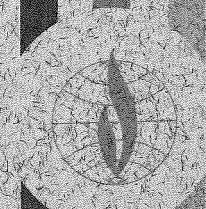


# Attacks on Justice

The Harassment and Persecution  
of Judges and Lawyers

June 1993 - December 1994

Centre for the Independence of Judges and Lawyers  
Geneva, Switzerland



Established in 1978 by the International Commission of Jurists in Geneva, the Centre for the Independence of Judges and Lawyers:

- promotes world-wide the basic need for an independent judiciary and legal profession;
- organizes support for judges and lawyers who are being harassed or persecuted.

In pursuing these goals, the CIJL:

- works with the United Nations in setting standards for the independence of judges and lawyers. The CIJL was instrumental in the formulation of the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers endorsed by the UN General Assembly;
- organizes conferences and seminars on the independence of the judiciary and the legal profession. Regional seminars have been held in Central America, South America, South Asia, South-East Asia, East Africa, West Africa and the Caribbean. National workshops have been organized in Cambodia, India, Nicaragua, Pakistan, Paraguay and Peru;
- sends missions to investigate situations of concern, or the status of the bar and judiciary, in specific countries;
- provides technical assistance to strengthen the judiciary and the legal profession;
- publishes a Yearbook in English, French and Spanish. It contains articles and documents relevant to the independence of the judiciary and the legal profession. Over 5,000 individuals and organizations in 127 countries receive the CIJL Yearbook;
- publishes a yearly report on "Attacks on Justice: The Harassment and Persecution of Judges and Lawyers" world-wide.

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Jurists and their organizations may join the world-wide network which responds to CIJL appeals by intervening with government authorities in cases in which lawyers or judges are being harassed or persecuted.

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# Attacks on Justice

**The Harassment and Persecution  
of Judges and Lawyers**

**June 1993 - December 1994**

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## Introduction

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This is the sixth annual report of the Centre for the Independence of Judges and Lawyers (CIJL). Every year, the CIJL, which is a component of the International Commission of Jurists (ICJ), publishes an annual report analysing existing legal structures and the prevailing human rights situation in various countries of the world as they effect judicial and legal independence. The report also catalogues the cases of judges and lawyers who are harassed or persecuted.

Why do we focus on judges and lawyers? This is because effective universal protection of human rights requires that every country has a system that checks the proper application of law. The executive authority has significant power to limit individual rights and freedoms. These limitations can only be permissible if they are consistent with human rights norms. It is the courts' task to examine the proper application of law and to check against the abuse of power by the executive. Hence, protecting judges and lawyers from improper interference in carrying out their professional duties is essential to preserving human rights. In other words, only where the judiciary and the legal profession are independent can a domestic remedy be effective. This is why the CIJL strives to promote judicial and legal independence.

Similar to previous years, the CIJL submitted *Attacks on Justice* to the United Nations. This year, the report was submitted to the UN Commission on Human Rights. Our purpose is to assist this body in assessing ways and means to protect judicial and legal independence.

The draft report was also submitted to the governments it covers for their comments. The observations of the governments who responded are included in the report.

## Trends in Judicial and Legal Independence during 1993-1994

This year's *Attacks on Justice* catalogues the cases of 572 jurists in 58 countries who have suffered reprisals for carrying out their professional functions between June 1993 and December 1994. Of these, 72 were killed, 3 were «disappeared», 28 were attacked, 119 received threats of violence, 24 were tortured, 177 were detained, and 149 were professionally sanctioned or obstructed. The report also examines how legal structures and the human rights situation as they influence judicial and legal independence in most of the countries considered in the report.

The report found that in Algeria, militant Islamist groups appear responsible for the killing of scores of civilians since 1992, including 27 judges and lawyers. The government passed anti-terrorism laws granting wide powers to the police and establishing special courts. The identity of the judges before these courts is concealed and the right to a legal defence is restricted. The appointment of lawyers in cases before the special courts is subject to the final approval of the president of the court.

Violence in Colombia has claimed the lives of 32 jurists, 13 others received threats, and 1 was attacked. Violence is carried out by the armed forces, paramilitary, or insurgent groups. The government cites attacks against judges to justify its creation of public order courts. In such courts, the identity of the judge is concealed. The prosecution may request that the witnesses and their testimonies be kept secret. Such courts are said to be used against drug-traffickers and insurgents. In practice, however, many cases before these courts are cases of non-violent social protest involving students and peasant leaders or cases of small coca cultivators.

*Attacks on Justice* demonstrates that instituting special procedures to try certain types of cases or individuals is a phenomena that is increasing. Peru, for instance, passed a new constitution in December 1993 which permits the trial of civilians before military courts. Individuals suspected of «treason» are tried

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before such courts. The court is composed of one legally trained officer, and four other active duty officers. In crimes of «treason» and «terrorism» the identities of the judges, prosecutor, and, in some cases, even of the witnesses, are not disclosed to the defendant. The terms «treason» and «terrorism» are loosely used. In many cases, lawyers who defend those accused of such charges were themselves accused of «treason» and «terrorism», therefore identifying the lawyer with the cause of the client.

In Egypt, while the regular judiciary is highly regarded, there is concern about the State Security and Emergency Courts. Following an increased campaign by Islamist groups since 1991 to attack civilian and government targets, hundreds of suspected militants have been brought before military courts composed entirely of military judges. There is no appeal of the decisions of these courts. Furthermore, the death of a lawyer in police custody intensified the friction between the government and the Bar Association in Egypt. A number of lawyers were beaten and arrested following an attempted demonstration by the Bar on 17 May 1994. To date, the result of the investigation on the lawyer's death has not been announced. The CIJL sent a mission to examine the situation.

Another matter that is taken up by the report is the way in which the question of corruption could affect judicial independence. In January 1995, as *Attacks on Justice* was being finalised, the Government of Equatorial Guinea suspended the entire judiciary in the country and set up a Commission of Inquiry to verify allegations of corruption. Until the report of the Commission is released, only the most urgent court-files are examined. Moreover, international human rights lawyer José Dougan Beaca was arrested. A few days later, he was released as a result of international pressure.

Also, revelations of pervasive corruption at the highest levels of Italian industry and politics have destabilised the country since 1992. The Italian judiciary has been the driving force behind the investigation of crimes of corruption. In November 1994, Judge Di Pietro decided to investigate Prime Minister Berlusconi. On 6

December, the judge resigned stating he had been subjected to pressure from various sides. On 22 December 1994, Prime Minister Berlusconi resigned.

Further, in France, judges investigating sensitive cases of corruption have been subjected to pressure. *Attacks on Justice* documents the cases of 4 judges who were subjected to such pressure. On a positive note, however, France amended the composition of its High Council of Judiciary, a constitutional body responsible for the selection, promotion, and transfer of judges. The amendment allows judges to elect their own representatives to the Council. As the French legal system serves as a model for many countries in the world, this development is much welcomed.

Indeed, the manner in which judges are nominated and promoted is of particular concern to the CIJL since it significantly affects judicial independence. The report shows that while Tunisia, for instance, allows judges to elect some representatives to its High Council of Judiciary, the majority of members are appointed. Twenty-five judges were intimidated by officials of the Tunisian Ministry of Justice following a CIJL seminar because they constructively criticised the role of the executive in the administration of courts in the country. In Morocco, the High Council of the Judiciary does not meet regularly. In Malaysia, in at least two recent cases of judicial appointments, junior judges superseded their senior colleagues. Such actions give rise to the fear that the appointment process is influenced by political considerations.

*Attacks on Justice* also deals with questions related to judicial tenure. It clarifies that the modes of appointing state level judges in Australia, for example, are governed by state law. The security of tenure of 26 judges was prejudiced as a result of abolishing the Accident Compensation Tribunal of Victoria and the Industrial Court of South Australia. The security of tenure is also threatened in Kenya through appointing judges on short-term contracts.

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In Indonesia, judges are supervised jointly by the Minister of Justice and the Supreme Court. In practice, the role of the Minister of Justice tends to endanger judicial independence. Judges are considered civil servants and as such they are required to be members of the Indonesia Civil Service Corps, an organisation chaired by the Minister of Home Affairs. The association requires its members to comply with its rules and policy guidelines. Such requirements undermine the neutrality of judicial power. Also, several lawyers, members of Indonesian human rights groups, were arrested.

In Iraq, the Revolutionary Command Council interferes in the administration of justice by promulgating decisions which have the force of law and hamper judicial independence and discretion. On 4 June 1994, the Revolutionary Command Council issued a decree introducing corporal punishment for the first time in the Iraqi legal system. Judges have no discretion on the imposition of such punishments.

The imposition of decrees that interfere in the proper administration of justice is a cause of serious concern. In Nigeria, for instance, a number of Military Decrees grant the Government freedom from accountability and oust the jurisdiction of the courts concerning governmental actions. The judicial system has been subjected to constant executive interference. Human rights lawyers have been detained for protesting the cancellation of the June 1993 elections. Lawyers also have been prevented from travelling abroad.

*Attacks on Justice* further examines the fate of defence lawyers in many countries of the world. In Turkey, for instance, since June 1993, 4 lawyers were killed, 19 tortured, 35 detained, 1 attacked, and 21 professionally sanctioned. Under the state of emergency, which is declared in 10 south-eastern predominantly Kurdish provinces, special courts are created. One member in such courts is a military officer. Broad anti-terrorism provisions are used which incriminate non-violent actions such as making oral and/or written statements regardless of the method, intention, and ideas behind them.

Lawyers who take up the defence of people before the State Security Courts in the area of Diyarbakir seem to be a special target. In a mass arrest, 16 lawyers were detained during a period of three weeks in November and December 1993 and charged under the Anti-Terror Law. They report that they have been tortured while in custody.

Even in countries like the United States of America obstacles exist. Judges complain about recently enacted criminal statutes that limit judicial discretion in sentencing. Criminal defence lawyers have been sued by the Justice Department because they refuse to reveal the identity of the sources of their declared income to the Internal Revenue Service. The lawyers feel that revealing the names of their clients would violate the attorney-client privilege.

## **The Selection of Countries and the Need for Information**

The above overview demonstrates the range of issues covered by the report. It indicates that judicial and legal independence can be obstructed not only by blatantly violent means such as the killing of judges or lawyers. Such obstructions can also take the form of imposing structural changes such as creating special courts that take away jurisdiction from regular courts or instituting administrative measures such as the termination of judicial tenure.

This is why *Attacks on Justice* covers countries ranging from Algeria and Colombia where judges are killed to countries like France and the United States of America where the issues are more subtle. While the 58 countries covered in this report do not always have comparable human rights records, what they have in common is that in all of them, actions were taken to undermine judicial or legal independence.

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This is not the sole criterion, however, which determines the inclusion of a country in *Attacks on Justice*. Such inclusion heavily depends on the availability of information. Whenever we have the necessary details, the country is included. Even new entities such as the Palestinian Autonomous Areas did not escape scrutiny. Unfortunately, however, some countries with obvious human rights problems escape our scrutiny because of the insufficiency of information.

What contributes to this lack of scrutiny is that many countries lack independent, courageous, and internationally-connected bar associations that can bring professional matters of concern to the attention of the international community. Also, human rights groups, who are active in monitoring the situation in their respective countries, do not always pay significant attention to the plight of judges and lawyers. Judges and lawyers are commonly regarded as more protected than ordinary people, and, therefore, do not need special attention.

The importance of monitoring the functioning of the legal system and the independence of judges and lawyers does not stem, however, from the special status of judges and lawyers in a society. It rather stems, as mentioned earlier, from the central role independent jurists play in maintaining the proper administration of justice and the protection of the human rights of all.

The CIJL warmly thanks the judges and lawyers and their associations as well as human rights groups who provide us with information. They are listed in the acknowledgements. We appreciate their courage and commitment to preserve the independence and integrity of judicial institutions. Their work enhances international solidarity and a better understanding of issues related to judicial and legal independence. It is only through this international solidarity that the universal dignity of the legal profession can be maintained.



## **The UN Recognises the Need to Protect Judges and Lawyers**

This need for international understanding of the situation of judges and lawyers is now recognised by the United Nations. In recent years, the United Nations reaffirmed the obvious link between protecting the independence of the judiciary and the legal profession and the advancement of human rights. For several years, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities studied measures taken by states to effect judicial and legal independence.

Convinced of how central this effort is to human rights protection, the Sub-Commission asked the 53 member states of the UN Commission of Human Rights in 1993 to appoint a Special Rapporteur on the Independence of the Judiciary. In 1994, a resolution appointing the Special Rapporteur was adopted by consensus. This significant step confirms that it is the duty of states to preserve judicial and legal independence and to protect judges and lawyers from inappropriate obstruction of their professional functions.

The mandate of the Special Rapporteur is three-fold. First, the Special Rapporteur monitors, investigates and reports on individual cases of judges and lawyers who suffer reprisals for carrying out their professional functions.

Second, the Special Rapporteur examines the contexts in which these violations of legal and judicial independence occur, and identifies the structural defects responsible for them. The Special Rapporteur makes concrete recommendations, including the provision of advisory services or technical assistance, in order to improve the functioning of legal systems around the world.

Third, the Special Rapporteur studies, for the purpose of making proposals, topical questions central to a full understanding of the independence of the judiciary, such as justice and emergency situations, justice and the media, and the status of the prosecuting authority.

The CIJL was instrumental in the formulation and the adoption of the resolution creating this office. The CIJL is proud that a member of its Advisory Board, Dato' Param Cumaraswamy, was nominated for this office.

The CIJL issued a statement announcing the appointment of the Special Rapporteur and his mandate. The statement was sent to bar associations, judges' groups, and other interested organisations all over the world. The Special Rapporteur, himself, wrote to all the governments and heads of judiciary of the world. We are pleased that several groups have responded positively and began to furnish the Rapporteur with information. Also the governments of Colombia and Peru extended an invitation to him to visit their countries.

In attempting to paint a picture on the situation of judges and lawyers around the world, as stated above, *Attacks on Justice* illustrates the need for information on this subject. As was reiterated earlier, precise information on particular situations of concern enhances international understanding and solidarity.

## Government Responses

The aim of *Attacks on Justice* is not to point out certain governments. Rather, this exercise attempts to pin-point problems related to judicial and legal independence in order to improve the situation.

In order to encourage constructive dialogue on judicial and legal independence, the draft of this edition of *Attacks on Justice* was sent to all the countries mentioned in the report for comments. States were given time to send their observations.

We are grateful to the governments of Bangladeshi, India, Iraq, Myanmar (Burma), Philippines, Sudan, Trinidad and Tobago, and Tunisia who took the time to read the report and

made efforts to comment on it. The summary of these governments' positions can be found in the relevant country chapters.

The CIJL hopes that *Attacks on Justice* contributes to enhancing international solidarity for the independence of judges and lawyers throughout the world.

*Mona A. Rishmawi*  
*CIJL Director*

# Algeria

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On 11 January 1992, faced with the imminent victory of the opposition Islamic Salvation Front (FIS) in the second round of Algeria's National Assembly elections, a military-backed governmental group ousted President Chadli Benjadid and replaced him with a High Security Council. The Council cancelled the second-round of elections and, on 14 January, established a five-member High State Council headed by Mr. Mohammed Boudiaf. On 9 February 1992, a state of emergency was declared. After the assassination of Mr. Boudiaf on 21 June 1992 by a member of the security services with Islamist sympathies, Ali Kafi was selected as President. In July 1993, Mr. Lamine Zeroual assumed power.

The cancellation of elections and the subsequent confrontations between the Government and militant Islamist groups have had dire consequences for the Rule of Law and have resulted in grave violations of human rights. Armed violence, the responsibility for which is shared by both government forces and militant Islamist groups, has resulted in the death of tens of thousands of individuals. Algerian security forces have carried out summary executions. Additionally, a large number of Algerians arrested by the authorities are detained under administrative orders, without charge or trial. Torture in detention has become commonplace.

Militant Islamist groups also claimed responsibility for the killing of scores of civilians since 1992, among them prominent

public figures, judges, lawyers, journalists, writers, artists and foreigners.

## **The Judiciary**

Under the 1989 Constitution, the President holds executive power, while legislative power is shared by the President and the Legislative Assembly. The judiciary is composed of: civil courts, which deal with misdemeanours and felonies; military courts, which try civilians accused of terrorist offences; and three Special Courts established in 1992 to try terrorism cases.

Despite the creation of exceptional courts, the regular justice system is still in operation in Algeria. According to the Constitution, judges are guided only by law and are protected against any form of pressure or intervention that might hinder the fulfilment of their mission.

The administration of the regular judiciary is the responsibility of the High Council of Judiciary. This body is presided over by the President of the Republic and decides on nominations, promotions and dismissal of judges. It also ensures respect for the provisions in the statute and the discipline of judges under the presidency of the First President of the Supreme Court.

According to the Organisation of the Judiciary Act, judges are appointed by presidential decree after consultation with the High Council of Judiciary. In addition, the Act introduced the principle of guaranteed tenure for judges who served ten years on the bench. Accordingly, these judges are "irremovable and cannot be transferred or given another assignment without the judge's consent."

Since the events of 1992, the competence of the regular judiciary has been substantially weakened. On 30 September

1992, Legislative Decree N° 92-03 *Relative to the Struggle Against Subversion and Terrorism* described below created three special courts and set forth penalties for crimes of terrorism and subversion.

Furthermore, under the State of Siege Decree of 4 June 1991, the government resorted to military courts to try civilians for politically motivated offences. The Military Courts are supervised by the Department of Military Justice of the Ministry of National Defence. These Courts have jurisdiction over crimes committed by military personnel as well as crimes committed by civilians against the security of the state.

### **The Anti-Terrorism Law**

On 30 September 1992, the Government issued Decree N° 92-03 *Relative to the Struggle Against Subversion and Terrorism*. The Decree defines «terrorism» in vague terms, stating that it includes any offence directed against state security, territorial integrity, or the stability and normal functioning of institutions. The Decree also considers the establishment of membership in any association, assembly, or group with aims or activities that fall within the definition of «terrorism» to be itself an act of terrorism. Moreover, actions such as praising, encouraging or financing subversive acts by any means, as well as the reproduction or distribution of any subversive documents, publications or recordings, are considered acts of terrorism. The Decree imposes more severe punishments for these crimes than those stipulated in the Penal Code. The death penalty has replaced life imprisonment as punishment for certain crimes. Life imprisonment became applicable to crimes previously carrying sentences of 10-20 years imprisonment. Crimes that were previously punishable by sentences of 5-10 years imprisonment now carry sentences of 10-20 years.

Moreover, the Decree increased the period of *garde à vue* detention to a maximum of 12 days. In some cases, suspects

belonging to Islamist groups were held in *garde à vue* detention for longer periods. In other cases, detainees are brought before an investigating judge at the end of their detention without having access to legal counsel. The extension of the period of *garde à vue* detention resulted in a marked increase in torture and ill-treatment in prisons.

## Special Courts

Decree N° 92-03 established three Special Courts and granted them jurisdiction over offences which took place before these courts were established. The Special Court prosecutor has the power to transfer any case under investigation or already on trial before ordinary courts to the Special Courts, if they concern an offence that falls within the Decree.

The Special Courts have competence to try suspects from the age of 16. The courts are empowered to sentence defendants accused of subversive or terrorist acts to long-term imprisonment or execution.

The Special Court chamber is composed of a President and four assessors. One or several chambers of instructions are created in the Special Court. The judges of instruction are chosen from among the judges of the court. Also, a chamber of instruction control is established. This chamber is composed of a President and two assessors.

According to Article 19 of the Decree, the judicial police have competence to investigate and to conclude that an offence, as prescribed in the Decree, has been committed throughout Algerian territory. The judicial police function is under the supervision of the General Prosecutor of the Special Court. Their function limits the task of the judge of instruction. The judicial police has wide power in the investigating process. They may, for example, after the approval of the General Prosecutor of the

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Special Court, deem individuals to be wanted and may publish their pictures and descriptions. The wide powers exercised by the judicial police may, in practice, affect the independence and impartiality of the judge of instruction.

After the case is examined by the judge of instruction, the file is referred to the chamber of instruction control. The decision of the chamber of instruction control is not subject to appeal. Then the case is referred to the Special Court.

Although Decree N° 92-03 states that trials should normally be held in public, it allows the judge, either on his own initiative or through a request made by the *ministère public*, to hear all or part of the proceedings *in camera*. The Decree gives the judge discretionary power in this matter; it does not include any criteria which would limit the holding of the session *in camera* to exceptional circumstances. Moreover, in practice, the judges reportedly restrict the number of observers at the trials and fail to order investigations of torture allegations.

Also, Decree N° 92-03 states, in Article 35, that decisions of the Special Courts may be appealed only before the Supreme Court. The latter has the power to annul the decision and return it to a Special Court composed of different judges.

The President, the Assessors and the General Prosecutor in the Special Courts are appointed by a presidential decree, based on the recommendation of the Minister of Justice. Other judges are appointed by an order from the Minister of Justice. The Decree states that the orders appointing judges shall not be published. Moreover, according to the Decree, anyone who publicises the identity of the President of the Court or its judges, or distributes information that leads to their recognition, will be sentenced from two to five years imprisonment.

## The Role of Lawyers

On 19 April 1993, Decree N° 92-03 was amended. The



modifications strongly curtail the rights of the defence. Modified Article 24 provides that the appointment of a lawyer in cases before the special courts is subject to the final approval of the President of the special court. Moreover, the judge presiding over the session has the power to appoint defence lawyers to replace lawyers who were absent, or who withdrew from the case or were expelled from the courtroom. Article 31, as amended, grants the judge the power to expel any party to the case or any other person, temporarily or permanently, using all legal means if he believes that the session is being disturbed.

