ON THE ROLE OF LAWYERS

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Havana, Cuba, from 27 August to 7 September 1990 adopted by consensus Basic Principles on the Role of Lawyers.

In its resolution 45/121 of 14 December 1990, the General Assembly "welcomed" the instruments adopted by the Congress and invited "Governments to be guided by them in the formulation of appropriate legislation and policy directives and to make efforts to implement the principles contained therein... in accordance with the economic, social, legal, cultural and political circumstances of each country." In resolution 45/166 of 18 December 1990, the General Assembly welcomed the Basic Principles in particular, inviting Governments "to respect them and to take them into account within the framework of their national legislation and practice."

**Whereas** in the Charter of the United Nations the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language, or religion,

**Whereas** the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

**Whereas** the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

**Whereas** the International Covenant on Economic, Social and Cultural Rights recalls the obligation of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,

**Whereas** the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

**Whereas** the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

**Whereas** the Safeguards guaranteeing protection of those facing the death penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the



proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

**Whereas** adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

**Whereas** professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and co-operation with governmental and other institutions in furthering the ends of justice and public interest,

The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

#### ACCESS TO LAWYERS AND LEGAL SERVICES

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.
2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.
3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall co-operate in the organisation and provision of services, facilities and other resources.
4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

#### SPECIAL SAFEGUARDS IN CRIMINAL JUSTICE MATTERS

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.
7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.
8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

#### QUALIFICATIONS AND TRAINING

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognised by national and international law.
10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.
11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

#### DUTIES AND RESPONSIBILITIES

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.
13. The duties of lawyers towards their clients shall include:
  - (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
  - (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;
  - (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognised by national and international law and shall at all times act freely and diligently in accordance with the law and recognised standards and ethics of the legal profession.
15. Lawyers shall always loyally respect the interests of their clients.

#### GUARANTEES FOR THE FUNCTIONING OF LAWYERS

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics.
17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.
18. Lawyers shall not be identified with their clients or their clients causes as a result of discharging their functions.
19. No court or administrative authority before whom the right to counsel is recognised shall refuse to recognise the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.
20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.
21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.
22. Governments shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

#### FREEDOM OF EXPRESSION AND ASSOCIATION

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisation and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organisation. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognised standards and ethics of the legal profession.

#### PROFESSIONAL ASSOCIATIONS OF LAWYERS

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.
25. Professional associations of lawyers shall co-operation with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognised professional standards and ethics.

#### DISCIPLINARY PROCEEDINGS

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognised international standards and norms.
27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.
28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.
29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognised standards and ethics of the legal profession and in the light of these principles.



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THE NINTH EDITION OF **ATTACKS ON JUSTICE**, THE ANNUAL REPORT OF THE CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS (CIJL) ANALYSES LEGAL STRUCTURES AND THEIR EFFECTS ON THE INDEPENDENCE OF THE JUDGES AND LAWYERS IN 48 COUNTRIES. IT CATALOGUES THE CASES OF AT LEAST 876 JURISTS WHO SUFFERED REPRISALS FOR CARRYING OUT THEIR PROFESSIONAL DUTIES FROM MARCH 1997 UNTIL FEBRUARY 1999. OF THESE, 53 WERE KILLED, 3 DISAPPEARED, 272 WERE PROSECUTED, ARRESTED, DETAINED OR EVEN TORTURED, 83 PHYSICALLY ATTACKED, 111 VERBALLY THREATENED AND 354 PROFESSIONALLY OBSTRUCTED AND/OR SANCTIONED. THE CIJL ALSO RECEIVED REPORTS OF AN ADDITIONAL 508 JURISTS WHO SUFFERED REPRISALS IN 1997 AND 1998 BUT WAS UNABLE TO CONCLUSIVELY CONFIRM THOSE REPORTS.

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