Furthermore, on the request of the Public Prosecutor, the judge can discipline lawyers whose acts during the court session are deemed by him to be unprofessional. The judge may temporarily or permanently expel the lawyer from the session or temporarily suspend him from practising law for up to one year. These penalties may be implemented immediately and are not subject to review.

Algerian human rights organisations have expressed their concern that these provisions constitute a grave breach of the right to a legal defence and violate Article 16 of the UN Basic Principles on the Role of Lawyers. This provision states, «Governments shall ensure that lawyers are able to perform all their professional functions without intimidation, hindrance, harassment or improper interference.»

**Mustapha Ameur:** Judge of Instruction at the Court in El-Goléa. On 15 August 1994, he was shot dead at the entrance of the Mosque in Oued El-Abtel, W. Mascara.

**Larbi Baida:** Public Prosecutor at the Court of Algiers. On 14 July 1993, Baida was shot dead at Diar El-Afia near Kouba.

**Saadi Belghoul:** Lawyer. He was kidnapped in May 1994. His body was later found with his throat slit in Haouch El-Makhfi.

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**Mebarek Benantar:** President of Court in El-Harrach. He was injured on 22 September 1994.

**Brahim Benghanem:** Lawyer. On 16 April 1994, he was assassinated in his law firm in Sidi Moussa.

**N. Eddine Boucetta:** Judge at training. He was kidnapped on 22 September 1994. His fate remains unknown.

**Salah Bouhali:** Judge of Instruction at the Court of Bou Saada. On 19 June 1994, two days after he was kidnapped, he was found with his throat slit on National Street in Bou Saada.

**Redouane Chaouche:** President of Court at Tenes. On 20 November 1993, he was shot dead in his car outside his house.

**Abderahmane Chekkaf:** Public prosecutor in Saida. Mr. Chekkaf was shot and consequently died on 11 December 1993.

**Chiek Cherrak:** President of Court at Djelfa. On 27 January 1994, he was shot dead in Ain Temouchent.

**Arezki Mohammed Chaib:** Public prosecutor at Court in Tighzirt. On 22 October 1994, he was kidnapped and killed.

**Ahmed Djennidi:** Counsellor at Court in Algiers. He was kidnapped in Tablet on 28 January 1994. His body was found on 31 January 1994.

**Youssef Fathallah:** Lawyer and President of the Algerian League for Human Rights. On 18 June 1994, two armed men shot and killed him at the entrance of his office, in the Emir Abdel Kader area in the centre of Algiers. So far, no group has claimed responsibility for the killing. Mr. Fathallah practised law until three years ago, when he became a public notary. He was a human rights activist and an outspoken critic of both governmental and non-governmental abuses of human rights. He was elected twice as a member of the Algerian Bar Council. In

1991, he was elected as the President of the Algerian League for Human Rights. He was also a member of the commission of inquiry into the death of President Mohammed Boudiaf, assassinated on 29 June 1992.

**Mohamad Seddik Gantri:** President of Court in Tizi Ouzou. He was shot dead in December 1993, in the market in El Mouradia.

**Laid Grine:** Lawyer. On 13 May 1994, he was kidnapped. He was found with his throat slit in El Haouch El Makhfi, a few meters away from his residence.

**Abdelkader Ferhat Habouchi:** Attorney General at the Court in Mascara. Mr. Habouchi was a judge for 19 years. On 18 March 1994, he was shot dead in front of his house.

**Tahar Halis:** Public Prosecutor in Tighzirt (Kabyl). He was assassinated on 29 October 1994.

**Mohammed Keddari:** Counsellor at Court in Tlemcen. On 17 February 1994, he was shot dead as he was leaving his house.

**Mahfoud Kerdali:** Judge of Instruction at the Court of Algiers. On 30 November 1993, he was shot dead in Blida.

**Ali Khellaf:** Attorney General in Batna. He was injured on 22 September 1994.

**Mohammed Khellafi:** Public Prosecutor in Boufarik. On 2 September 1994, he was shot dead near his parents' residence in Chlef.

**Rabah Khelifi:** Lawyer. He was shot dead in Constantina on his way to work.

**Mahmoud Khelili:** Lawyer and President of the Algerian Bar Association. He is also active in defending human rights in

Algeria. On 10 August 1994, it is reported that his son, Farid Khelili, and a male companion, were ambushed and held hostage by unidentified armed men near the town of Boufarik. The following day, the men holding Farid brought him to see his parents, threatening them not to report the abduction to the authorities. Farid assumed his captors were armed Islamic militants. He therefore took several letters dating from 1990-1991 from his father's files, in which members of the FIS, a legal party at the time, expressed their appreciation towards his father for representing them in a number of trials. On 12 August 1994, while Farid, his companion and one of his captors were driving back from his father's residence to the place of his captivity, the police stopped the car and searched it. All the occupants of the car were taken to the police station. Two were later released, but Farid remained in custody. Farid was then brought before the prosecutor in Boufarik and was charged with membership in an Islamist group, apparently on the basis of the letters addressed to his father from the FIS. He is currently awaiting trial in Blida prison. Human rights organisations expressed their concern that, through the detention of his son, Mr. Khelili may be the victim of an officially sanctioned act of intimidation designed to pressure him to stop defending political opponents of the State.

**Rachid Oucham:** Former Attorney General and administrator at the Ministry of Justice. On 7 February 1994, he was shot dead in Braraki.

**M'hamed Rahmouni:** Counsellor at Court in Chlef. On 12 December 1994, he was shot dead near his house.

**Moussa Rekila:** Judge at the Court of Tighzirt. He was a judge for forty years. On 27 May 1994, he was kidnapped with his nephew. They were both shot dead a few hundred meters away from Mr. Rekila's house in Haouch El-Makhfi.

**Lakhdar Rouaz:** President of Court at Oran. On 6 December 1993, he was shot dead outside his house. Rouaz had held numerous functions in the judiciary. Among them are judge and Attorney General at the Court in Mers-El-Kebir, and

President of the Court in Gdyl. In 1993, he was promoted to President of a Chamber at the Court in Oran, where he remained until his death.

**Mohammed Said:** Attorney General at the Court of Tlemcen. On 17 May 1993, Mr. Said was shot dead near his home. He was accompanied by his two youngest children.

**Youcef Saidi:** Counsellor at Court in Médéa. He was kidnapped on 25 September 1993. On 26 September 1994, his body was found.

**Brahim Taouti:** Lawyer (see *Attacks on Justice 1992-1993*). On 3 May 1993, the Blida Military Court sentenced him to three years in prison, the maximum sentence allowed by law. He remains in prison.

**Amor Younsi:** Judge at Sétif. He was injured on 22 September 1994.

**Djillali Zaagane:** President of Court in Oued Rhiou. He has been a judge for ten years. On 3 January 1994, he was shot dead near his residence.

**Mabrouk Zidiri:** Lawyer. He was kidnapped around 7 March 1992 by the group *El Hidjra Oua Tekfir*. His body was found later that year.

**Ali Zouita:** Lawyer. Mr. Zouita has remained in detention without being formally charged since 1 February 1993, accused of «disseminating subversive documents» given to him by a client, Abdelkader Hachani, who is a leader of the FIS. He has also been accused of, among other things, incitement to murder and subversion, belonging to an armed movement, and possessing weapons.

In addition to judges and lawyers, several clerks of court have been killed. Among them are: **Berkane Serrai**, clerk of court

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in Blida, killed on 23 November 1993; **Khaled Miloudi**, clerk of court in Boufarik, killed on 12 December 1993; **Aissa Boudella**, clerk of court in Blida, killed on 27 January 1994; **Karim Senadjki**, clerk of court in Boudouaou, killed on 15 March 1994; and **Djamila Bentaiba**, clerk of court in Oued Rhiou, killed on 24 June 1994.

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# Argentina

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On 22 August 1994, a Constitutional Assembly passed amendments which significantly altered Argentina's constitutional structure. The ground for this reform had been set by President Carlos Saúl Menem and opposition leader Raúl Alfonsín Foulkes in what is known as Olivos-Pact (*Pacto de Olivos*) on 13 December 1993.

One of the most controversial features of the new Constitution is the clause allowing for a one-time re-election of the President (new Art. 90). This enables President Menem to run for a second term in 1995. In exchange, the presidential term was shortened from six to four years.

Also, the power of the President was diminished by the creation of the office of a Chief of Cabinet (*Jefe de Gabinete*), who is politically responsible to Congress (Art. 100). In many ways, this office resembles that of a prime minister.

Other new features include the requirement of congressional approval for emergency decrees and other urgent legislation (Art. 100.13) and the incorporation of petitions of *amparo* (writ of protection), *habeas corpus* and *habeas data* (Art. 43). According to new Art. 75.22, nine major international and regional human rights treaties now enjoy constitutional rank. Any other human rights treaty is automatically accorded this rank too, if approved by a majority of two-thirds of both houses of Congress.

The reform of the Constitution also brought important changes to the judiciary. Under Art. 86 of the old Constitution, the President had the power to nominate judges on all levels, subject to approval by a simple majority in the Senate. According to new Art. 99.4, the President will only keep the right to freely appoint the members of the Supreme Court (*Corte Suprema de Justicia*), but this appointment must be approved by a two-thirds majority in the Senate. Appointments for lower-level courts will have to be made from a list of candidates set up by the newly created Council of the Judiciary (*Consejo de la Magistratura*). The Council will also administer the funds assigned to the judiciary in the annual budget, exercise disciplinary functions and decide whether to open removal proceedings against lower-level judges (new Art. 114). In cases where a removal proceeding is started, the judge in question will immediately be suspended from office and judged by a special tribunal composed of members of Parliament, judges and lawyers (Art. 115).

The changes introduced by the reform could lead to strengthening the independence of the judiciary. However, the clauses that are especially relevant to the administration of justice (including those dealing with the procedure for filing *amparo* and with the composition of the Council of the Judiciary) are still vague. All details are left to future laws. Whether or not a depoliticisation of the judiciary will take place will depend on these laws. And even though Minister of Justice Rodolfo Barra announced in August that efforts would be made to get the Council working by February 1995, as of December 1994, no bill was introduced to Congress.

Politicisation and the susceptibility to outside pressure seem to be the main problems, especially of the higher levels of the federal judiciary. As a condition for their signing of the Olivos Pact, the opposition demanded «a more politically balanced» composition of the Supreme Court, which President Menem filled with judges close to his party in 1990 (see *Attacks on Justice 1990-1991*). Shortly after the signing of the pact, two judges resigned «as a patriotic act» and were replaced by judges acceptable to the opposition party. One of the judges who had resigned, Rodolfo



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Barra, was immediately named Minister of Justice by President Menem. Furthermore, pressure has been put on a third judge to retire voluntarily. Even though some observers point out that the new judges are highly qualified and that the court is now indeed more balanced than before, the incident demonstrates the enormous influence of the executive over the judiciary.

The change in the Supreme Court's composition took place at a time when public esteem for the highest tribunal had been seriously eroded. A study published in early 1994 reportedly indicated that not more than 13 percent of the population had faith in the judiciary. The main reason for the judiciary's bad image was the mysterious disappearance of one of the Supreme Court's decisions from its official record. The Court had reviewed a sentence that could have set a precedent for the Central Bank (*Banco Central*) to pay high legal fees to lawyers involved in the liquidation of small banks. As it first appeared, the case was decided against the Central Bank and the judges signed that decision. The relevant document, however, disappeared before it was ever published. The question was discussed again and decided in favor of the Bank. Investigations into the case were started by the police and also by Congress. Impeachment proceedings were called for by some members of Congress but never started. In the end, the Court decided that the missing document had only contained a draft (*«proyecto»*) and not a final verdict. In the course of this highly publicised incident, the Presidency of the Court changed hands four times.

Another factor that contributes to the judiciary's low prestige is its slowness in delivering decisions. This is due to the immense backlog of cases, especially in civil and labour law courts. According to statements made by Minister of Justice Alfonso Barra in August 1994, in the city of Buenos Aires alone there are more than 1,000,000 cases awaiting decision, which adds up to one case for every five inhabitants. In March 1994, newspapers reported that the 68 labour courts in Greater Buenos Aires had a backlog of 130,000 cases.

**Laura del Cerro, Elena Mendoza:** Lawyers in Buenos Aires. Both Laura del Cerro and Elena Mendoza received death threats

from a man who called himself «the right hand of Aníbal Gordon.» Gordon had been a paramilitary leader and head of the clandestine detention centre *Automotores Orletti* during the military dictatorship in the 1970s. The two lawyers are representing a young woman who is suing Eduardo Ruffo, a man from Mr. Gordon's former group, for monetary compensation because of his responsibility for the death of the young woman's mother. Mr. Ruffo had been sentenced to six years in prison for the abduction of the young woman. He has already served part of that sentence and is free again, but has so far not paid the compensation of about US\$ 5,000,000 he was fined.

**Alberto Ramón Durán:** Federal Judge of La Plata. On 15 June 1993, two men reportedly entered the school of Judge Durán's daughter and told the teachers that they were supposed to take the girl to her father. When the teachers refused to hand her over, the two men unsuccessfully tried to kidnap the young girl by force. A few weeks later, Judge Durán received a letter with photographs of his mother and his daughter as they entered a cemetery. He also received pictures showing his 11-year old son as he entered a gymnasium. One set of pictures was sent to his mother's house and another was found on a table in the entrance hall to the Federal Appeals Court (*Cámara Federal de Apelaciones*). Notes were included threatening Judge Durán's life and that of his family. The federal Appeals Court condemned the threats and expressed their solidarity with the judge, who had already been shot and severely wounded in 1988 by two unknown men. No further information could be obtained.

**Miriam Galizzi:** Lawyer and President of the Bar Association (*Colegio de Abogados*) of Paraná, Entre Ríos province. In December 1993, both Miriam Galizzi and judge **Susana Medina de Risso** reportedly received telephonic threats in which they were warned by a male voice not to keep on investigating into a certain issue. Otherwise they would end up like Lucio Dato, a lawyer who had been found stabbed to death in his office. The Superior Court (*Superior Tribunal de Justicia*) of Entre Ríos province publicly condemned these threats. No further details could be obtained.

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**Federico Alfredo Hubert:** Lawyer in Salta. Federico Hubert received death threats because of his work for the family of Diego Rodriguez Laguens. The latter was allegedly beaten to death in police custody in San Pedro, Jujuy province, in February 1994.

On the night of 14 October 1994, three unmarked cars passed Federico Hubert's house in the city of Salta on several occasions. An unidentified person got out of the cars and passed up and down outside the house. Earlier that same day, Mr. Hubert had received a telephone call from a person who refused to identify himself and who told him «not to make so much noise» about the Rodriguez Laguens case. Later that evening Federico Hubert detected another suspicious car parked outside his house. When he approached it, it drove off at high speed.

A judicial investigation into the death of Rodriguez Laguens was conducted in the city of Jujuy. As a result, Mr. Hubert frequently had to travel from Salta to Jujuy to attend court hearings. Since these hearings were held late at night, Mr. Hubert had to drive for a long time through thinly populated areas in the dark. His demand for a change in the court's schedule was refused, but he did receive police protection after protest from international organisations such as Amnesty International. Since then, he has not received any more threats.

**Germán Moldes, Eamon Mullen:** Public prosecutors (*fiscales*) in Buenos Aires. Eamon Mullen is in charge of investigations into the bomb attack on the Israeli Association AMIA in Buenos Aires in July 1994. Unknown people reportedly tried to enter his house right after he started the investigation into the massacre which had killed a large number of civilians. Germán Moldes, who also works on this case, said that his car had been broken into. At the same time, the Procurator General's Office (*Procuración General de la Nación*), which supervises all prosecutors, registered a number of telephonic death threats.

**Carlos Pérez Galindo:** Lawyer in Buenos Aires. Carlos Perez Galindo has been representing a repenting police officer who had participated in the infamous case of the kidnapping of

Mr. Sivak. Ever since Pérez Galindo helped his client denounce the other participants in the kidnapping, he has been threatened and harassed in his work. In September 1994, Pérez Galindo filed a suit with the Organisation of American States' Inter-American Commission of Human Rights (ICHR) against the State of Argentina. The Buenos Aires Bar Association (*Colegio Público de Abogados de la Capital Federal*) has unanimously voted to back him and support his complaint before the ICHR.

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# Australia

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By Section 71 of the Australian Constitution, judicial power is vested in the Federal Supreme Court, called the High Court of Australia, and in such other federal courts as the federal parliament may create. At the state level, courts are established by charter and by acts of the state Parliaments. Judges are appointed by the Government of the Commonwealth in the case of

judges of the federal courts, or by the state governments. They are usually appointed following consultation with the Chief Justice or presiding judge. In the case of the federal courts, the Constitution provides for judicial independence and security of judicial tenure. Section 72 (ii) states that judges:

«shall not be removed except by the Governor-General in Council, on an address from both houses of the parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.»

Although similar protection exists in the state constitutions, the provisions of these constitutions are subject to amendment without the approval of the people at referendum. As a result, the tenure of judicial and quasi-judicial officers in state tribunals is relatively insecure, dependent on long standing convention rather than legal guarantees. In recent years, this vulnerability has given rise to an encroachment by state governments on judicial tenure and independence. In several cases, judges or quasi-judicial officials have been effectively removed from office by the dissolution of the courts or tribunals over which they preside, and

a subsequent refusal by the government to re-appoint them to an equivalent judicial office. This practice has serious consequences for the independence of the judiciary in general, as it undermines judicial tenure, and reveals the disturbing possibility that other branches of the judiciary may suffer similar interference by the executive. Proposals are now being advanced to «entrench» protection of state judges in state constitutions by a process of referendum; however, it is expected to be some time before these safeguards are in place.

**Neil Wilkinson, Ray Rooke, Angela Smith:** Members of the Administrative Appeals Tribunal of Victoria (ATT). Members of the tribunal, which performs judicial functions, are generally appointed by the government for three-year terms. There is no statutory requirement that these appointments be renewed, but a convention had operated whereby re-appointment followed as a matter of course. In March 1994, three members of the tribunal, all of whom had some past association with the opposition party, were not re-appointed by the new government. The Attorney General denied any political motivation for this decision, maintaining that she merely wished to find «fresh faces.» No other reasons were given for the failure to re-appoint.

**Bernard Bongiorno:** Director of Public Prosecutions (DPP) of Victoria. In December 1993, the government of Victoria published draft legislation which substantially reduced the independence and powers of the DPP. The proposed legislation would have permitted a Deputy Director to control many decisions of the DPP. These would have included the decision to present a person for contempt of court, the decision to overrule a Crown Prosecutor who had declined to make a presentment or to enter a *nolle prosequi*, and to issue guidelines on prosecutions. The proposals came after the DPP had criticised the government and had threatened action for contempt of court against senior politicians. The DPP had also previously been involved in the investigation of the Former Federal President of the Government Party. Following protests from lawyers and members of the judiciary, the government modified its proposals, abandoning the idea of a Deputy Director. Bongiorno resigned in October 1994.

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Later, in a report made to parliament, he stated that the office of the DPP had been rendered meaningless, and its independence compromised, by the loss of control over budget and staff. The report stated that: «It is not unlikely that in the future the actual independence of the director of public prosecutions will be effectively compromised by an inability to direct or control the staff.»

**President R F Betts, Judge M J Arnold, Judge J B Bingerman, Judge L R Boyes, Judge J R Bowman, Judge M J Croyle, Judge M J Gorton, Judge P B Hardham, Judge C E Macleod, Judge B P McCarthy, Judge P J Mulvany:** Members of the Accident Compensation Tribunal of Victoria. The tribunal, established by the Accident Compensation Act of 1985, was abolished in 1992 by the Accident Compensation (Work Cover) Act of 1992 (see *Attacks on Justice 1992-1993*). The members of the tribunal performed judicial functions, and had the rank and status of judges of the County Court of Victoria. On the abolition of the tribunal, no provision was made for the continued tenure of its judges; consequently those among them who were not appointed to another equivalent judicial office were effectively removed from office. The nine judges who did not secure a new judicial appointment were offered some monetary compensation; however, the amount offered was insufficient to compensate for the loss of tenure. The judges have now commenced legal proceedings against the state of Victoria. They are claiming that they are entitled to re-appointment, but are seeking damages in the alternative.

**President Judge Jennings, Deputy President Hanson, Deputy President Stevings, Deputy President Gilchrist, Deputy President Huxter, Judge Parsons, Judge McCuster, Judge Cawthorne, Magistrate Cunningham, Magistrate Thompson, Magistrate Hardy, Commissioner Fairweather:** Members of the Industrial Court of South Australia. The Industrial Relations Bill of 1994 provided for the abolition of the Industrial Court. A schedule to the bill placed the continued tenure of judges of the court at the discretion of the government. Section 9 (1) of the schedule provided that Judges could be

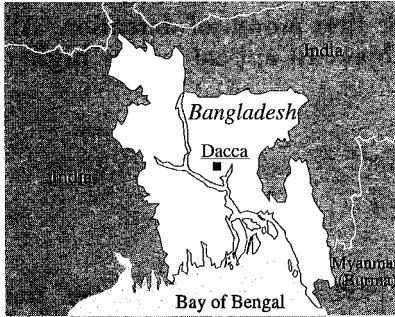
transferred to a corresponding office of the court «unless the Governor otherwise determines.» By subsection 4 of the same section, those judges who were not so transferred were to be appointed to «a judicial office of no less a status.» As a result of protests from the Australian judiciary, the Bill was amended to remove the above provisions. However, a clause remained whereby officers of the court, who previously enjoyed tenure until the age of 70 in the case of judges and 65 in the case of magistrates, are now to be appointed on the basis of six-year contracts.



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# Bangladesh

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Bangladesh has been a parliamentary democracy since 1991, when elections ended many years of military rule. Legislative power is vested in a unicameral parliament, the *Jatiya Sangsad*. The present government is made up of the Bangladesh National Party. Opposition parties, led by the Awami League, have boycotted Parliament since May

1994, in support of their demand for a neutral caretaker government and fresh elections.

The independence of the judiciary is guaranteed by the 1972 Constitution. Article 94 (4) provides that: «subject to the provisions of this Constitution the Chief Justice and the other judges shall be independent in the exercise of their judicial functions». Article 22 provides that: «The State shall ensure the separation of the judiciary from the executive organs of the State.»

The Bangladesh court system is comprised of the Subordinate Court and the Supreme Court. The Supreme Court is divided into the High Court division, which hears original cases and cases on appeal from the Subordinate Courts and the Appellate Division, which hears appeals of High Court cases.

The frequent use by the government of emergency powers contained in the Special Powers Act of 1974 (SPA) substantially restricts the role of the courts in protecting human rights. Under the SPA, the Ministry of Home Affairs may detain those deemed a «threat to the security of the country» for an initial period of 30

days. In some cases however, this period has been further extended. A second emergency powers act, the Suppression of Terrorist Offences Act of 1992 was enacted to deal with terrorist type offences in speedy trials before special tribunals. The tribunals are staffed by judicial officers who are selected by the Chief Justice of the High Court. There is no bail available for those arrested under the Act in the first month of detention. All decisions of the tribunals are subject to appeal to the higher courts.

## **The Government's Response**

In its response of 14 March 1995 to *Attacks on Justice*, the Government of Bangladesh stated that the Special Powers Act of 1974 has been amended. The amendments, however, were not supplied to the CIJL. It also stated that in November 1994, it repealed the Anti-Terrorism Act.

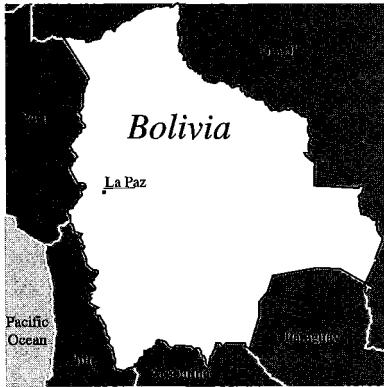
**Kazi Monwaruddin:** Judge of the High Court. On 11 December 1994 three bombs exploded at Judge Monwaruddin's home. That day, the judge, along with another High Court judge, had ruled that the boycott of Parliament by the opposition party was illegal. The bombs exploded at his home before he had left the court after giving his ruling in the case. The explosion damaged a car and wounded its driver, according to police. Though no group claimed responsibility for the attack, Judge Monwaruddin said that his ruling on the boycott was «the apparent reason.»

In its response the government said that this case is an isolated incident and that it took steps to prevent the reoccurrence of similar cases.

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# Bolivia

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Bolivia is a multi-party democracy with a directly elected President and a bicameral legislature. On 6 August 1993, after what was seen as a fair election, Gonzalez Sanchez de Lozada succeeded Jaime Paz Zamora as President. For the first time, a politician with indigenous ancestors, Victor Hugo Cárdenas, took office as Vice President.

On 12 August 1994, the President promulgated a reformed Constitution, the first to be modified according to rules established under it. All previous reforms had been carried out by *de facto* governments or constitutional assemblies. The promulgation was the result of a three-year process and was reached by compromises between all political parties. The reforms affect some 38 articles and deal mostly with political, electoral and judicial questions. The presidential and municipal terms of office were extended from four to five years and the voting age was reduced from 21 years to 18 years. Congressional seats will depend 50 percent on direct elections and 50 percent on «closed lists» (*listas cerradas*) presented by presidential and vice presidential candidates.

## Reforms of the Judiciary

The reform brought important changes to the administration of justice. A Council of the Judiciary (*Consejo de la Judicatura*) was introduced as the highest administrative and disciplinary body of the judicial branch. According to the new Article 119, the Council

will be presided by the President of the Supreme Court (*Corte Suprema de Justicia*). The other four members are selected by a two-thirds majority of Congress for a period of ten years from a list of candidates who must have worked as lawyers, judges, prosecutors or professors for at least ten years. The Council is charged with drafting the annual budget for the judiciary which it then presents to Congress. It administers the financial resources granted to the judicial branch by Congress, exercises disciplinary power over all members of the judiciary and draws up a list of candidates for the election of members of the Supreme Court by Congress.

Another institution created by the reform is the Constitutional Tribunal (*Tribunal Constitucional*). According to the new Article 119, it is independent from all other branches of government. Its five members will be elected for a term of ten years by a two-thirds majority in Congress. Its main task will be to resolve questions of constitutionality of laws, decrees and resolutions. It will also hear appeals in cases of *habeas corpus*. The President, the President of Congress and the President of the Supreme Court can ask the Constitutional Tribunal for an advisory opinion on the constitutionality of a law or decree as applied in a concrete case.

Unfortunately, the Constitution does not spell out in detail the co-operation between regular courts (which according to Article 228 are also directly bound by the Constitution and must not apply unconstitutional laws) and the Constitutional Tribunal. A law establishing the Tribunal is being discussed now and it is hoped that it will regulate that matter. Also, the rules applying to the revision of *habeas corpus* decisions should be elucidated.

## **Practical Problems and Recent Developments**

The major problem of the judiciary in Bolivia is its desolate financial situation. Even though the Constitution spells out the right of defendants to legal counsel in case they cannot afford it,

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this provision is often not respected. Lack of funds is given as justification for this failure. Another problem is the length of procedures which leads to a large backlog. A high number of prison inmates spend years in prison awaiting trial. Judges are poorly paid, which can give rise to corruption.

In a landmark trial, the Bolivian Supreme Court in April 1993 sentenced former dictator General Luis García Meza and 47 of his collaborators to long terms of imprisonment for massive human rights violations committed under their «narco-dictatorship» in 1980-1981. After an intensive search, García Meza was located and arrested in Brasil in March 1994. As of December 1994, his extradition to Bolivia was being processed by Brazilian courts. This exemplary case constitutes a new step forward in the struggle against the impunity of perpetrators of grave human rights violations.

On 13 June 1994, former Supreme Court President Edgar Oblitas and Justice Ernesto Poppe were impeached and removed from office by Congress. The Senate found them guilty of seeking to extort a bribe in the extradition case of a citizen from Nicaragua. The opposition parties all expressed their reservations about the correctness of the process. The Justices themselves said that the real reason for their removal had been their defence of the sovereignty of Bolivia in the face of demands for foreign extradition.

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# Brazil

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Brazil is a federal republic comprised of 23 states, three territories and the federal district (Brasilia). On 3 October 1994, former Minister of Finance Fernando Henrique Cardoso was elected President. Cardoso won an overall majority in the first round mainly because of taking financial measures which reduced inflation. His *Partido da Social Democracia Brasileira (PSDB)* also won 6 out of 27 governorships, and the coalition supporting him received the largest number of

seats in the Congress. Following a 1994 constitutional amendment, Cardoso's term of office will be limited to four years.

One of the main problems for the new administration will be the high level of violence in the country, especially in some shantytowns (*favelas*) of Rio de Janeiro. On 31 October 1994, then President Itamar Franco sent the armed forces into some favelas to fight the gangs that dominate these areas. During the course of this operation, the media reported a number of beatings and mistreatment. In rural areas, on the other hand, violence mostly stems from conflicts between the owners of large farms and landless peasants.

Among the reasons for the high crime rate are discrepancies in income, but also the fact that a large number of crimes go unpunished. Either they never reach the courts because of a malfunctioning investigatory system, or they are not dealt with effectively by the judiciary. The impunity enjoyed by most offenders also contributes to public tolerance of vigilante

lynchings of suspected criminals. Such lynchings were reported in all regions of the country.

In this climate of impunity, the security forces, and especially the state-controlled «military-police», are responsible for a number of killings and excessive use of force throughout Brazil. All crimes committed by members of this uniformed police (which despite its name is not part of the active armed forces) are tried in special military police courts. These courts, composed of four high-ranking military police officials and one civilian judge, have only seldom convicted policemen. They are understaffed and have a large backlog of cases. A bill introduced in Congress to give jurisdiction over police crimes against civilians to civilian courts remained stalled in Congress in 1994.

**Francisco Abreu, Jose Do Carmo, Celso Sampaio:** Lawyers. As a group of human rights advocates tried to investigate cases of violence between landowners and settlers near Lake Santo Agostinho in the north-eastern state of Maranhão on 6 November 1993, they were reportedly intimidated and threatened by several gunmen. A police officer accompanying them informed the group that he could no longer guarantee their safety and refused to enter the settlement. As a result, the group had to withdraw. Among the group were the lawyers Francisco Abreu of the Central Workers Union, Jose Do Carmo of the Pastoral Land Commission and Celso Sampaio of the Maranhão Society for the Defence of Human Rights.

On the night of their visit to Santo Agostinho, the members of the commission were again intimidated by a group of some 30 gunmen who surrounded the inn where they were sleeping in the nearby town of São Bernardo.

**Jayme Benvenuto de Lima Jr., Valdenia Brito, Katia Costa Pereira:** Lawyers in Recife, Pernambuco State, and members of the *Gabinete de Apoio Jurídico as Organizações Populares* (GAJOP), a human rights organisation that gives legal advice to poor people and community organisations. In the second half of 1993, all three lawyers reportedly received death threats. Jayme

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Benvenuto de Lima Jr., co-ordinator of GAJOP, survived an attack on his life when two people shot at his car on 23 July 1993. Shortly before, he had publicly denounced several cases of corruption within the state judiciary.

**Sister Cecilia Petrina de Carvalho:** Catholic nun and lawyer. Sister Cecilia works for the Church Land Commission (*Comissão Pastoral da Terra*) of the diocese of *Senhor do Bonfim* in the State of Bahia. She represents peasants in legal disputes with landowners and land claimants. On 22 October 1993, Sister Cecilia's car was reportedly shot at by a hooded man when she was travelling to the town of Cacimbas with a local town councillor. She was hit by a bullet that went straight through her right leg. Sister Cecilia, as well as local trade unionists and a priest, also received death threats in connection with another case. In that case, she had helped peasants gain a preliminary ruling in their favour for the demarcation of communal lands in the municipality of Andorinha.

There has been a history of violent land disputes in the Bonfim region. Land claimants try to fence off communal land used by peasants for grazing livestock and for gathering sisal to make crafts. At least six rural workers have reportedly been killed by gunmen in such disputes in the region.

**Lauro Ribeiro Escobar Junior, Stella Kuhlman, Marco Antonio Ferreira Lima, Paulo Marafanti, Antonio Augusto Neves:** Judges and prosecutors with the Military Justice Department of the State of São Paulo. The five jurists reportedly received death threats throughout the years 1993 and 1994. The threats were delivered to their homes as well as to the Offices of the State Council for the Defence of Human Rights. The threats could be connected to the involvement of these judges and lawyers in a number of cases involving crimes committed by members of the military police.

In July 1993, prosecutor Marco Antonio Ferreira Lima accused five agents of ROTA (*Rondas Ostensivas Tobias de Aguiar*) of forming a kidnapping ring that targeted wealthy businessmen.



ROTA is a special section of the military police known for gross human rights abuses during the military rule of 1964 - 1985. Four of the five policemen were sentenced to prison terms of 14-20 years. On 21 October 1993, Mr. Lima discovered a bomb planted in his car. A couple of days before, he had received an anonymous phone call in which he was warned that he would die in a car explosion.

In a deposition given on November 19, 1993, prosecutor Stella Kuhlman stated that she received death threats after she tried and convicted police officer Daniel Viana of the ROTA 148 division for kidnapping, robbery and two murders. On one occasion she was followed by an unmarked car driven by two ROTA officers.

Judge Lauro Escobar received a letter containing a bullet hole and a picture of a machine gun with the message «you will be next.»

In a report sent to the Ministry of Justice, the five jurists who received the death threats, accused the São Paulo Governor, the State Attorney General and the Commander of the Military Police of knowing about the death threats but declining to take any action to deter them.

**Reinaldo Gueded Miranda:** Lawyer and prominent member of the Workers' Party in Rio de Janeiro. The body of Reinaldo Gueded Miranda was found together with that of Hermogenes Almeida Filho, a poet and historian, on 13 June 1994. Reports suggest he was killed by security forces. No further details could be obtained.

**Judges at Electoral Court in Rio de Janeiro:** According to press reports, a number of judges of electoral courts received death threats. After the first round of elections for federal and state deputies in the State of Rio de Janeiro, more than 2,000 ballot boxes were recorded as having irregularities. The electoral court thus decided to recheck all ballot papers. Later, it annulled

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the results and set a re-run for November 1994. That decision led to several death threats that were received at the office.

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# Burundi

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The assassination of two Presidents in the space of six months and the severe ethnic violence, which re-emerges with each political crisis, have left the Burundian constitutional and legal order in a state of great fragility. The credibility of the legal system has been a victim of the deepening ethnic divisions; judges are predominantly Tutsi, hence their independence is held in low regard by members of the Hutu majority. The system is also hampered by a lack of resources and a shortage of trained judges; in criminal cases, defendants are often not represented by counsel.

The Constitution of March 1992 guarantees the independence of the judiciary. Article 143 states: «The judicial power is independent of the legislative power and the executive power. In the exercise of his functions, the judge is subject only to the Constitution and the law.»

The Burundian court system includes a Constitutional Court (see case, below) with the power to review the constitutionality of all laws, including decrees. It may interpret the Constitution, at the request of the President, Prime Minister, President of the National Assembly or a quarter of the Assembly's representatives. The court has power to rule on the regularity of presidential or legislative elections and referenda. A decree of April 1992 stipulates that it shall be composed of a president, a vice-president, and at least three other members. All members of the court are nominated by the Burundian President.

There is a divided system of civil and criminal courts, with appellate jurisdiction from both vested in the Supreme Court. Military courts try cases involving crimes by the members of the military. Article 145 of the Constitution establishes the Supreme Court as the highest court of ordinary jurisdiction. It is divided into several chambers: an appeal chamber, an administrative chamber, and a judicial chamber which hears cases concerning holders of public office. Decisions of the administrative and judicial chambers are appealable to a sitting of the full Supreme Court (Article 146). Appointments to the Supreme Court are the responsibility of the President (Article 147).

Under the Constitution, in cases of serious individual fault, judicial mandates are revocable only by disciplinary sanction, in cases of serious individual fault, where such has been established by fair enquiry during which judges have the opportunity to defend themselves.

**Gérard Nikungeko, President of the Constitutional Court; Dévotte Saburanka, Gervais Gatunance, Spès Carites Ndironkeye, Gédéon Mubirigi:** judges of the Constitutional Court. By decree N° 100/001/94 of 29 January 1994, issued by the government, the judges were dismissed from the court. At the time of the dismissals, the court had been due to give a ruling on the validity of the presidential elections of January 1994. No disciplinary proceedings had previously been brought against the judges. The decree revoking their mandate alleged a serious breach of their duties but detailed no specific charges against them. The Minister of Justice justified the dismissals by pointing to the impending resignation of two other members of the court, alleging that this would leave the number of judges of the court below the minimum required by the Constitution, and would result in an ethnic imbalance in the composition of the court. The resignation of the two judges had provoked a crisis within the court and had been followed, in the days immediately preceding the dismissals, by negotiations between the judges and members of the government in an attempt to avoid the dismemberment of the court. In the course of these negotiations, the government allegedly subjected members of the court to considerable pressure

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over their decision on the validity of the presidential elections. They were warned that a ruling invalidating the election would lead to civil war, for which the court would bear responsibility.

The Minister also alleged, in his justification of the dismissals, that the court had not respected the time limit specified in the electoral code, within which it must rule on the legitimacy of the presidential elections (under article 76 of the code the court must give its ruling within four days). However, the judges in a statement dismissed this as a mere pretext, arguing that the presidential election was not in fact governed by the electoral code but by Article 85 of the constitution, which imposes no time limit on the court. They also pointed out that in any case the negotiations of 25 to 28 January had prevented the court from sitting. They stated that the court, reduced though it was to five members, had been ready to hear the case on 28 January and that any delay was attributable to the government, since the negotiations took place at the initiative of the Minister of Justice.

The third justification put forward by the Minister was that the secrecy of the court's deliberations had been breached. In fact, there had been rumours as to the content of the court's decision on the January elections. However, the reports had been immediately followed by the dismissal of another judge, not among those listed in the decree. The Minister's failure to specify which of the listed judges was responsible for the violation of judicial secrecy also points to the weakness of the accusation.

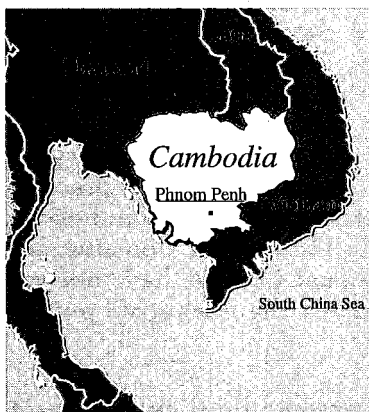
It seems that the dismissals were in fact an attempt by the government to avert the possibility of an unfavourable decision on the presidential elections. Regardless of the government's motive, the decree represented a breach of the security of judicial tenure guaranteed by the Constitution. The dismissals also violate Articles 1, 2, 17 and 18 of the UN Basic Principles on the Independence of the Judiciary.

On 1 October 1994 there was a bomb attack on the home of Gérard Nikungeko.

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# Cambodia

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The UNTAC supervised elections of May 1993, which took place in accordance with the 1991 Paris Peace Agreements, brought the first hope of stable government to Cambodia since 1970. The newly elected government established a committee of the Constituent Assembly to draw up a new Constitution, as provided for in the Paris Peace Agreements. The new Constitution was promulgated on 24 September 1993.

The Constitution establishes a Monarchy, with guarantees of fundamental human rights and provision for an independent judiciary. Article 31 of the Constitution provides that «The Kingdom of Cambodia shall recognise and respect human rights as stipulated in the Charter of the United Nations, the covenants and conventions related to human rights, women's and children's rights.» However, there is room for concern over ambiguities in the wording of the fundamental rights provisions, which would seem to accord rights only to Khmer citizens, leaving others, particularly the vulnerable Vietnamese minority, unprotected. In the context of the serious and continuing human rights violations in Cambodia, reliable guarantees of human rights and a judicial system with the strength to enforce them are of vital importance.

The notion that the government may interfere in the working of the judiciary is deeply entrenched, due to the Vietnamese-Soviet model on which the pre-1993 legal system was based. This notion has not been entirely extirpated by the institution of the new Constitutional structure. Prior to the establishment of the Supreme Court under the State of Cambodia (SOC) regime,

cases decided before the provincial courts were referred to the Ministry for Justice, which had an «advisory function.» Subsequent to the establishment of the Supreme Court, the Ministry of Justice continued to exercise considerable influence on the courts. Decisions of the Supreme Court could be referred to the Legislative Committee of the National Assembly, chaired by the Vice-Minister of Justice, and then to the Permanent Committee of the National Assembly. According to the present practice, there remains a perception that the Ministry of Justice has a role in the judicial process: in the course of some cases, negotiations take place between the judge and the ministry or between the judge and the provincial governor's office, a practice which seriously undermines the independence of the judiciary. The higher courts provided for in the Cambodian Constitution, the Supreme Court and the Constitutional Council, have not yet been established. Their absence leaves the executive power dangerously unchecked.

The new legal system must overcome both cultural and structural difficulties. The first of these is the lack of trained judges and lawyers; the majority of those with legal training did not survive the civil war. Second, the absence of detailed legal regulation in many important areas endangers the new system. The task facing the Cambodian judiciary is an immense one, involving as it does the construction of a respected judicial system in a country where all familiarity with fair judicial process, with the Rule of Law and the principles of human rights, has long been lost. The evacuations of 1975 resulted in the collapse of organised urban society; the Cambodian experience since that time has been almost exclusively one of imposed military force. Prior to 1993, the police force usurped the judicial function in relation to criminal matters. The police dictated verdicts in criminal cases, leaving the courts to «rubber-stamp» the outcome of the police investigation. In order to resist the power of the police and military, the new judiciary will require considerable strength and resilience.

It is questionable whether the new Constitution provides an adequate basis on which this strong structure can be built. The Constitution provides that «the judiciary shall be an independent

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power» but does not describe any of the structures which will be necessary to support and foster real judicial independence in Cambodia. The absence of guarantees of judicial tenure and salary, and lack of disciplinary procedures for the dismissal of judges leaves the new judiciary in a relatively weakened position which Cambodia can ill-afford. Municipal and provincial court judges are poorly paid, earning as little as US\$20 per month. Such low earnings clearly invite corruption.

The proposed establishment of a Supreme Council of Magistrature has given rise to some controversy. The function of the Supreme Council is to advise the Prince in matters of the appointment and disciplining of judges. The proposal, in the draft law on the Council, that the Minister of Justice should be one of its members, has been criticised as contravening Article 79 of the Constitution, which provides that no member of the National Assembly shall be a member of another Constitutional institution. There are fears that the Council will be dominated by judges and prosecutors appointed under the CPP administration and will thus put the independence of the judiciary at risk.

Problems continue to arise as a result of the lack of a qualified or trained judiciary. Rights guaranteed by the Constitution, such as the presumption of innocence, have in fact not been realised, due to the unfamiliarity of trial judges with such concepts. The stipulation in the code of criminal procedure that detainees must be brought before a judge within 48 hours, is often not complied with. There are also problems in relation to the granting of bail; there are reports that the bail laws are sometimes breached or applied unequally. In addition, the civil courts appear to function ineffectively; there is no legal representation in civil cases.

In 1993 the Centre for the Independence of Judges and Lawyers (CIJL) held a seminar on Judicial Functions and Independence in Cambodia. In the course of the seminar, members of the present and proposed judiciary of Cambodia discussed issues of human rights, the independence of judges and lawyers, as well as substantive legal and procedural issues.



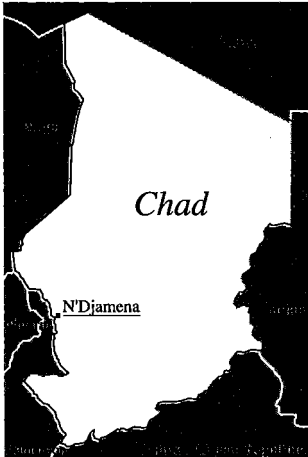
The position of legal defenders is far from secure; their existence is a novelty to the Cambodian legal process and they are present only in a small number of cases. Most legal defenders in Cambodia are not qualified lawyers, though they fulfil the role of a defence lawyer in criminal cases. Their work goes some way towards remedying the acute shortage of lawyers in Cambodia. The recent establishment of a law school is also an encouraging development. Legal defenders' access to defendants in custody is often restricted and they are regularly left with inadequate time to prepare a defence. A draft law proposed by the government envisages the establishment of a Bar Association of Cambodian Lawyers. The proposal would restrict entry to the association to Khmers who are law graduates and are certified as competent by a judicial body.

**Inn Cheng:** Legal Defender in Pursat, member of the Cambodian Defenders Association (CADEAS). Mr. Cheng was arrested after he refused to bring two clients whom he was defending to court. The judge in the case involving Cheng's clients had sent a clerk of the court to inform Cheng that he would not be accepted as a defender in the case. Cheng was denied access to files concerning the case. There were allegations that the plaintiff enjoyed the support of the military, and that both the judge and the defendants had been subject to pressure from high ranking military officials. At the hearing of the case on 13 July 1994, Cheng stated that he would not bring his clients to court unless he was given adequate time to prepare a case and allowed to read the files of the investigating magistrate and prosecutor. After the defendants defied a second order by the judge summoning them to appear before the court, Cheng was arrested. He was released several days later but received threats from the military aimed at both his family and himself, as a result of which he fled Pursat for Phnom Penh.

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# Chad

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Since a 1990 *coup d'état*, President Idriss Déby has been the Head of State of Chad. As reported in last year's *Attacks on Justice*, in 1993, a Sovereign National Conference established a transitional government under President Deby and adopted the Transitional Charter as an interim constitutional document for a period of one year.

Chad suffers at the hands of state security forces, who enjoy wide impunity for their acts, including extra-judicial killings. According to Amnesty International, over 800 individuals, many of them unarmed civilians, have been killed since President Deby took power in 1990. A general breakdown in the judicial system made, and will make in the uncertain future, prosecution of these crimes unlikely, if not impossible.

The first transitional year resulted in little improvement of the country's situation, especially in the area of judicial reform. The Transitional Charter was extended in force until 9 April 1995. In 1994, there were two noteworthy positive developments, a law on the creation of a constitutional chamber and the Government's ratification of two human rights conventions on 20 July 1994.

From 30 September to 2 October 1994, the Chadian Association of Jurists (ATJ), an organisation affiliated with the International Commission of Jurists, held a conference on the draft Constitution of Chad. The ATJ has released its observations on the draft constitution concerning judicial independence.

Stating that the power to nominate judges should not be vested in the executive, the A.T.J. calls for a High Council of the Judiciary comprised of elected and appointed judges, lawyers, and jurists with the authority to nominate, advance and discipline judges.

**Abdoulaye Cheick:** State Prosecutor, N'Djaména. In July 1994, the State Prosecutor in N'Djaména received a death threat allegedly from an officer of the Republican Guard for having released from detention the former Customs Director. Following the threat, judicial personnel staged a work stoppage for reasons of security. The President of the Republic intervened for work to restart.

**Bramina Onal Dékard:** State Prosecutor, Mao. In December 1994, M. Bramina Onal Dékard received a death threat directed at himself, as well as all judicial personnel in the area. It seems as if the threat emanated from the Gendarmerie in the area, who openly oppose the Prosecutor.

**M. Mbaiman:** President of the Tribunal of Faya-Largeau. In July 1994, M. Mbaiman received a death threat allegedly from an officer of the Chadian National Army. He fled to N'Djaména.

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# Chile

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Five years after the transition from a military dictatorship to a democracy, Chile is still struggling to do justice for the victims of past human rights abuses. On 11 March 1994, Eduardo Frei Ruiz-Tagle, who had been the candidate for the governing centre-left *Concertación de Partidos por la Democracia* coalition, succeeded President Patricio Aylwin Azócar as head of state. After a change in the Constitution shortly before the election, Frei will only serve a six-year term (instead of eight as envisaged by the 1980 Constitution, which had been drafted by the Pinochet government). Although the *Concertación* won a majority of seats in the lower house of Congress, in the Senate a voting system that favours minority parties, as well as eight senators appointed by the military in 1990, will continue to deprive the Government of a majority until 1997. Until then, the new President's scope of action will be rather limited, as he will have to work with constitutional structures drafted by the former military rulers.

The former dictator, 78 year-old general Augusto Pinochet Ugarte, still serves as Commander in Chief of the army and cannot legally be removed by the new President until 1997. Tensions between the military and the government are still strong. They have, however, not escalated as far as they had in May 1993, when troops in combat uniform had remained in the streets of Santiago for several hours.

## The Judiciary

Chile's court system consists of general law courts and military courts. Within the former, most cases are heard by single judges of first instance (*Juzgados de Letras*). The jurisdiction of general law courts is divided according to subject matter (civil, criminal, family or labour law) as well as regional jurisdiction. The Courts of Appeals (*Cortes de Apelaciones*) have the power to review all these cases. In some of the more severe cases, single judges of the *Corte de Apelaciones* have original jurisdiction, whereas a limited number of cases (especially those of habeas corpus /amparo) are heard in first instance by the full court. Appeals in the latter cases must be filed with the Supreme Court (*Corte Suprema*), which otherwise only hears appeals on important questions of law. Art. 7 of Law 19,047 of 1991, however, places crimes that «affect the international relations of the Republic» under the original jurisdiction of the Supreme Court, «which may appoint one of its members to investigate» (so-called *Ministro en Visita*). The sentence handed down by this judge can only be overturned on appeal to the entire Court.

There is general criticism of the judicial system being too slow and inefficient. A number of studies were undertaken in an attempt to prepare a comprehensive reform of the judicial system. The resulting proposals are a subject of debate in the academic and political arenas.

Under the present military penal code (*Código Penal Militar*) military courts exercise jurisdiction over military crimes as well as over common crimes committed by military personnel on active service or on military premises. In first instance, it is the commander of the respective division or brigade who serves as military judge, assisted by a military prosecutor (*fiscal*), by an *auditor*, who serves as general advisor to the administrative and judicial institutions within the armed forces, and by a secretary of the court. In second instance, the Martial Court (*Corte Marcial*) in Santiago hears all appeals, except for questions regarding Navy personnel, which are heard by the *Corte Marcial de la Armada* in Valparaiso. It is composed of two civilian judges from the

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Santiago (or Valparaiso) Appeals Court and a member of the respective branch of the armed forces. Under limited conditions, appeals on questions of law can be filed with the Supreme Court, which also decides all questions of jurisdiction. In times of war, special Councils of War (*Consejos de Guerra*) serve as the only instance within the military jurisdiction.

The judiciary and particularly the Supreme Court, where General Pinochet had nominated 9 new judges shortly before handing over power in 1989, remain dominated by Pinochet-appointees. These judges show an extreme reluctance to hold members of the military responsible for past human rights violations and readily apply the 1978 Amnesty Law. They are also very ready to grant jurisdiction to the military courts. Military judges rapidly apply the Amnesty Law and then close the cases.<sup>1</sup> Exercising original jurisdiction, one Supreme Court Justice did, however, sentence commanders of the former National Intelligence Directorate (*DINA*) for masterminding the 1976 assassination of former foreign minister Orlando Letelier in Washington, D.C. As of December 1994, the appeal to that sentence was pending before the entire Court, with counsel for Letelier's family objecting to various judges.

A Supreme Court Justice, Hernán Cereceda, was impeached and removed from office by Congress for «gross neglect of duty» because of lack of progress in a case where people were unjustly arrested.

A case that led to serious tension between the government and the Supreme Court was the 1976 murder of Carmelo Soria, a Spanish citizen and international civil servant for the United Nations' Economic Commission for Latin America and the Caribbean (*CEPAL*), who was killed by the *DINA* in 1976. After

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1 For a detailed description of the role the Chilean judiciary played under the military dictatorship, see the report Chile: *A Time of Reckoning*, published by the ICJ and the CIJL in 1992.

the Santiago Court of Appeals had appointed a *Ministro en Visita* to the case in May 1992, investigations implicated six soldiers, including two high-ranking army officers on active service, one of whom had worked for General Pinochet. The military courts immediately claimed jurisdiction, which they were granted by the Supreme Court on 16 November 1993.

After a very strong reaction by the Spanish Government, the Chilean government made use of its powers under Law 19047 (see above) and asked the Supreme Court to nominate a new *Ministro en Visita*. In line with its tradition that favoured impunity for members of the armed forces, the Supreme Court first refused. Only after Spain withdrew its ambassador and several procedural deadlocks were overcome, did the Court change its mind. As of December 1994, the case was still being investigated.

The last decision in the Soria case indicates a trend to slowly stop impunity for members of the armed forces. Several decisions issued by the Santiago Court of Appeals and the *Corte Marcial* also seem to testify to this trend. In September 1994, the Santiago Court held in two separate decisions that the amnesty law was inapplicable because it ran counter to Chile's obligations under international humanitarian and human rights law. In November 1994, the *Corte Marcial* ordered investigations into the 1975 detention and disappearance of socialist leader Carlos Lorca reopened.

**Héctor Salazar Ardiles:** Human rights lawyer in Santiago. On 14 April 1994, Mr. Salazar was arrested on the orders of the Second Military Prosecutor's Office (*Segunda Fiscalía Militar*) and charged with «sedition and inducement to disorder causing loss of commitment of the troops» (*Sedición impropia*, Art. 276 of the Military Penal Code). He was briefly held in the prison Anexo Capuchinos in Santiago, but released on bail the day after.

When he was detained, Héctor Salazar Ardiles was working on the so - called «slit throats» case (*Los Degollados*) concerning Santiago Nattino Alliende, Manuel Guerrero Ceballos and José Manuel Parada Maluenda. In a landmark decision on 3 April

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1994, sixteen members of *Carabineros* (the Chilean gendarmes) and one civilian were convicted of abducting and killing the three men. They received sentences ranging between 41 days and life imprisonment. In addition to the sentencing of the 17, five generals and two other armed forces officers were implicated as having tried to cover up the crime and obstruct justice. Among the officers, the name of General Rodolfo Stange, head of the *Carabineros* was mentioned.

After the publication of the verdict, an official investigation was started against General Stange. President Frei, who cannot legally remove any commander of the armed forces until 1997, called on the general to resign «as a matter of conscience,» but the latter refused. After a strong protest from a wide range of political leaders, he finally did agree to go on «indefinite leave» pending the judicial hearing of his case. When it was established, however, that his involvement in the cover-up did not go far enough as to constitute a criminal offence, he returned to his post .

It was in the context of that debate that Héctor Salazar Ardiles gave interviews for *El Siglo* newspaper and for *Canal Nacional* and *Canal 13* TV channels, during which he asked whether any *Carabiniro* was ready to follow orders from General Stange and risk facing life imprisonment like others before them. That statement was used as the basis for the sedition charges and led to a conviction by the *Corte Marcial*. On appeal to the Supreme Court, the first chamber overturned and ordered a retrial. On 27 October 1994, the Martial Court temporarily closed the case, arguing that the investigation had been exhausted. This, in turn, was appealed by the Military Prosecutor. On 29 December 1994, the Supreme Court's second chamber allowed the appeal. Héctor Salazar fears that the military is trying to influence his professional activity by artificially keeping the case open.



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# China

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Article 126 of the Chinese Constitution of 1982 provides that the courts shall be free from interference by «administrative organs, public organisations and individuals.» As a result of the pervasive influence of the ruling Chinese Communist Party, however, the Chinese legal system

does not enjoy any real degree of independence. The criminal justice system is widely used by the State to suppress political dissent. Large numbers of dissidents continue to be detained on charges of «counter-revolution.» The limitations placed on the courts are twofold in nature: their role is usurped by non-judicial structures and their operation is influenced by executive pressure.

Under the Chinese Constitution, the courts are under the authority of the National People's Congress, but have status equal to that of the State Council and the Central Military Commission, the two principal institutions of government. The Chinese court system is comprised of four levels of courts: People's Courts, Intermediate People's Courts, High People's Courts and the Supreme People's Court. At first instance, decisions are made by a 'collegial panel' of professional judges and 'peoples assessors,' lay people drawn from the local community.

In many instances detention takes place outside the authority of the judicial system altogether; administrative sanctions, which circumvent the established criminal procedures, are widely used to detain suspected political dissidents. These include procedures

such as «taking in for shelter and investigation» and «re-education through labour.»

Criminal procedure, governed by the 1979 Criminal Procedure Law (CPL), falls short of international fair trial standards. Much importance is attached to confession in the determination of guilt, an outlook which is conducive to the ill-treatment of detainees. Great emphasis is placed on the pre-trial investigative procedure. The lengthy process of investigation can be seen as establishing guilt, making the determination by the court a mere formality. In the course of an investigation the authorities may decide to 'exempt' an individual from prosecution where «the circumstances of a person's crimes are minor and do not require sentencing to punishment.» (Section 32 of the Criminal Law). Such a determination involves an implication of guilt without a trial having taken place, thus circumventing the judicial process.

Decisions of the courts are closely monitored by the CCP's «politics and law committees.» In addition, «major or difficult cases» may be submitted to an «adjudication committee;» such committees are composed largely of Communist Party members. The procedure in effect allows the jurisdiction of the courts to be ousted in favour of a political body.

The functioning of the Chinese legal profession is similarly obstructed by the lack of independence from executive power. The legal profession is under the authority of the Ministry for Justice, which controls the All China Lawyer's Association. Most lawyers are state employees. Since 1988 there has existed a number of «co-operative» law firms, which enjoy a greater degree of autonomy than the mainstream firms, but are nevertheless not immune from state influence. In October 1993, the Ministry of Justice stated that the number of independent law firms would be increased. All lawyers must have a licence to practice law, which is issued with the approval of the local justice agency and provincial justice bureau. The licence must be renewed yearly, a requirement which can be used to weed out politically undesirable lawyers (see case of Li Gouping, below).

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State interference with the legal profession is manifested in the authorities' practice of warning lawyers not to represent defendants in certain cases. In an illustrative case of August 1993, Liao Jia'an was sentenced to three years imprisonment on charges of «counter-revolution,» after the judicial authorities had reportedly warned lawyers in Beijing not to defend him.

Under the Criminal Procedure Law, defendants must be given notice of their right to appoint counsel seven days before the trial. However, even this minimum period is not always guaranteed in practice. In criminal trials, lawyers are often left with inadequate time to prepare a defence. In the case of Gao Yu, a journalist sentenced to six years imprisonment in November 1994, her lawyers were not notified of the date of her trial; they heard about it only after it had taken place. An additional problem exists in relation to lawyer - client confidentiality. Article 2(3) of the Several Specific Provisions Regarding Lawyer's Participation in Litigation, 1981, requires a defending lawyer in a criminal case to inform the authorities of anything he knows about the defendant which the authorities «need to understand.»

**Fan Weijun:** Professor at the Law Research Institute of the Chinese University of Politics and Law. Leader of the Beijing Citizens Autonomous Federation. He was arrested in 1989. His whereabouts remain unknown.

**Li Gouping:** Lawyer. Li Gouping's licence to practice law was revoked in 1992 (see *Attacks on Justice 1992-1993*), following her plea in a Hong Kong newspaper for the release of her husband, Yang Zhou, a political prisoner. Li Gouping has reportedly continued to request the reinstatement of her licence, but the requests have been consistently denied.

**Li Shuguang:** Associate of the Chinese Legal Institute. Since his arrest in June 1989, his fate remains unknown.

**Ren Jun:** Lawyer and former student at Beijing University. There are reports that he disappeared in 1993.

**Wang Tiancheng:** Lecturer in law at Beijing University and editor of the law journal 'Chinese and Foreign Jurisprudence' (see *Attacks on Justice 1992-1993*). In September 1993, he was formally indicted on charges of «actively participating in a counter-revolutionary group» and «carrying out counter-revolutionary propaganda and incitement.» This followed his arrest without charge almost a year earlier, on 2 November 1992. The authorities claim that he was a leader of two political groups, the Young Marxist Party and the Democratic Freedom Party. At a 1988 conference on the Chinese Constitution, Wang had described the state of Chinese administrative law as 'feudal,' a comment which reportedly aroused the anger of the Chinese authorities. Wang's trial began on 14 July 1994 : he was tried alongside 13 other political prisoners. On 16 December 1994 the Beijing Intermediate People's Court sentenced him to five years imprisonment.

**Professor Yu Haocheng:** Legal scholar, former director of the China Legal System and Social Development Institute and former editor of the journal «The Science of Law». Professor Yu has been a strong advocate of human rights and legal reform. He has repeatedly been denied a passport and permission to leave China. In July 1993, he requested permission to travel to the US to take up a position as visiting scholar at an American university. The permission was denied the following month. In October, he once again requested permission to leave the country, this time in order to attend a conference on human rights in Hong Kong. Again the request was rejected; no reason was given for this decision. His paper 'On Human Rights and their Guarantee by Law' was nevertheless delivered at the conference. Subsequently, the Chinese authorities have threatened Yu with punishment if he continues to allow his views to be published outside China. However, in May 1994 Professor Yu was granted a visa, after he had requested permission to travel to the US to take up a position as visiting scholar at Columbia University.

**Yuan Hongbing:** Law professor, director of the sub-department of procedural law at Beijing University. **Zhiou Guoqiang:** Lawyer, founding member of the illegal Beijing

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Autonomous Worker's Federation, (BAAF). **Wang Jiaqi:** Postgraduate law student. The three were among a group of dissidents detained and questioned in March 1994. They were held under the «taking in for shelter and investigation» procedure. Yuan Hongbing and Wang Jiaqi were detained on March 2, accused of «being involved in unlawful acts inciting turmoil and disrupting social order.» They were also accused of other, unspecified, «criminal acts». They had been involved in campaigning for the right of freedom of association for Chinese workers and had initiated a petition addressed to the National People's Congress and judicial bodies in Beijing, which demanded justice in a case of alleged police brutality. Wang had also provided legal advice to individuals and groups pursuing violations of human rights committed by government officials. He was legal co-signatory of an administrative law suit filed on behalf of dissident Han Dongfang and at the time of his arrest he was representing about 2,000 persons in a civil suit against a supermarket allegedly responsible for large-scale pollution.

Zhiou Guoqiang was detained the following day, 3 March, accused of «collaborating with hostile organisations and elements both inside and outside the country to carry out anti-government activities» and of writing anti-government articles and sending them to Hong Kong «by means of an unauthorised fax machine.» According to the China News Service (CNS) in Hong Kong, these charges were in connection with his involvement in drawing up a «Peace Charter» in October 1993 which called on the government to respect international standards of human rights. The charges also stem from his plans to «distribute t-shirts bearing provocative slogans» during the meeting of the National People's Congress in March 1994. Zhiou Guoqiang represented BAAF leader, Han Dongfang, who was forcibly prevented from re-entering China in August 1993.

Wang Jaiqi went on a hunger strike shortly after his arrest. On 27 March he escaped from detention and left the country. No information is available on the detention of Yuan Hongbing, despite his wife's repeated requests for information to the Ministry of State Security in Beijing. Zhou Guoqiang's whereabouts remain unknown.

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# Colombia

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At first glance Colombia seems to be one of the few stable democracies in Latin America with constitutional safeguards for human rights. Its 1991 constitution calls for a strict separation of powers, with a directly elected President as head of the executive, a two-chamber Parliament, and an independent judiciary.

The Supreme Court (*Corte Suprema*) is the highest court of appeal within the system of ordinary jurisdiction. It also has the power to investigate and try members of the government. A Council of State (*Consejo de Estado*) is the highest court for administrative litigation. A Constitutional Court (*Corte Constitucional*) has jurisdiction to review the constitutionality of ordinary laws passed by Congress as well as that of decree laws and legislative decrees issued by the executive pursuant to the state of emergency. Judges for any of these Courts are chosen through mechanisms that try to assure the participation of all three branches of government for a non-renewable term of eight years (see *Attacks on Justice 1991-1992* and *1992-1995*).

Three different agencies share the task of investigating alleged offences. The Prosecutor General's Office (*Fiscalía General de la República*) is responsible for investigating crimes and bringing charges against alleged offenders before the appropriate courts. In addition, the Procurator General (*Procurador General*) as head of the independent Public Ministry (*Ministerio Público*) watches over the lawfulness of all actions of the executive. Working together with the Defender of the People (*Defensor del Pueblo*), a national-level ombudsman, the Procurator has the power to investigate and sanction as disciplinary infractions all alleged human rights

violations by public officials. He can demand the dismissal of perpetrators from public service, including from the military.

At second glance, however, the picture looks quite different. Neither members of the armed forces nor members of the national police can be brought before regular courts for «actions in connection with their service» (Art. 221 of the Colombian Constitution), a term usually interpreted very broadly. Their cases all fall under military jurisdiction, which rarely leads to convictions even in cases of severe human rights violations. The *Procurador* himself stated before the Senate that human rights violators in the military enjoyed «100 percent immunity in the military criminal court systems.» In none of the cases in which the Inter-American Commission of Human Rights has held the Colombian state responsible, has a person been brought to justice.

The unwillingness of the previous Government to fight against impunity became once again apparent when former President Cesar Gaviria Trujillo, whose term ended in August 1994, objected to provisions of a draft law against disappearances passed by Congress. Mr. Gaviria objected to the core provisions of the draft that would have submitted members of the armed forces to civil jurisdiction in cases of forced disappearances, as well as the clause in the law which would have deprived the accused of the defence of «due obedience.» The clause allows subordinates to claim innocence on the grounds that they were acting on orders of a superior officer. He also objected to the mandatory 40-year prison sentence for «disappearances» carried out after a lawful detention.

The Inter-American Commission of Human Rights and the President's own Advisor on Human Rights (*Consejero de Derechos Humanos*) both called on the Government to exclude forced disappearances from military jurisdiction, just as is called for by the American Convention on Forced Disappearances which the Organisation of American States had approved in June 1994 with a favourable vote by Colombia. In spite of promises to safeguard human rights, however, newly elected President Ernesto Samper Pizano objected to the mandatory civilian jurisdiction clause. In

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the end, the Senate accepted all reservations (even those no longer supported by Samper). If the bill should become law in its present form (as of December 1994 it was still being considered by the lower house), the objections would render it useless, as it does nothing to fight against the current impunity. It would also send a message to the armed forces that no real fight against forced disappearances is intended.

## Violence

The powerful role of the armed forces must be seen in connection with the high level of violence in the country. According to statistics compiled by the National Planning Office (*Departamento Nacional de Planeación*), Colombia, with an average of 78.5 murders for every 100,000 people, leads the world in murder. Among these victims are the so-called «undesirables», i.e. street children, prostitutes, homosexuals, beggars or presumed car-thieves who are killed by paramilitary or even guerrilla groups, in what is called «social cleansing» operations (*limpieza social*). Many people are killed for political reasons, either by the armed forces, the paramilitary groups, or the several armed insurgent groups; especially the Colombian Revolutionary Armed Forces (*Fuerzas Armadas Revolucionarias Colombianas*, FARC), and the National Liberation Army (*Ejército de Liberación Nacional*, ELN). Reports by various independent human rights organisations have shown, however, that a majority of the abuses for which personal responsibility could be established can be attributed to the armed forces or the police, who are either directly responsible or acquiesce to such acts by paramilitary organisations.

Since 1992, when negotiations between the Government and the insurgent groups failed, Colombia has seen a new round in the spiral of violence with the former Government determined to beat the guerrilla on the military front. Responding to public demand, the former Government also tried to crack down on the drug cartels and hunt down the leader of the Medellín cartel, Pablo Escobar Gaviria. Escobar had walked out of a luxury prison he



had built. A new paramilitary group called the PEPEs (*Los Perseguidos por Pablo Escobar*, the Persecuted by Pablo Escobar) emerged and with the acquiescence of the government killed dozens of Escobar's relatives and friends, including five of his lawyers (see *Attacks on Justice 1992-1993*). In the end, Escobar was hunted down and killed in December 1993. In the course of this struggle, and in order to strengthen the security forces, the armed forces were assigned functions of the judicial police giving them an unprecedented power over civilians. Even though this measure was subsequently declared unconstitutional by the Constitutional Court, the armed forces have persisted in exercising these functions.

## Public Order Courts

Citing the danger judges and judicial officials face as primary targets of insurgents and drug traffickers, the Colombian government in 1988 created a system of public order courts, now called courts of regional jurisdiction (*Justicia Regional*). In these courts, the defendants' due-process rights are severely restricted. The identity of the judges is concealed. Furthermore, the prosecution can insist on keeping its witnesses and their testimonies secret. Although this is meant to be used in exceptional cases, it seems to be general practice. This makes it impossible for the defence to cross-examine witnesses, many of whom are informants of the army hoping for personal rewards in exchange for inculcating others.

Often the armed forces intervene in the judicial investigation by presenting intelligence reports which incriminate the defendant. Even though no precise dates or sources are mentioned in these reports, they are regularly admitted as valid evidence. Defence lawyers very often have little or no access to the files until the court stage. At times they have no access whatsoever. All this makes a proper defence illusory. In August 1994, the UN Working Group on Arbitrary Detention held the detention of the three Dominican citizens in Colombia to be

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arbitrary of infringements of due process in cases before the public order courts.

The number of cases listed below shows that even the severe restrictions of defendants' due process rights in cases before public order courts do not lead to a complete protection of the judges and prosecutors. This pretext is, however, often invoked to try and expand the «regional» jurisdiction. Of the 30,000 detainees the National Penitentiary Institute registered in 1993, more than 10,000 are being detained for offences that fall under the jurisdiction of the public order courts. In practise, many cases before the public order courts are cases of non-violent social protest by student and peasant leaders or cases involving peasant cultivators of coca.

In June 1993, Congress approved a law regulating states of emergency. This law entitles the security forces to carry out arrests and raids without warrant and allows the government to restrict the right to strike, redefine crimes, increase sentences and modify penal procedures. Although the state of internal commotion, which had been declared in November 1992, was lifted in August 1993, most of the emergency measures taken during this state of internal commotion were extended for another 90 days. In December 1993, Congress passed a bill which incorporated many of them.

## **The Government and the Judiciary**

The last year of President Gaviria's administration was marked by tensions between the executive and the judiciary. A ruling by the Constitutional Court in May 1994, which decided that the penalisation of the consumption of small quantities of drugs was unconstitutional, prompted strong criticism from the Government. In another case, the Council of State ruled that the presence of US soldiers, who were supposedly building a school on Colombian territory, was unconstitutional; the executive openly defied the decision. In another case of conflict, then

President César Gaviria declared the State of Internal Commotion on 1 May 1994 to prevent the release of prisoners whose cases had not been brought to trial within the maximum period allowed by law according to the Code of Criminal Procedure (*Código de Procedimiento Penal*). Shortly afterwards, the Constitutional Court declared this proceeding unconstitutional.

In some cases, however, the Constitutional Court itself contributed to the weakening of the judiciary's ability to protect the rights secured by the new Constitution.

In a ruling published on 27 January 1994, the Court allowed detentions and searches by the police without a written judicial warrant. The 1991 Constitution had explicitly abolished the right of the Government to arrest people in case of a national emergency. Instead, the new Constitution requests that everybody be brought before a judge within 36 hours of an arrest. In its decision, the Court interpreted this clause - intended as a safeguard for due process rights - as allowing the police to arrest people, as long as they are presented to a judge within the 36-hour limit. On the day after this decision, in the city of Bogotá alone 3,000 people were arrested and searched without a warrant. In the countryside, the effects of the decision might be felt even more as warrantless arrests have never been unusual there. In the town of Saravena, Arauca department, for example, the armed forces on 3 January 1994 detained more than 1,000 people and huddled them together in a park accusing them of collaboration with the guerrilla.

In another decision published in April 1994, the Constitutional Court greatly limited the right to privacy. It considered the unauthorised entry of police officials into private homes as a minor offence to be dealt with by police investigators.

## **The New Administration of President Samper**

Newly elected President Ernesto Samper Pizano made

specific promises at the beginning of his term. These include the continuation of the reform of the National Police, eradication of the paramilitary groups, increased support for judges and greater protection of witnesses, setting up a fund for victims of human rights abuses and the close co-operation with non-governmental organisations such as Amnesty International.

This apparently new approach to dealing with human rights concerns, as well as President Samper's initiative to start negotiations with the guerrilla without preconditions, could be a significant change from past policies. The Colombian human rights situation will only improve, though, if the level of impunity is drastically reduced.

**Emilio Abuabara Noriega:** Lawyer, political activist of the Liberal Party in the town of Aguachica, Cesar department, and candidate for the House of Representatives (*Cámara de Representantes*). After receiving several death threats, Emilio Abuabara Noriega was killed on 23 November 1993 by gunmen, possibly from a rival political faction.

**Juan Fernando Alvarez Castrillón:** Lawyer in Medellín and secretary general of the National Bar Association (*Colegio Nacional de Abogados*). On 24 May 1994, Juan Alvarez Castrillón, who had worked as defence counsel for a number of political prisoners, was shot on the street in his hometown.

**José Tobías Alvarez Zuleta:** Lawyer who specialised in labour law in Medellín, Antioquia department. On 20 January 1994, he was killed by a gunman in the centre of town.

**Evaristo Amayo Morales:** Ex-municipal ombudsman and candidate for mayor. Everisto Amayo Morales, who had held several public offices in the town of Villavicencio, Meta department, was killed in the Santa Josefa District of the town at about 5 p.m. on 24 February 1994. He was travelling home in a taxi when he was shot dead by unidentified gunmen from a passing vehicle.

**Miguel Angel Avelia, Fabio Hernández Forero, Antonio Suárez Niño:** Judges and prosecutors, leaders of *Asonal Judicial*, an organisation representing the jurists employed by the Colombian judiciary. On 19 November 1992, *Asonal Judicial* had organized a national day of protest. On that day, the three men defended the interests of the protesting jurists. On 18 June 1993, the Prosecutor General of the Nation brought disciplinary actions against these and other members of *Asonal* (see also *Attacks on Justice 1992-1993*). Hernández Forero was suspended from his official duties as public prosecutor and it is expected that Angel Avelia will also be removed from all his functions as prosecutor. Suárez Niño, 22nd Criminal Investigations Judge from Bogotá, will have to appear before the regional Council of the Judiciary (*Consejo Seccional de Justicia*).

**Mariela Aristizabal Pineda:** Lawyer and government official working in the National Prison of Bellavista in Medellín, where she was in charge of issuing release orders. She was assassinated on 1 July 1993 by two individuals who shot her several times while she was riding in a bus. She had received a number of death threats for her work in the prison before that incident.

**Feisal Mustafa Barbosa:** Lawyer, political activist for the Conservative Party (*Partido Conservador*) and candidate for the House of Representatives. On 10 September 1993, Feisal Mustafa Barbosa was kidnapped by members of the ELN guerrilla. Later his body was found with two bullets in his head and his eyes blindfolded. The guerrilla justified the assassination by accusing Barbosa of having worked together with paramilitary groups in the Magdalena Medio region.

**Rafael Barrios Mendivil:** Lawyer in Bogotá, Chairman of the Lawyers' Collective «Jose Alvear Restrepo» (*Corporación Colectiva de Abogados, CCA*) and a prominent human rights lawyer. The CCA is working on numerous cases of human rights violations in Colombia in which members of the police and military seem to be implicated.

In June 1992, Barrios Mendivil had taken over the representation of the families of 20 indigenous people (Paece

Indians) murdered in the Town of Caloto, Cauca department, on 16 December 1991. That massacre is attributed to a paramilitary group acting in complicity with members of the police. The three previous attorneys for the victims, Carlos Edgar Torres, Rodolfo Alvarez and Oscar Elías López, had been killed while pursuing the case (see *Attacks on Justice 1991-1992, 1992-1993*). During the collection of information in Caloto, Barrios Mendivil was reportedly followed and harassed by members of the police, military and state security forces. On a number of occasions he received threatening phone calls at his home. After participating in a public meeting of the *Cabildo Por La Vida Y La Esperanza*, which took place on 1-2 August 1993, he reported being followed.

During another meeting Barrios Mendivil attended in a rural area from 15 to 19 August 1993, a notebook containing information about him was found on a man unknown in the region, presumed to be a state security agent. On 15 September 1993, the CIJL and other human rights organisations asked lawyers all around the world to intervene with the Colombian Government so that it would protect the life of Rafael Barrios Mendivil. However, when rumours spread that there was an order out to kill him, Barrios Mendivil decided to leave the country on 9 October 1993. Despite the persistent danger to his life he returned to his country in March 1994. Since then, he has not received any further threats.

Following the international protest, the Government initiated investigations into the threats, but so far the results have not been made public, and no one has been brought to justice.

**Carlos Alberto Caicedo Méndez:** Lawyer. On 8 October 1993, Alberto Caicedo Mendez was assassinated by six men identifying themselves as members of the XXII Front of the Colombian Revolutionary Armed Forces (FARC) guerrilla group in the village El Hato, near La Palma, Cundinamarca department.

**Eduardo Carreño Wilches, Pedro Julio Mahecha Avila, Luis Guillermo Pérez Casas, Alirio Uribe Muñoz, Reinaldo Villalba Vargas:** Lawyers and members of the *Corporación Colectivo de Abogados «José Alvear Restrepo.»* In addition to the threats

which forced its chairman, Rafael Barrios Mendivil, to leave the country in 1993 (see above), the other members of the CCA have also received death threats in their offices. The telephone conversations of the organization and of its members have reportedly been illegally intercepted. A paramilitary group called COLSINGUE (*Colombia sin Guerrillas*, Colombia without Guerrilla), which has claimed responsibility for the murder of several leading trade unionists, published a pamphlet in Cúcuta, where members of the CCA represent various people accused of membership in the guerrilla. In that pamphlet they promised to «eliminate all those lawyers who defend members of the guerrilla.»

On 27 April 1994, an unidentified woman, who later admitted to be working for the army intelligence, came to the offices of the CCA requesting information about a number of trials in which members of the organisation are acting as legal counsels.

On 26 October 1994, two men on an unmarked motorcycle followed Luis Guillermo Pérez Casas to his office in Bogotá and then followed his family to his son's school gates. The men only left when police assistance was summoned. After complaints by the CCA, Pérez Casas was assigned a police escort in the mornings. The escort failed to show up on 8 November 1994, and his car was again followed by two men on a black motorcycle. Realising they had been spotted, the motorcyclists began intimidating the family by driving up to the car and staring at Pérez Casas's pregnant wife until she became hysterical. According to the CCA, similar incidents occurred frequently during October and November of 1994, with CCA lawyer Pedro Julio Mahecha Avila also receiving various death threats by telephone.

**Lourdes Castro García:** Lawyer and former member of the *Corporación Colectivo de Abogados*, CCA (see above). Lourdes Castro García was the defence lawyer for Francisco Galán, a left-wing guerrilla leader held by the Colombian authorities at the 13th Battalion Military Police base, near Bogotá. On her visits to see

the prisoner, Castro García received persistent harassment. She repeatedly received verbal abuse from military personnel in charge of guarding her client. Because of telephone threats against her life, Lourdes Castros García later decided to leave the country on 3 February 1993. As of December 1994, she has not felt safe enough to return.

**Luis Alberto Corrales García:** Criminal Lawyer in Medellín. Legal advisor to several banks, as well as freelance lawyer for the Court of Auditors of the Antioquia department. On 4 November 1993, Corrales García was shot and killed while driving in the Los Laureles neighbourhood on the western side of town. His wife was injured in the incident.

**Castor Iván Correa Castaño:** Lawyer and historian. On 18 September 1993, various gunmen entered his property in the town of Heliconia, Antioquia, and assassinated him while he was sleeping. Besides working as a lawyer and teaching at the University of Medellín, he had been a prominent member of the Conservative Party (*Partido Conservador*).

**Luis Fernando Correa Isaza:** Lawyer and Director of the Technical Investigation Corps of the Regional Prosecutor's Office of Antioquia in Medellín. While travelling in his official car, Correa Isaza was killed by a gunman on 6 March 1994 who fired various shots at Correa and fled in a car that had been waiting nearby. His driver was seriously injured.

At the time of his assassination, Correa Isaza had been in charge of investigating a number of sensitive cases. Among them were the investigations against the Navy's Intelligence Service Unit in Barrancabermeja which is accused of having organized and planned the assassination of several leftist politicians, trade union leaders and human rights activists.

In addition, Correa also headed investigations against a paramilitary group known as «The Persecuted by Pablo Escobar» («*Los Perseguidos por Pablo Escobar*», PEPES) and against members of the Medellín drug cartel. He also played an important role in



getting various members of the Medellín cartel to surrender to authorities and headed investigations into acts by the guerrilla.

**Jairo Duque Pérez:** Lawyer and professor at the University of Antioquia in Medellín. When Prof. Duque Pérez came back from visiting his daughter on 2 June 1993, he was killed by three gunmen in a car that had been stolen a few moments earlier. Prof. Duque Pérez had been a Magistrate of the Supreme Court and Medellín town councillor. Sources close to the police accused the guerrilla to be behind the attack.

**José Duván Franco Marín:** Lawyer and official at the prosecutor's office in Bucaramanga, Santander department. On 4 July 1993, on the way from Zamora to Amaime, in the area of Palmira (Valle de Cauca department) José Franco Martín, Oscar Hernando Ríos (a former police officer) and a third person were killed by gunmen who later fled in a car.

**Julio Edgar Galves Quimbay:** Lawyer in Bogotá and member of a legal opposition parties. On 18 March 1994, Galves Quimbay called his wife around 6 p.m. and said that he was on his way to meet a friend. He never arrived at the supposed meeting place and was not seen again. On the same day two other politicians, Enan Rafael Lora Mendoza and Raúl Gutierrez Guarín, also «disappeared.»

Two days later, their families received anonymous phone calls stating that the men had been abducted and were given the license plate of a vehicle used in the abduction of one of them. That vehicle was found in the car park of the Administrative Security Department, *Departamento Administrativo de Seguridad (DAS)*. When judicial officials inspected the vehicle, traces of blood were found. On 25 March, the bodies of Raúl Gutiérrez Guarín and Enan Rafael Lora Mendoza were found in the village of Los Manzanos in the municipality of Facativá, Cundinamarca department. The men had been shot, one had been hanged and both had been set on fire. A few days later, the body of Julio Edgar Galves Quimbay was also found.

**José Giraldo Cardona:** Lawyer in Villavicencio, Meta

department. Following the death of Evaristo Amayo Morales (see above), José Giraldo Cardona, and four other active members of the legal leftist coalition party *Unión Patriótica* received threats. They all appear on a list reportedly held by the Administrative Security Service (*Departamento Administrativo de Seguridad*, DAS).

On 16 July 1994, the men presented a writ of protection (*acción de tutela*) before the regional court in Meta, asking for official protection from surveillance by individuals believed to be working for the DAS. The action was granted by the regional court, but that ruling was overturned by the Supreme Court following an objection by the regional director of the DAS. Since then threats and harassment have reportedly increased.

**Germán González de la Rosa:** Lawyer and political activist of the Liberal Party (*Partido Liberal*). On 5 November 1993, Germán González de la Rosa was killed by gunmen near his ranch in the municipality of Ovejas, Sucre department.

**Francisco Alejandro González Jaramillo:** Lawyer, former member of Parliament and candidate for the Senate for the *Movimiento de Renovación Liberal*. On 30 January 1994, the 48 year-old man was assassinated while driving his car in Medellín. Two men on a motorcycle stopped the car and killed González Jaramillo. The driver of the vehicle remained unhurt.

**Gabriel Guevara Carrillo:** Judge in Bogotá. On 13 February 1994, judge Guevara Carrillo was taken hostage and transferred to the neighbouring village of Cota, where he was warned «to behave and act wisely.» Later he was stripped of his shoes and left near Bogotá. On 17 February he received another anonymous threat by telephone.

At the time of the threats, Judge Guevara was deciding a preliminary injunction blocking the pay of money from the national petroleum company *ECOPETROL* to owners of land in the Cusiana region. The petroleum reservoirs in that region were nationalised by Law 97 of 1993, an act which is being contested by the land owners before the State Council.

Several members of Parliament and lawyers that had been involved in the legislative process of the nationalisation had also been threatened. Despite these threats, Judge Guevara issued the injunction blocking payment until the State Council reaches a decision.

**Lina Yunie Hernández Fandiño:** Local judge in the town of Contratación, Santander department. On various occasions, Judge Hernández was threatened by individuals and by the 46th Central Command of the FARC guerrilla that she and her family would lose their lives if she did not rule in their interest.

**Jaime Isaza Sánchez:** Criminal lawyer in the town of Piendamó, Cauca department. On 21 August 1994, two unidentified men fired four shots at Jaime Isaza, killing him while he was visiting the Chalet Amarillo farm in a rural part of town. No further information on the motives for the killing was available, but sources said that frequent battles between the armed forces and the guerrilla have been reported in the region.

**Judge at the Constitutional Court.** The Judge received an anonymous telephone call in which he was threatened to be killed if he upheld the decision of the State Council in a writ of protection (*acción de tutela*). In that decision, the Council had declared null and void the election of the mayor of Santa Marta, the capital of Magdalena department. In those days the expedient which was at the centre of the writ, was almost stolen by various individuals when a judge's assistant was on his way to take it to the courthouse. In the end, the Constitutional Court upheld the State Council's decision in all of its findings.

**Judge at the Constitutional Court.** On 10 September 1993, another judge of the Constitutional Court received death threats while he was preparing the Court's decision on the constitutionality of Law 15 of 1992. The contested articles of Law 15 defined certain crimes falling under the Public Order Court's jurisdiction and restricted the habeas corpus rights of detainees charged with drug trafficking or terrorism. The magistrate also reported that a group of armed men had tried to enter his

apartment at night. Later, the secretary of the Court received a telephone call threatening that the judges would pay with their lives if they «let free detained drug-traffickers and terrorists.»

A majority of the Court later ruled that part of the law could not be applied. Other parts were held to be openly unconstitutional.

**Luis Guillermo López Puerta:** Lawyer and Co-ordinator for the Regional Prosecutor's Office (*Fiscalía Regional*) for the Uraba region of the Antioquia department. López Puerta as well as various other officials of the Investigator's Office of Apartadó, Antioquia department, had been receiving death threats during early 1994. On 2 June 1994, López Puerta was killed by two unknown men near his house in Apartadó. According to one source, López Puerta had been working on the *La Chinita* massacre. In that neighbourhood of the town of Apartadó, 35 people were killed in January 1994, among them sympathisers of the political movement Hope, Peace and Liberty (*Esperanto, Paz y Liberated*). Several sources attributed the massacre to a group of guerrillas from the FARCE. It seems that the murder of López Puerta was related to the later arrest of the mayor and a former mayor and candidate for Parliament.

**José Salomón Lozano Cifuentes:** Criminal lawyer in Medellín. On 8 July 1993, Lozano Cifuentes was shot to death by two young men believed to be members of the paramilitary group «PEPEs.» After killing Lozano Cifuentes, the two fled in a taxi. A brother of the victim was hurt in the incident. At the time of the murder, Lozano was head of the accounting department in the municipal auditing office (*controlaría municipal*) of Bello, a town outside of Medellín.

His murder is most likely connected to his role as defence lawyer for drug lord Pablo Escobar. Together with Santiago Uribe Ortiz and Reinaldo Suárez, he had resigned from that post only one month earlier due to the constant threats against his life and to the obstacles put in his way to limit his right as defence counsel, making it difficult for him to have access to the relevant

files. Lozano Cifuentes was the fifth defence lawyer assassinated for representing Pablo Escobar (see *Attacks on Justice 1992-1993*).

**Francisco Javier Marín Ramírez:** Criminal lawyer in Medellín. On 24 November 1994, the 44 year old Marín Ramírez was shot in the head and killed by a man and a woman in a store near his house in the Los Rosales neighbourhood. After the assassination, relatives found out that the lawyer had received death threats and had gone into hiding two weeks earlier. Out of fear for the lives of Marín Ramírez's wife and two children, the family did not want his death to be investigated.

**Julio Martinez Granados:** Lawyer and member of the Civil Police in Cali, Valle del Cauca department. On 10 July 1993, Martinez Granados was killed by several gunmen in a van and a motorcycle while driving in the Centenario neighbourhood of Cali. His wife was severely injured.

**Sergio Alberto Martínez Sarmiento:** Lawyer and military judge assigned to the Santander Battalion. On 2 August 1994, Martínez Sarmiento was assassinated by two men on a motorcycle in the La Gloria neighbourhood of Ocaña, a town in the north of Santander department. The victim was investigating cases involving drug-trafficking, guerrilla activities and theft of petrol. The commander of the Santander Battalion attributed the murder to the guerrilla forces.

**Ana Rosa Medina:** Criminal lawyer in Bogotá. On 31 August 1993, she was killed by a hitman who shot her eight times in front of her house. At the time of her assassination, Mrs. Medina represented a young man charged with killing a police officer. In the pre-trial hearings her client was remanded to prison. The brother of the detainee, a well known dealer of emeralds, ordered her killing when he learned of the detention.

**Gloria Mondragón Yamosa:** Legal advisor to the *Departamento de Valorización* of the city of Cali. On 12 June 1993, Gloria Mondragón Yamosa, who was reportedly five months pregnant, was killed by a gunman who shot at her from a motorcycle.

**Jesús Antonio Montoya Ospina:** Lawyer, member of the Committee of Solidarity with Political Prisoners (*Comité de Solidaridad con los Presos Políticos*) and attorney for various trade unions. When Montoya Ospina arrived for a meeting with the housing committee of the Navarra quarter in the Belcazar neighbourhood of Cali on 14 December 1993, he found the doors of the building closed. Two gunmen were waiting for him in the doorway. During an argument with the men Montoya Ospina was injured. He tried to flee into a nearby shop but was followed by the men who shot him 14 times in the chest, killing him instantly. The assassins fled on a motorcycle, taking with them Montoya Ospina's briefcase of documents.

The reasons for the murder have not been clearly established. For one, people connected to the drug-traffickers claimed to have rights to the land given to the Navarra housing committee, which could mean that the drug lords are responsible for his death. Montoya Ospina had, however, also received various threats because of his representation of a group of trade union members claiming compensation from the state for their arbitrary arrest, torture and imprisonment by the Army's Third Brigade in 1990. Another lawyer for that trade union «disappeared» in July 1990.

**Miguel Morón Vélez:** Lawyer in the town of Santa Catalina, Bolívar department, and nephew of a Supreme Court Justice. On 10 September 1994, Miguel Morón Vélez and his father, Miguel Morón Díaz, an official at the Sixth Municipal Court (*Juzgado Sexto Municipal*) of Cartagena, were killed by a bomb detonated by several unknown men while they were passing a spot known as «El Coquito» in their car. The motives for the assassination of the two men is not clear. Sources suggest, however, that the two were killed by the guerrilla.

**Oscar Angel Muñoz Cantillo:** Lawyer. On 27 April 1994, Oscar Muñoz Cantillo was killed by armed men in military clothes. He had been driving on a road near Patía, Cauca department, with his wife, when armed men tried to stop his minivan. As he did not stop the car, the men shot at them, killing Muñoz Cantillo. His wife suffered severe injuries. The attackers

took all valuables from the car. The police only showed up three hours later, claiming that they had not been able to come earlier because of guerrilla activities.

**Luis Narvaez García:** Lawyer and member of the *Comité de Solidaridad con los Presos Políticos* (Solidarity Committee with Political Prisoners) in Sincelejos, Sucre department. In March 1994, he barely survived an attempt on his life and had to seek refuge in Switzerland.

In the department of Sucre, tension exists between the owners of huge *haciendas* and the landless peasants. Often, groups of peasants have occupied pieces of land. In retaliation, paramilitary groups financed by the landowners, and with the acquiescence of the security services, have attacked and killed peasant leaders and teachers. During his 12 years of professional work in Sincelejos, Luis Narvaez García defended many peasants in the public order courts and in suits against landowners. On a number of occasions, he reportedly proved that accusations against clients had been fabricated by the security forces. He also publicised severe abuses committed by the intelligence service of the local military unit, the *Batallón N° 5 de Infantería Marina*.

In December 1993, the lawyer received a phone call from a former client and then member of the *Batallón* who warned him that he had «a very bad reputation within the military.» He was told to be extremely careful. Around the same time, the lawyer was involved in the case of the assassination of a local peasant leader. The latter had been shot right after leaving his office. Luis Narvaez publicised indications that pointed to the involvement of the local *Departamento Administrativo de Seguridad* in the murder.

In early January 1994, two members of the military intelligence confessed their membership in a death squad and their participation in a series of murders to the Prosecutor General's office. They also reported the names of people on a «death list» kept by the squad. Reportedly, Luis Narvaez was among the potential targets. He was warned by an official of the Prosecutor General's Office on 20 February, who offered to help him leave the town.

On 19 March 1994, Narvaez and his family went to visit peasant friends in the countryside. He was standing on the terrace, preparing to leave, when two men appeared. One of them shot at him a number of times. Narvaez threw himself on the ground and was not hit. In the meantime, another two men entered the house and shot Narvaez's friend, Jonny Marquez Paternina. The men believed Narvaez was dead and walked towards the road. From a waiting car a voice ordered them to go back and make sure Narvaez was dead. Narvaez, however, had run away. The hitmen went after him, but he hid in a tree and escaped.

After walking back into town, the lawyer was secretly taken to Bogotá. He spent two months in secret hide-outs, while his family reported that their telephone lines were tapped. On 27 May 1994, he took refuge in Switzerland.

**Jorge Núñez Tobón:** Lawyer and former representative for the Human Rights Ombudsman's Office in the banana-growing areas. Núñez Tobón was killed on 5 June 1994 in his house in Apartadó, Antioquia department. At the time of his murder, he was actively exercising his profession.

**Angel Custodio Posso Rengifo:** Lawyer who specialised in labour law in the town of Guarne, Antioquia department. On 26 August 1993, he was killed by gunmen.

**Luis Norberto Quiñones Góngora:** Lawyer. On 23 September 1994, Luis Quiñones Góngora was found dead near an electrical power plant in the El Poblado neighbourhood of Medellín. His hands and feet had been bound and there were signs he had been tortured.

**Rodolfo Rivera Sttuper:** Lawyer, former member of Parliament and farmer in San Alberto, Santander department. On 4 October 1994, Rodolfo Rivera Sttuper and his son Luis were attacked by three men on foot in the Primero de Mayo neighbourhood of San Alberto. While the son survived, the father, who had been an important local leader and staunch opponent of



the guerrilla, died of gunshots to the abdomen. Five years before, his brother had been killed by the guerrilla.

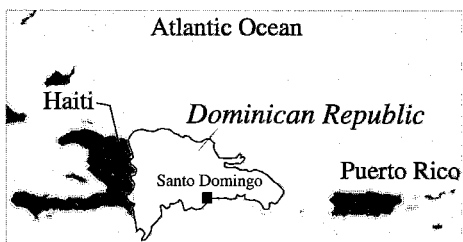
**Carlos Arturo Sepúlveda Toro:** Lawyer and Dean of the Faculty of Law at the *Universidad Central del Valle*. On 2 June 1994, Professor Sepúlveda Toro was assassinated by men on motorcycles in the town centre of Tuluá, Valle department. He was shot seven times and died immediately.

**Laura Mercedes Simmonds:** Lawyer and Director of the *Fundación para la Comunicación Popular* (FUNCOP). Laura Simmonds was assassinated by two men who shot her near her house in the Loma de Cartagena neighbourhood of Popayán, Cauca department. Before working for FUNCOP, Laura Simmonds had been the co-ordinator of the National Rehabilitation Plan for Cauca and had participated in the peace process between the Colombian government and the Quintín Lame and M-19 guerrilla groups. Since the legalisation of M-19 as a political party, she had been an active member in that group.

**Jairo Yantén Jiménez:** Lawyer and municipal ombudsman (*personero*) in the town of Yumbo, Valle del Cauca department. On 9 September 1994, Jairo Yantén Jiménez, who represented all the ombudsmen in the Valle department and also presided over the sports tribunal of the regional football association, was found dead near the village of Mulalo. According to one source, he showed knife-wounds in the neck and one bullet hole, and he seemed to have been tortured. The evening before his murder, he had received two phone calls by strangers. After receiving a third call he left his house. Hours later his corpse was found.

# Dominican Republic

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Official results of the 16 May 1994 elections in the Dominican Republic showed 87-year old incumbent President Joaquín Balaguer winning by a very narrow margin. Foreign observers expressed their «deep concern» over

the running of the elections, and even an official investigation by the Central Electoral Junta (JCE) revealed «serious irregularities.» A major political crisis over the results led to the signing in August of a «Pact for Democracy» (*«Pacto para la Democracia»*) where the main political parties agreed on a shortened presidential term for Balaguer and the creation of a new National Judiciary Council (*Consejo Nacional de la Judicatura*).

The three-stage judicial system consists of courts of first instance (*Juzgados de Primera Instancia*), Courts of Appeals (*Cortes de Apelación*) and the Supreme Court of Justice (*Suprema Corte de Justicia*). Each municipality must have Courts of the Peace (*Juzgados de Paz*). The Justices of the Peace should be lawyers, but exceptions can be made in towns where no lawyer is available. Even though the Constitution spells out the independence of the judiciary, observers agree that in practice interference occurs from the other branches of government, especially from the President, as well as from private interests. According to Amnesty International, President Balaguer announced in September 1993, for instance, that 54 prisoners held illegally in the National Penitentiary of *La Victoria* should not be released.

Until the above-mentioned Council of the Judiciary becomes operative, judges are elected by the Senate. Candidates for judicial posts have reportedly been nominated on political rather

than professional grounds. The personal independence of low-court judges is reduced by the fact that the Supreme Court, as the highest disciplinary authority for the judiciary, can transfer judges «if it deems it useful.»

On paper, all judicial remedies for arbitrary detentions are provided for by the Constitution. In reality, however, police have been ignoring judicial release orders. Officials from the National Police (*Policía Nacional*) and the National Drug Control Directorate (DNCD) allege judicial corruption and the seriousness of the alleged crimes as justification for this non-compliance. In one reported case three separate judicial release orders within four years were not carried out.

**Marcelino de la Cruz:** Lawyer in Santo Domingo and member of the board of the *Comité de Derechos Humanos* (Human Rights Committee, CDH). On 23 July 1994, a delegation of the CDH, including Marcelino de la Cruz and the CDH President Virgilio Almanzar, visited the National Penitentiary *La Victoria* to investigate the situation in the prison. As they were preparing to leave again, the director of the institution, Colonel Benito Díaz Pérez, stopped and accused them of inventing stories about the situation in the prison. He also threatened them. In the past, the CDH had publicly accused prison officials of being responsible for the deaths of two inmates, Antonio Alcantara and Oscar del Rosario Manzueta.

**Somnia Vargas Tejada:** Judge at the Court of Appeal of Santo Domingo. Judge Vargas Tejada had for many years been legal advisor to the Union for the Defence of Human Rights (*Unión para la Defensa de los Derechos Humanos*), before becoming a judge at the Court of Appeals in 1987. On 22 December 1993, the Supreme Court decided to transfer Judge Vargas Tejada to the town of San Juan de la Maguana, a town about 300 kilometres from the capital, close to the Haitian border. It seems that the transfer order was motivated by critical remarks the judge had made in the media about the country's judicial system.

In the weeks before the decision to transfer her, Judge

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Vargas openly criticised a number of alleged abuses by the police and by judicial authorities. On 14 July 1993, she expressed concern about frequent reports of physical coercion by police. She also drew attention to the growing influence of the drug cartels on the judiciary. At a seminar on human rights on 5 September 1993, the judge criticised the appointment procedure for new judges and urged the Government to take measures to insure the independence of the judiciary.

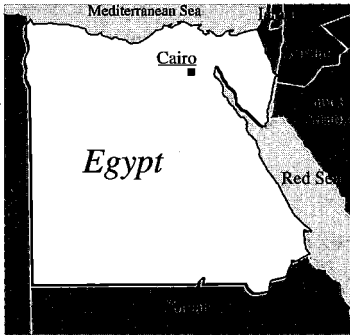
It was reported that Judge Vargas was not directly informed of the decision to transfer her, but learned of it through press reports. She responded that her transfer was unconstitutional because she had not been granted a hearing.

In December 1993, Judge Vargas filed a protest with the Attorney General (*Procurador General de la República*). She received broad support from both legal associations, such as the Dominican Bar Association and the Dominican Lawyers Association, as well as from local human rights organisations. When she learned that the transfer would not be revoked, she decided to resign from the judiciary. She is now working in a private law firm in Santo Domingo.

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# Egypt

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The Egyptian Constitution includes several guarantees for the independence of the judiciary. Articles 165 to 168 provide that the judges are independent and immune from removal, and forbid interference by other authorities in the exercise of their judicial functions.

## The Regular Judiciary

The regular judiciary is highly regarded in Egypt. It is composed of civil and criminal courts, a separate administrative court structure, and a constitutional court. The High Council of the Judicial Authorities, a constitutional body headed by the President of the Republic is composed of the Minister of Justice, the Attorney General, the head of the Court of Cassation, the head of the *Conseil d'Etat*, and other senior judges. It supervises and co-ordinates the regular judicial bodies.

### 1. The Civil Courts

The civil courts comprise a Court of Cassation, courts of appeal, courts of the first instance, and magistrate courts.

Egyptian law accords the President of the Republic the right to appoint and promote all judges and members of the Attorney General's office upon the approval of the civil courts' High Council of the Judiciary. In practice, the Ministry of Justice

prepares a list of appointments, promotions and transfers of judges, and refers it to the High Council of the Judiciary for approval. The appointment or promotion of the President of the Court of Cassation and the Attorney General is, however, made independently of the High Council. The High Council of the Judiciary is a legal body headed by the President of the Court of Cassation, and is composed of senior judges in addition to the Attorney General, all of whom are appointed *ex-officio*.

## 2. The Conseil d'Etat

The *Conseil d'Etat* is a highly respected constitutional authority. It has three functions: judicial, consultative, and legislative. It comprises administrative courts whose decisions are subject to appeal to high administrative courts. The judicial branch of the *Conseil d'Etat* deals with wide ranging matters that include public appointments, elections to local bodies, salaries of public employees, administrative decisions, and citizenship applications. Members of the *Conseil d'Etat* are immune from removal or transfer to a non-judicial function except for reasons of incapacity or misbehaviour that renders them unfit to discharge their duties.

## 3. The Constitutional Court

The Supreme Constitutional Court is an independent judicial entity. It sits with seven judges chosen from among senior judges and law professors. The court examines the constitutionality of laws and regulations. The President of the Court is appointed by the President of the Republic. He is also third in line for the presidency of the Republic after the President and the Speaker of the People's Assembly. The decisions of the Supreme Constitutional Court are not subject to appeal and are binding on all state authorities. The Court has the jurisdiction to annul laws, if it finds them unconstitutional.

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## The State Security and Emergency Courts

Despite the high public regard enjoyed by the regular Egyptian judiciary, the Government has resorted to special and military tribunals to try civilians accused of opposing the State. This has undermined the jurisdiction of the regular judiciary and impaired the proper application of the Rule of Law.

### 1. State Security Courts

There are two types of State Security Courts in Egypt: the Emergency State Security Courts and the Permanent State Security Courts. The Emergency State Security Courts were set up under the State of Emergency Law N° 162 of 1958. Article 7 of this law stipulates that the Supreme and Magistrate State Security Courts will deal with crimes that violate the decrees of the President of the Republic or his representative. Article 9 added that the President of the Republic or his representative may transfer to these courts crimes punishable by the regular criminal code. Since the declaration of the State of Emergency in 1967, and except for an 18-month reprieve in 1980, several crimes were transferred to the jurisdiction of these courts. These include: threatening the internal security of the State, bribing and embezzling, and possessing and using arms and explosives. These courts are not independent from the executive authority by virtue of the fact that the judges are appointed directly by the President of the Republic. The Magistrate State Security Courts, which are seated in the Courts of the First Instance, are normally composed of one judge. The President of the Republic may order, however, that the court be composed of one judge and two military officers. The Supreme State Security Courts on the other hand is seated in the Courts of Appeal and is normally composed of three judges. The President of the Republic may add two military officers to the bench. Article 8 of the law accords the President, under certain circumstances, to order the formulation of State Security Courts that are composed of military officers only. In other words, these courts can turn into de facto military courts. Additionally, court decisions are not subject to appeal but only require the ratification of the President of the Republic.

On 1 June 1980, two weeks after the late President Anwar Sadat annulled the 13-year old State of Emergency, law N° 105 was issued to set up permanent State Security Courts. The Egyptian Constitution provides for the establishment of these courts. Law N° 105, however, accorded these courts exclusive jurisdiction over a wide range of matters that normally fall under the competence of the regular courts. Additionally, these courts were accorded exclusive jurisdiction over crimes specified in numerous laws and decrees such as those concerning national unity, political parties, internal security, and economic stability. Cases before the High State Security Courts are heard by a three judge court of appeal. The President of the Republic can add two military officers to the bench who are members of the military justice system.

## **2. Military Courts**

As a result of an increased campaign by clandestine Islamist groups to attack civilian and government targets since 1991, hundreds of suspected militants have been brought before military tribunals. The military tribunals are presided over by military officers who do not necessarily possess legal qualifications and their decisions are not subject to appeal before the civil courts but must be approved by the President of the Republic or his representative. According to the Law of the State of Emergency, the President is empowered to refer certain crimes to the jurisdiction of military tribunals. Over the past two years, military tribunals have handed out at least 57 death sentences to convicted Islamist activists. Forty death sentences have actually been carried out.

## **3. The Court of Ethics**

Another special tribunal which has been utilised in Egypt to try members of opposition groups is the Court of Ethics. The Court of Ethics and the Supreme Court of Ethics were established in 1980 by law N° 95 concerning the Protection of



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Ethics from Shame, a law that holds people politically responsible for certain acts that may be interpreted as blasphemy, corrupting the minds of youths, or incitement against the government. Cases before these courts are prosecuted by a special prosecutor called the Socialist Prosecutor General. These courts can ban convicted individuals for up to five years from holding public positions, political activities or membership in professional associations. The Court of Ethics comprises seven members that include four senior judges and three public personalities. The Supreme Court of Ethics comprises nine members, four of whom are public personalities. The public personalities are chosen by the Minister of Justice. The decisions of the Supreme Court of Ethics are not subject to appeal. The President of the Republic can pardon convicted individuals or reduce their sentences.

### **Treatment of the Legal Profession and the Bar**

On 26 April 1994, lawyer Abdel Harith Madani was arrested and later died in police custody. Egyptian lawyers mounted a protest campaign which began by a general strike on 15 May 1994. Two days later, some 4000 members of the Bar Association attempted to hold a protest march to the presidential palace. Riot police confronted the lawyers with tear gas and rubber bullets and forced them to disband. Several lawyers were bruised and needed hospitalisation. A total of 40 lawyers were detained during and after the attempted march (see details below). In light of these incidents, the CIJL conducted a mission to Egypt between 10 and 17 August 1994. The preliminary findings and conclusions of the mission were published in a press release. A full report is expected in the near future.

Egyptian lawyers who represent security prisoners continue to face harassment and intimidation in the course of exercising their professional functions. Several forms of harassment have been recorded, among them:

- Lawyers attempting to visit their imprisoned clients have to wait for long periods before being allowed into prison compounds.
- They are subjected to a thorough personal inspection by prison guards. Their legal and personal documents are read or confiscated.
- In at least three prisons (Mazra't Tora, Abu Za'bal, El-Marg), the prison administration insists on marking the lawyer's hand with a special stamp which is humiliating to the lawyers.
- Confidential visits are prohibited. The lawyers are obliged to interview their clients in the presence of security personnel who often intervene to halt the interview, to prevent the detainees from speaking about prison conditions, or prevent the lawyer from noting down the prisoner's complaints. In certain prisons (Abu Za'bal, El-Marg, El-Kanater) the lawyers are obliged to interview their clients through a barbed wire with one meter separating them.
- The lawyers are searched when they leave the prison after meeting with their clients.

The Egyptian authorities have also resorted to administrative orders to detain lawyers who have been arrested and charged but later acquitted by the courts. At least nineteen Egyptian lawyers, who have been arrested over the past four years, remain in detention despite court orders for their release. Egyptian human rights groups estimate that there are no less than 150 individuals who continue to be detained by administrative orders despite their acquittal of all charges by the civil or military courts.

**Abdel Harith Madani:** Lawyer and member of the Egyptian Bar Association and the Egyptian Organization for Human Rights. On 26 April 1994, Egyptian police and security personnel

arrested him at his Cairo office and took him to an undisclosed location. On 5 May, the authorities announced that, according to an official autopsy report, he had died from an asthma attack within 24 hours of his arrest. A few days later, the authorities announced that he was a member of a clandestine Islamic organization and had acted as a conduit between his imprisoned clients and Islamist militants. Mr. Madani's family and colleagues, suspect he was tortured to death or assassinated by security personnel. Unable to obtain a copy of the autopsy report, they demanded an impartial investigation and a second autopsy to be performed on his body. Egypt's Attorney General announced he would investigate the death of Madani without allowing for a second autopsy. The CIJL mission mentioned above met with the Attorney General and was told by him that the result of his investigation would be made public soon. He added that if it became evident that Mr. Madani died as a result of acts or an omission by the police, he would bring those responsible to justice. As of January 1995, however, the results of the investigation have not been announced. Mr. Madani is the fifteenth individual to die while in the custody of the Egyptian authorities since 1991.

**Hani Abdel Kader, Sha'ban Abdel Mon'em, Mumtaz Abdel Rahim, Hisham Abdel Ra'ouf, Ussama Ali, Nushi Awad, Adel Badawi, Khaled Eid, Ahmad El-Hilou, Ali El-Jundi, El-Sayyed El-Nabi, Adel Ezziddin, Hammad Hammad, Mohammed Joudeh, Ahmad Karim, Khalaf Khader, Yasser Mabrouk, Samir Mohammed, Sayyed Mohammed, Rabi' Mohammed, Salah Mohammed, El-Hussein Rashed, Jamal Rashwan, Hana' Saleh, Munir Saleh, Abdel Aziz Salim:** Lawyers. They were arrested on 17 May, 1994, during the attempted march by an estimated 4000 members of the Bar Association from the Bar premises to the presidential palace to protest the death in police custody of lawyer Abdel Harith Madani. They were charged with «the offence of planning to assemble, resist the authorities, incite and disturb public order.» They were given a 15-day detention order, which was eventually extended, and transferred to Tora Prison. They were gradually released within six weeks of their arrest. On 19 June 1994, the

*Battonier* of Cairo, Mr. Abdel Aziz Mohammed, and several lawyers went on a hunger strike to protest the manner in which the lawyers were treated. They ended their strike eight days later following the deterioration of the health of Mr. Mohammed, a diabetic, and after the authorities released nine lawyers.

**Khaled Badawi, Mohammed Hamdan, Qamar Moussa, Mukhtar Nouh, Mahmoud Riyad, Jalal Sa'd, Salah Salem, Jamal Taj El-Din, Montasser Zayyat:** Lawyers. They were arrested on 18 May 1994 in connection with the attempted march. They were given a 15-day detention order and held at Tora prison. Their detention was extended twice before all but Mr. Zayyat were released on 26 June 1994. Mr. Zayyat was ordered released on 26 June 1994 but a new order for his arrest was issued charging him with involvement in a clandestine organization seeking to disrupt the Constitution. Lawyers representing Mr. Zayyat discovered that the State Security Police had tapped Zayyat's telephone for over one year and recorded conversations he had with his clients, local and international human rights organizations, as well as private conversations. Mr. Zayyat was released on 5 December 1994.

**Jamal Abdel Azizi, Sayyed Fathi:** Lawyers and field workers for the Egyptian Organization for Human Rights; and, **Mohammed Abdel Mon'em, Mohammed Hilmi, Ahmad Nasser:** Lawyers. They were arrested on 14 June 1994 after attending a court hearing to extend the remand of lawyers detained in connection with the protest march. They were accused of incitement against the government and endangering public order. They were released without trial on 6 July 1994.

**Mohammed Ghareib, Ali Abdel Hamid:** Lawyers. They were arrested on 4 September 1994 while travelling to the city of Bour Sa'id. They were investigated by the General Prosecutor in Bour Sa'id then referred to the High State Security Prosecution. They were accused of holding an illegal meeting and possessing illegal literature. They were released on 31 October 1994.

**Hussein Jaber, Ibrahim Nasser:** Lawyers. They were arrested at their homes on 18 September 1994 and accused of

contacting Tharwat Salah, an escaped convict sentenced to death in connection with an attempt on the life of an Egyptian official. They were held at Tora prison and released without trial on 14 December 1994.

**Tarek Abdallah:** Lawyer. He was arrested in July 1994 because of an alleged connection to an Islamist militant group but was acquitted by the courts. However, he was kept in detention at Tora prison under a State of Emergency administrative order.

**Ramadan Ahmad:** Lawyer. On 6 July 1994, he was arrested while attempting to visit detainees at Abu Za'bal prison. He was referred to the State Security authorities at Lazoughly who accused him of forging his prison visit permit. He was stripped naked, blindfolded and beaten, and received electric shocks. He was released without charges on 10 July 1994.

**Sharif Attiyeh:** Lawyer. He was arrested on 6 July 1994 while visiting his detained brothers in Abu Za'bal prison. He was reportedly interrogated about his frequent visits to the prison. He was released on 10 July 1994.

**Ibrahim El-Sayyed:** Lawyer. He was arrested in October 1993 after requesting to visit his clients held in Shbein Al-Koum prison. He was reportedly told by the prison officials prior to his arrest not to return to visit his clients. He remains in detention at Abu Za'bal prison to date.

**Nabawi El-Sayyed:** Lawyer. He was arrested in October 1993 following his legal defence of members of the Tala'eh Al-Fath Islamist group. He remains in detention without trial.

**Mohammed Hassanein:** Lawyer. He was detained by the security authorities on February 1993 in attempts to force his brother-in-law, who was wanted by the police, to give himself up. He remains in detention despite an order by the Attorney General to release him.

**Ala' Eddin Hijazi:** Lawyer. He was arrested on 6 November 1994 after he lodged an official complaint that he was harassed by Tora prison officials while visiting his clients there. During his detention, he was allegedly blindfolded, beaten and tortured by electric shocks. He was released on 17 November 1994.

**Ahmad Hureidi:** Lawyer. He has been detained since March 1992 under an administrative order despite having been acquitted by the courts on 30 December 1993.

**Ashraf Nasser:** Lawyer. He was arrested on 26 June 1994 at the State Security prosecution office during hearings to extend the remand of lawyers who were arrested in connection to the protest march. He was released on 8 July 1994.

**Ramadan Mahmoud:** Lawyer. He was arrested on 6 July 1994 while visiting his clients at Abu Za'bal prison. During his detention, he was allegedly stripped of his clothes, blindfolded, beaten and tortured by electric shocks. He was released on 10 July 1994.

**Mansour Mansour:** Lawyer. He was arrested on 1 November 1994. Charges unknown. He was previously arrested in July 1992 and charged in connection to the murder of Egyptian writer Farag Foda. He was acquitted by the courts in December 1993, but remained behind bars under an administrative order until July 1994.

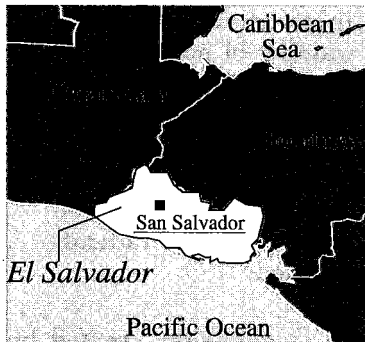
**Ismail Mohammed:** Lawyer. He was arrested in September 1992 in connection to a murder in the city of Aswan. He was ordered released by the Attorney General's office but was re-arrested and held at Tora prison under a State of Emergency administrative order.

**Hassan Shehateh:** Lawyer. He was arrested on 11 January 1989. He remains in detention under a State of Emergency administrative order despite his acquittal by the courts on 29 May 1990.

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# El Salvador

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From 1980 to 1991, El Salvador was the scene of a bloody civil war between the United States-backed government and armed forces against the rebel Farabundo Marti National Liberation Front (FMLN). Government «death squads» killings, disappearances and torture, as well as rebel abuses, resulted in some 75,000 deaths, mostly civilian. The judiciary, thoroughly politicised and corrupt,

allowed most abuses to go unpunished. Even under US pressure, the judicial system was unable or unwilling to pursue cases as notorious as the murder of Archbishop Romero and the rapes and killings of four American churchwomen.

The signing of the final peace accords between the government and the FMLN, on 16 January 1992, called for reform of the judiciary through: a constitutional amendment requiring a two-thirds legislative majority for the election of the Supreme Court, based on slates of nominees proposed by judges and lawyers, so that no party could control the Court as in the past; an annual allocation of 6 % of the state budget to the judiciary; the restructuring of a more independent National Council of the Judiciary (*Consejo Nacional de la Judicatura*); and a career judicial service. Nevertheless, the accords left the existing hard-line Supreme Court (*Corte Suprema*) in place until 1994.

The United Nations Observer Mission in El Salvador (ONUSAL), established to verify the peace accords, reported in 1993 that:

[t]he non-fulfilment of the duty to provide guarantees; the slow pace of justice; the negligence of certain judicial officials; the failure to respect the right to legal counsel; the large number of unconvicted prisoners; the lack of forensic impartiality; the difficulties and obstacles encountered in the effective investigation of crimes; the persistence of obsolete administrative and trial structures; the lack of technical training of members of the judiciary, especially magistrates; the ineffectiveness of constitutional justice (particularly of *habeas corpus*); the absence of proper resources for speedy and effective justice; the lack of independence and autonomy with which the judiciary acts; and the continuing clear signs of corruption in many cases all indicate that a radical reform of the judiciary is urgently needed.

On 15 March 1993, the UN Truth Commission, created by the accords to investigate abuses committed during the armed conflict, citing the «tremendous responsibility» of the judiciary in allowing those abuses to go unpunished, called on the Supreme Court to resign. The Commission also recommended measures to combat the concentration of power in the hands of the Supreme Court President, including transferring the power to name lower-court judges from the Supreme Court to the National Council of the Judiciary, improving the Judicial Training School and reforming the judicial-career law.

The response by the Supreme Court was to further dig in its claws and resist all change. The President of the Supreme Court, Mauricio Gutierrez Castro, privately stated that the peace accords had been signed by the executive only and were therefore not binding on the judiciary. He accused ONUSAL of « [a] tendentious and partial attitude» and «a total ignorance of our judicial system.»

Justice Gutierrez Castro continued his campaign to thwart all reform of the judiciary by ignoring the National Council of the Judiciary, authorised by the accords to run the new Judiciary Training School and to evaluate judges for action by the Court.



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The Supreme Court refused to consider either the Council's evaluation of lower-court judges or ONUSAL's report on complaints it had received against judges.

The deadlock was not resolved until a new Supreme Court was elected in August 1994. In accordance with the peace accords, the election required a two-thirds legislative majority, thus forcing the governing party ARENA and the opposition to negotiate. Wrangling between the parties delayed the election almost a month, during which time the country was without a Supreme Court, but eventually a 15-member tribunal was selected, providing El Salvador with a solidly professional, non-partisan Court. No member of the old Court was re-elected.

The new President, José Domingo Mendez, and his colleagues, embraced human rights and announced they would rid the judiciary of corrupt or inefficient judges. The Court immediately replaced the Director of the Court's Institute of Legal Medicine whose forensic work ONUSAL had criticised as politicised. The Court co-operated with ONUSAL in workshops for judges to familiarise them with the concepts of international law and human rights, and its application in specific cases.

The new Supreme Court's first major decision on human rights, in November 1994, revealed that the Salvadoran judiciary has finally begun a new era. The Court's Constitutional Chamber ruled, for the first time, that human rights treaties, which are expressly incorporated into the Salvadoran Constitution, prevail over ordinary laws. It then held that, pursuant to these treaties, preventive detention should be the exception rather than the rule, as had long been the case in El Salvador.

Near total impunity for gross human rights violations was one of the principal causes of the civil war in El Salvador. The problem remains. A 1994 ONUSAL study showed that of the 75 murders, attempted murders and death threats which were reported to ONUSAL over a two year period, not one person had been convicted or sentenced. The new Supreme Court has been criticised from almost all sides for failing to sanction misbehaving

judges and for its slowness in purging the lower courts, who are on the front lines in the fight against impunity. Thus, the transformation of the Salvadoran judiciary has just begun.

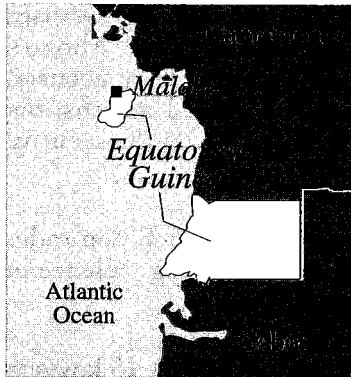
**Juan Jerónimo Castillo**, Attorney General (*Fiscal General*), **Carlos Molina Fonseca**, Human Rights Procurator (*Procurador de Derechos Humanos*), **Eduardo Tomasino**, President of the National Council of the Judiciary (*Consejo Nacional de la Judicatura*): Reports indicate that on 6 June 1994, individuals identifying themselves as members of the death squad *Comando Domingo Monterrosa* (named after a military official killed in the 1980s) called various representatives of the Salvadoran media. They warned that the three jurists, as well as unspecified Jesuit priests of the *Universidad Centroamericana* (UCA) would be executed within 48 hours if they did not leave the country.

Carlos Molina Fonseca and Juan Jerónimo Castillo are members of the commission created to look into apparent political killings by «illegal armed groups.» As mentioned above, the National Council of the Judiciary is in charge of rendering the judiciary less corrupt and more effective in dealing with human rights abuses.

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## Equatorial Guinea

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The malfunctioning of the administration of justice is one of the major problems facing Equatorial Guinea. There is no official gazette which publishes laws and decrees; this makes it almost impossible for judges and lawyers to update themselves on the developments of law in the country. The independence of judges is not guaranteed. According to the United Nation's Special Rapporteur on Equatorial Guinea, a number of

judges also work as government employees. This violates the most basic concepts of judicial independence.

**José Oló Obono:** Lawyer and former notary in Malabo. Because of his activity in certain «difficult» cases, José Oló Obono received death threats between 1990 and August 1993. The threats were reportedly verbal and vague. Because of his executive position in the opposition party *Convergencia para la Democracia Social* (CPDS), he was removed from his post as legal advisor to GEOTAL, a semi-state company, as well as from his post as notary public in early 1993.

José Oló Obono allegedly received his first threat following his defence in the «Kong» case in late 1990. In this case, a number of people were accused of practising witchcraft to kill people. Those defended by José Oló Obono were acquitted; the others were given various terms of imprisonment. The threats were reportedly verbal and vague.

In March 1992, after José Oló Obono had undertaken the defence of Plácido Mikó Abogo, a political prisoner and member of the CPDS, the threats and pressures became more constant and serious. That case attracted a lot of publicity outside Equatorial Guinea, and Amnesty International sent an observer to the trial. Shortly after the observer's arrival, Plácido Miko was given a special presidential pardon and was released. The security police reportedly took and photocopied Plácido Mikó Abogo's defence dossier and gave it to President Obiang. They accused José Oló Obono of being an opponent. For several months, his house was under surveillance and openly patrolled by the security police.

On 30 August 1993, José Oló Obono was publicly (on radio and television) accused by the authorities of fomenting violence in parts of the continental region of Equatorial Guinea.

**Various Lawyers:** In August 1994, approximately 15 lawyers were dismissed from their posts as legal advisors to semi-state enterprises because they refused to sign a condemnation of a speech critical of the Government.

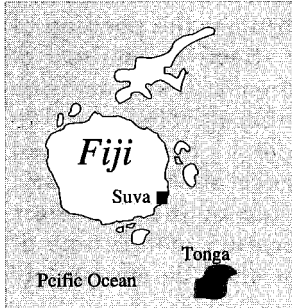
In June 1994, the Bar Association of Barcelona invited a delegate from the Equatorial Guinean Bar Association to give a speech at a conference organised by them. The speech was critical of the Government's human rights policies. It also pointed to the judiciary's lack of independence.

After the publication of the speech, the Minister of Justice, in his private capacity, wrote an open letter to the Bar condemning the speech. He circulated the list among approximately 45 lawyers in the country and asked them to sign. About 15 of them refused to do so. Shortly after their refusal, these lawyers were reportedly dismissed from their posts as legal advisors to semi-state firms. The dismissal was reportedly ordered directly by the Minister of Justice, not by the firms themselves.

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# Fiji

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**R A Kearsley:** Former Justice of the Supreme Court of Fiji. Kearsley was appointed a judge of the Supreme Court in 1982. Following the second coup of 1987, the leader of the coup, Colonel Rabuka, requested the judges to continue to exercise their judicial functions. They unanimously declined. Colonel Rabuka then abolished their offices by decree. Mr. Justice Kearsley was thus effectively dismissed. He received only one month's salary and an air ticket to Australia. He received no pension or other payments. Had it not been for his refusal to serve under the military government, Kearsley would have continued in office until he reached the age of 68, in August 1993, and would have had the right to a lifetime pension.

Since his departure, the government of Fiji has consistently refused to grant any form of compensation to the former judge. Relying on Section 164 of the 1990 Constitution, the government stated, in a letter to the International Commission of Jurists of 23 November 1994, that the section grants complete immunity to all actions taken by the military government during the 1987 coup. The government has also refused to grant *ex gratia* compensation. In the past they have maintained that such a payment would open the floodgates to similar demands for payment by Parliamentarians and civil servants who also refused, in 1987, to serve the new government or to take an oath to the Commander and Head of the Interim Military Government of Fiji, as required by Interim Military Government Decree N° 4, clause 6(1). The position of Kearsley, however, as a former justice of the Supreme Court, is substantially different. The Supreme Court justices did not resign from their offices, but were bound to abandon their judicial function; to do otherwise would have been inconsistent

with their oath of office. At the time of the 1987 coup, in a letter to the Governor-General of Fiji, the judges affirmed their «readiness to continue to exercise [their] duties in accordance with the law of Fiji and [their] oaths of office.»

The government's equation of the position of the Supreme Court justices with that of civil servants subsumes the position of judges to that of government officials. The effective dismissal of the judges, without compensation, constitutes a serious interference with the independence of the judiciary. The refusal to grant compensation is contrary to Article 11 of the United Nations Basic Principles on the Independence of the Judiciary, which provides that: «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.»

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# France

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The basis of the relationship between the executive and the judicial branches of government in France is Title VII of the 1958 Constitution concerning the «Judicial Authority.» Article 64 of the Constitution states that «the President of the Republic is the guarantor of the independence of the judicial authority» and that he is assisted in this task by the High Council of the Judiciary (*Conseil Supérieur de la Magistrature*). The High Council, until recently, comprised nine individuals appointed by the President of the Republic.

The 1958 Constitution includes provisions on judicial independence. Under the same Article 64, judges (*magistrats du siège*) are irremovable. Article 66 adds that «no person may be arbitrarily detained» and that «the judicial authority, the guardian of individual freedom, assures the respect of this principle in the conditions foreseen by the law.»

This relationship, in principle and in practice, has long been difficult. Over the last several years, there have been a series of reforms aimed at improvement, which brought a number of welcomed changes in both the constitution and the law. As the cases cited below illustrate, however, a wave of cases of political-financial corruption before the courts, accompanied by media scrutiny, keeps tension in the fore.

## High Council of the Judiciary

One of the most welcomed reforms concerned the High Council of the Judiciary. As originally conceived in Article 65 of the Constitution, the High Council was presided by the President of the Republic. The Minister of Justice was the Vice-President of the High Council, and it comprised nine other individuals appointed by the President of the Republic.

The High Council was reformed by a constitutional amendment (*loi constitutionnelle*) of August 1993 and a basic law (*loi organique*) of February 1994. According to these provisions, it is presided by the President of the Republic and vice-presided by the Minister of Justice. It is comprised of five judges (*magistrats du siège*), one prosecutor (*magistrats du parquet*), one *conseiller d'Etat* (nominated by the *Conseil d'Etat*), and three others, neither in the Parliament nor in the judicial order, nominated by the President of the Republic, the President of the National Assembly, and the President of the Senate (one each). The *magistrat* members are elected by their colleagues. Its primary functions remain largely the same. The Council nominates (by *avis simple*) judges and sits as a disciplinary council.

In his speech before the annual congress of the *Union Syndicale des Magistrats* (a union representing 53 percent of French judges), which took place in Bordeaux in October 1994, the Minister of Justice, M. Pierre Méhaignerie, stated that the reform of the High Council of the Judiciary opened a new era of institutional independence of the judiciary. «The result,» he continued, «is a text of equilibrium in which the Parliament wanted, and it expressed this clearly, to stretch the ties between the judicial authority and the executive power, without breaking them.»

While the reformed High Council is seen as a step towards greater independence, some, including many judges, still believe that the ties between the executive and the judiciary are too tight. President of the *Union Syndicale des Magistrats*, M. Claude Pernollet stated at the same conference that although the



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improvements are welcomed, the reform «will not be complete until the High Council assumes the management of a judiciary which is still too dependent on the Ministry of Justice.» Furthermore, he added, the work of the improved High Council has been plagued by a slow start caused by the lack of adequate resources.

The High Council of the Judiciary sits in a different formation when dealing with matters related to prosecutors. It is composed similarly, with the exception that there are five prosecutors and one judge, instead of vice versa. It does not nominate prosecutors directly, but rather gives its opinion concerning them (*avis consultatif*), a point which has been criticised by some.

### Status of the Prosecutor

The most sensitive aspect of the relationship between the executive and the judiciary is the role of the prosecutor (*magistrat du parquet*). While the French system is based on the separation of powers, that is to say that the executive does not have the power to judge, many have criticised the executive's power «to have judged» (*faire juger*). Article 36 of the Code of Penal Procedure is at the heart of the controversy. It states that the Ministry of Justice can inform the General Prosecutor of an infraction of the penal law and enjoin prosecution.

This provision allows for a political body, part of the executive branch, to dictate the initiation of judicial proceedings. Many believe that prosecutors should be more independent and enjoy the same independence as judges. Both the Union *Syndicale des Magistrats* and the *Syndicat de la Magistrature* (a union representing 32 percent of French judges) have consistently spoken out on this point.

In response, the Minister of Justice has stated that improvements have already been achieved. A first step was the

law of 4 January 1993 introducing the rule that the Minister of Justice must use the power to enjoin prosecution only in writing. Similarly, a law of 24 August 1993 provided that the written instructions of the Minister are to be put in the file of the case concerned.

These procedural reforms have not measurably reduced the tension, which is both institutional and political. According to one general prosecutor, «We have neither directions nor instructions, but we are permanently harassed by requests for information coming from the Ministry. Sometimes, these requests are accompanied by insinuations: we are accused, in not so few words, of obstructing procedures that focus upon political figures that are not on the same side as [the Minister of Justice].»

## **The Secret of Instruction**

Another delicate issue concerning the judiciary is the secret of instruction. In France, and in most countries of the world, the balance between the independence of the judiciary and the freedom of expression is far from struck. Recently, the intense media interest in cases of political-financial corruption has made this issue and its relation to the presumption of innocence of immediate concern to the French judiciary.

In January 1994, the CIJL held a seminar in Madrid on the Media and the Judiciary. Repeating that the principles of freedom of expression and independence of the judiciary establish «the contest, not its resolution,» the Seminar searched for ways forward. The resulting Madrid Principles on the Media and the Judiciary sets forth guidelines for a balance between these legitimate, often competing, interests.

Recent attempts at reconciliation in France were awkward and unpopular. During the night of 21-22 November 1994, a nearly empty National Assembly adopted what is known as the Marsaud-Houillon amendment. The amendment provides that «in

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order to guarantee the presumption of innocence, all information concerning a person who is the object of a judicial investigation cannot be made public without the person's consent until the seizure of jurisdiction is definitive.»

The amendment provoked an outcry from many and for many different reasons. Some, notably journalists, have voiced their extreme disapproval of this strike against the freedom of expression. Others see the amendment as a simplistic response to a complicated matter. Others see it as without effect: the Minister of Justice stated that the amendment is «inapplicable, because it does not provide for a penal sanction. For this amendment to be applied, it is necessary that the Senate approve it. This assembly has been engaged since June on a study on the presumption of innocence and the secret of instruction. ... I don't see the senators giving up months of work to adopt this amendment.» The Minister's forecast was correct; on 13 December, the Senate decided not to approve the Marsaud amendment.

There have since been attempts to compromise. In the circular of 2 January 1995, the General Prosecutor of Paris, M. J.F. Burgelin, urged prosecutors of the Court of Appeal of Paris to sue journalists who violate the secret of instruction. He did, however, urge them to also act as spokespersons for their cases. As such, they would directly provide the media with certain information in order to ensure the accuracy of reported facts.

## **Pressure on Individual Judges**

This pressure on the institution of the judiciary seem to have led to personal pressure on individual judges. Judges, particularly the front-line *juges d'instruction*, have been the target of harassment.

Issues concerning immigration have also given rise to pressure on individual judges. In a newspaper article of 18 April

1994, Minister of the Interior, M. Charles Pasqua denounced «an attempt on the part of certain judges to create jurisprudence which is contrary to the law.» This statement, which was widely criticised by judges and others, followed the decision of an administrative tribunal to suspend the expulsion order of two foreigners. On a well known television program six days later, M. Pasqua clarified that he was not referring to the judiciary as a whole, but to certain judges who were, in his opinion, changing the law.

**Philippe Courroy, Jean-Marie D'Huy, Thierry Rolland:** Judges in Lyon, Evry, and Toulon, respectively. During the course of November 1994, these three judges, who all are handling different cases of political-financial corruption, were the objects of destabilisation. In all three instances, the defence counsel in a case was approached by a man offering documents for a price. Each lawyer was shown a series of documents, including those with the respective judge's signature, which insinuated that the judge had previously accepted a bribe. The circumstances are still mysterious, but reportedly, the documents appeared to have been forged.

**Eric Halphen:** *Juge d'Instruction*, Créteil. On 21 December 1994, the father-in-law of Judge Halphen, Dr. Jean-Pierre Maréchal, was arrested on charges of extortion and influence peddling. In consequence, there was a call for Judge Halphen to recuse himself from a corruption case he was instructing concerning the funding of the majority party.

The matter stems from conversations the father-in-law had with Didier Schuller, *Conseiller général des Hauts-Seines*, in October 1994. In these conversations, Dr. Maréchal is said to have offered to influence Judge Halphen's decision in the case. Two months later, on 15 December, M. Schuller reported these conversations to the judicial police; the day after Judge Halphen had begun investigating files. On 21 December, M. Schuller revealed the content of these conversations, *l'affaire Maréchal-Schuller*, some illegally recorded.

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The *Syndicat des magistrats* and the *Union syndicale des magistrats* were among those who immediately expressed shock at the developments. According to the Syndicat, the belated revelation of the conversations was directed «to remove Judge Halphen from the case, at a crucial moment in his investigation.»

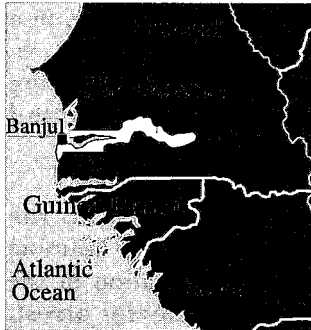
The High Council of the Judiciary met in late December 1994 to discuss this matter. The High Council's decision was rendered on 30 January 1995, in which it gave its support to Judge Halphen. According to that decision, the High Council stated that «the circumstances and chronology of facts that led to the arrest of M. Maréchal and his interrogation reveals the will or intention to attack the independence of this *juge d'instruction*...» While the High Council goes on to praise Judge Halphen's strength of character, it stated that given the controversy, it may be difficult for the Judge to continue this investigation, and that there is the possibility of naming another *juge d'instruction*. Many have noted that this decision ironically gives those who attacked judicial independence what they wanted; it may result in Judge Halphen not continuing with the case.

**Renaud Van Ruymbeke:** *Conseiller*, Rennes. During the weekend of 22-23 October 1994, a rumour surfaced that a «contract» had been taken out on the life of Judge Van Ruymbeke. An occasional police informant notified the authorities that two men were going to kill the judge on 24 October 1994. The Minister of the Interior offered immediate protection to the judge. Investigation into the matter has led to no conclusions. Some believe that the «contract» was a fiction, entirely designed to intimidate the judge from proceeding with certain instructions.

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## The Gambia

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On 22 July 1994, the democratically elected government of President Dawda Jawara was overthrown by a group of young military officers. The *coup d'état* was bloodless. Since then, the country has been ruled by the Armed Forces Provisional Ruling Council (AFPRC), under the chairmanship of Lieutenant Yaya A.J.J. Jammeh. According to a declaration of 24 October 1994, democratic elections will be held in 1998. An attempted violent counter-coup on 11 November failed.

The reason given for the coup was the level of corruption of the former Government. In one of their first acts in power, the AFPRC arrested several ministers of the former government. In Decree N° 1, dated 22 July, the AFPRC suspended and modified certain parts of the Constitution, namely concerning the presidency and the parliament. A series of decrees have followed, the most infamous being Decree No. 4 concerning the suspension of political activities. It abridges freedom of expression, outlawing the printing, publishing, and distribution of material deemed political propaganda.

While the breadth and scope of these decrees have affected all facets of life in the Gambia, it appears that the legal system is operating much the same as before the coup. The legal year was opened as usual on 6 November 1994 by Lt. Jammeh, Chairman of the AFPRC. Members of the Judiciary, including the Justice of the Peace, the District Tribunal Presidents and members and their Divisional Commissioners all took part in the proceedings.

Due to lack of qualified personnel, judges from Ghana, Nigeria, Sierra Leone, and Zambia serve in the Gambian judiciary. In response to criticism in its own country, the government of Ghana issued a statement explaining the presence of four Ghanaian judges in the Gambia. The statement said that agreements made with the former government of the Gambia will be respected. «Every effort should be made to ensure change in a smooth and orderly manner. It is because of this that Ghana, in concert with other Commonwealth African countries, is assisting in the efforts of returning the Gambia to democratic and constitutional rule within the shortest possible time.»

Lawyers have been outspoken in their opposition to the coup. In a declaration to the AFPRC of 1 November, the Gambia Bar Association condemned what it called «the usurpation of the reign of power by unconstitutional means; the unlawful arrest, detention and harassment of former state officers of the ousted regime and other civilians.» It further called on the AFPRC to «review the timetable for return to democratic constitutional rule with a view to handing over power to a democratically elected government not later than December 1995.»

Most recently, in December 1994, the AFPRC established the National Consultative Committee on the Programme of Rectification and Transition to Democratic Constitutional Rule in the Gambia. Composed of 22 individuals from throughout Gambian civil society, the Committee is to review and comment on the present four-year timetable for the return to democratic rule. The AFPRC is to take the Committee's views into consideration when finalising the timetable.

**Mr. Hassan Jallow:** former Minister of Justice and Attorney-General 1984-94. Immediately following the *coup d'état* of 22 July 1994, Mr. Hassan Jallow was arrested at 10:30 a.m.. Until 29 July, he was detained at the army headquarters in Banjul, and was denied access to visitors and telephone calls. He was kept in a room with Mr. Gaye, the former Minister of Information.

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On 29 July, they were released from the army headquarters and placed under guarded house arrest. Since the law of the Gambia does not allow for house arrests, a AFPRC decree was passed allowing such detention. Initially, he was allowed visitors. After one week, only relatives were allowed to visit. He did receive visits from international human rights observers, including the Secretary-General of the International Commission of Jurists and the UN Special Rapporteur on Summary Executions.

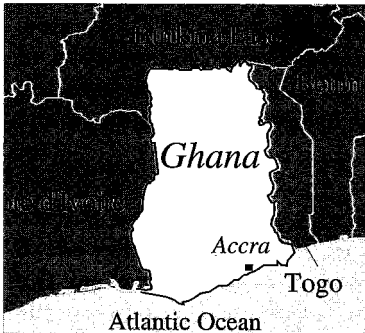
On 13 September at 1:00 p.m. he was forcibly seized from his house by a team of soldiers and locked in a cell in the Mile 2 Prison. He was detained with other former ministers. At 9.00 p.m., he was released without having been questioned. The guards were removed from his home the same day, but all travel and identification documents were taken.



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# Ghana

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The Constitution of Ghana, enacted in 1992, provides for a directly elected President, a directly elected Parliament, and a Council of State appointed by the President. The executive, the legislature and the judiciary are constitutionally separate: under section 125(1), «Justice emanates from the people and shall be administered in the name of the Republic by the

Judiciary which shall be independent and subject only to this Constitution.» Section 125(3) confirms this independence: «The judicial power of Ghana shall be vested in the Judiciary, accordingly, neither the President nor Parliament nor any organ or agency of the President or Parliament shall ever have or be given final judicial power.»

The Constitution establishes a Supreme Court, an Appeals Court, a High Court, and regional tribunals; provision is also made for the establishment of subordinate courts by legislation. Ghana now has a single system of justice: the system of special courts called «public tribunals» which previously operated alongside the regular courts under the military regime of the PNDC was phased out and integrated into the regular court system. In July 1993, the parliament abolished the National Public Tribunal, the highest tribunal in the system of special courts.

The new tribunals integrated with the regular courts are composed of Chairpersons and panel members. The Chairpersons are professionally qualified lawyers with the same qualifications that apply to judges at their respective levels. For example, the Chairpersons of the regional tribunals which have the same status

as the High Court must satisfy the requirements for appointment to the High Court. The panel members of the public tribunals, however, are not required to have legal or judicial training.

The Courts Act of July 1993 set up Community Tribunals as courts of first instance. The Community Tribunals replace the district magistrates courts and try both criminal and civil cases. Under the Courts Act, non-lawyers may become chairpersons of the Community Tribunals. This measure allegedly addresses the shortage of qualified lawyers in rural areas where many of the new tribunals will be established.

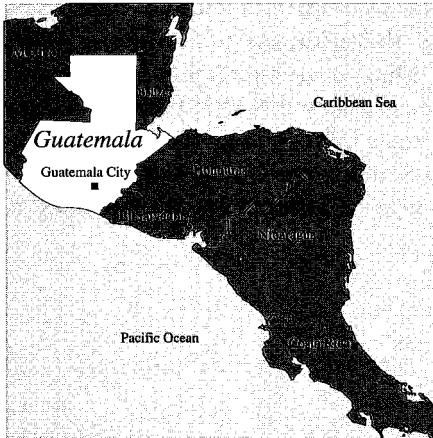
The new Constitution automatically repealed the Public Order (No. 2) Law, PNDC Law 288 of 1992, which allowed 28 days' administrative detention without charge or trial on the authority of the Minister of the Interior with no recourse to the courts. Under the present law, detainees must be brought before a court within 48 hours of arrest. Trials are public and defendants have the right to be present, to be represented by a lawyer, to present evidence and to cross-examine witnesses.

Other legal developments include the adoption of the *Habeas Corpus* Act (Adaptation of the Constitution) Instrument 1993, which returns to the High Court the right to inquire into any detention and to ask for the detained person to be produced with the written grounds for detention. The Constitution also provided for the establishment of a Commission on Human Rights and Administrative Justice. This Commission combines the traditional Ombudsman functions with the role of a national human rights body. The Commission was established by an Act of Parliament in July 1993.

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# Guatemala

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After the unsuccessful attempt of former President Elias Serrano to suspend the Constitution in an autogolpe in May 1993 (see *Attacks on Justice 1992-1993*), high hopes were raised when Congress elected former Human Rights Ombudsman (*Procurador de Derechos Humanos*) Ramiro de León Carpio as new head of state. Both inside Guatemala and with the international community, de León Carpio had gained much respect for

his outspoken criticism of human rights abuses by the security forces. The first steps taken by the new President were very promising: de León Carpio named known human rights defenders Arnoldo Ortiz Moscoso and Mario René Cifuentes as Ministers of Interior and as Head of Police. The latter launched an ambitious programme to eliminate military control over the police by removing military «advisors» to police department heads and by disbanding a joint military-police task force known as «Hunapú». In early 1994, Cifuentes hired a director for a new special unit to investigate human rights violations. The office had not become active, however, by the time Cifuentes was removed in March 1994.

Cifuentes's removal, as well as the nomination of Danilo Parrinello Blanco, a man known for his close ties to the military, as the new Minister of the Interior marked a change in the President's attitude. This became even clearer when de León Carpio named the former Director of the infamous intelligence service of the High Command (Director de Inteligencia del *Estado*

*Mayor*) as Vice-Minister of Government . In this function, this military officer will be in charge of supervising the National Police. A year earlier, the President had expressly reserved this function to a civilian.

Pushing forward with plans to reinforce human rights was not made easier by the result of the elections to Congress which took place on 14 August 1994. Due to an extremely low turnout of voters, a mere 21%, the former military dictator, General Efraín Ríos Montt, and his extreme right wing Revolutionary Guatemalan Front (*Frente Revolucionario Guatemalteco*) won a majority of seats. Ríos Montt was to assume the Presidency of Congress in January 1995.

## Peace Talks

Guatemala is a highly militarised society plagued by violence. Different from all other central American countries, the 34 year civil war in the interior of the country is still being waged. Between 350,000 and 500,000 civilians are still enrolled in so-called Volunteers' Committees for Civil Defence (*Comités de Voluntarios de Defensa Civil, CVDC*, popularly known under their old name *Patrullas de Autodefensa Civil, PAC*). These provide support for the army in their counterinsurgency efforts following a strategical plan developed by General Ríos Montt in the 1980s. Many of the human rights violations in the countryside are attributed to members of the CVDC, acting with the support, or at least the acquiescence of the military.

On 29 March 1994, the government and the guerrilla coalition reached a long-delayed first agreement as part of their global negotiations. It included a calendar for further discussions which foresaw the signing of a final, comprehensive peace accord for December 1994. The schedule could not be kept and negotiations are still under way.

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Under the agreement, the government has vowed not to promote an amnesty for those who have violated human rights. The agreement also provides for the establishment of a UN mission (MINUGUA), which is called upon to verify all allegations of human rights violations by both parties that present themselves after its installation. For this purpose, the mission has the power to move freely throughout the country, to interview anybody or any group it deems necessary, and also to check whether the competent national institutions carry out necessary investigations.

On 17 June both sides signed an agreement on the resettlement of over 1,000,000 people displaced during 34 years of civil war. This includes the approximately 40,000 Guatemalan refugees living in camps in neighbouring Mexico and the Communities of People in Resistance, long considered as guerrilla sympathisers, who for 12 years had been living in the mountains to escape from repression by the armed forces. A week later, another agreement was signed establishing a Commission for Historical Clarification (*Comisión de Esclarecimiento Histórico*, CEH) to examine responsibility for atrocities committed during the conflict. The CEH will begin its work after the signing of the final peace accord and will be composed of the UN Moderator of the peace talks, Jean Arnault, a Guatemaltecan citizen chosen by the Moderator, and an academic proposed by the universities and chosen also by the Moderator. It will have six months to prepare its reports and its brief is not to personalise responsibility nor to initiate legal proceedings for human rights crimes.

## Judiciary

Guatemala's Constitution provides for an independent judiciary composed of general law courts, with a Court of Appeals (*Corte de Apelaciones*) and a Supreme Court (*Corte Suprema de Justicia*) at the top, a Constitutional Court (*Corte de Constitucionalidad*), and a military court system.

A measure that was intended to strengthen the court system, the new Code of Criminal Procedure (*Código Procesal Penal*, see *Attacks on Justice 1992-1993*) finally entered into force on 1 July 1994. The new code calls for oral instead of written trials in both Spanish and indigenous languages. In a connected decision, the public Ministry (*Ministerio Público*) was converted into two separate entities: a Prosecutor General's Office (*Fiscalía General*) and an Attorney General's Office (*Procuraduría de la Nación*). The *Fiscalía*, with a large investigative unit, will be in charge of criminal investigations, a task so far fulfilled by the police, whereas the *Procuraduría* will represent the State in civil suits. Earlier deadlines for the coming into effect of the new code could not be kept due to budgetary constraints. For a while, the insufficient preparations led to a virtual standstill of the criminal justice system: the first trial under the new Code took place in the town of Chiquimula in mid-October 1994.

The new code affects the extent of military jurisdiction. Military courts used to have jurisdiction over all military personnel who had committed crimes while on official business. These included the so-called military commissioners (*Comisionados Militares*), civilian agents who work under the supervision of the military. In practise, the very wide military jurisdiction covered all those who depend on the military. As military courts have generally tended to «close ranks» and been unwilling or unable to convict military officers, they could count on almost complete impunity. The new code changes the procedures for common crimes committed by members of the military. As in all other cases, preliminary investigations will be in the hands of the Public Ministry, supervised, however, by a military judge. The trial will then take place before a so-called Council of War (*Consejo de Guerra*), which is made up of a regular three-judge first instance court of the area plus two military officers. On appeal, their sentences will go to the Court of Appeals and ultimately to the Supreme Court.

Theoretically, a court-issued arrest warrant is needed for detention unless a person is caught in the act of committing a crime and police must bring detainees promptly before a judge.

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The law provides for bail, access to lawyers and limits the time for which a detainee may be held to 20 days. After that period, a detainee must be charged or freed, and the authorities must produce detainees at the court's request. Despite these legal safeguards, however, there were frequent credible reports of arbitrary arrest by the security forces, *incomunicado* detentions and failure to adhere to the prescribed time limits for legal procedures. Those reportedly responsible for illegal detentions routinely ignore writs of *habeas corpus*.

Judges in Guatemala are badly paid and suffer from bad working conditions, which makes them susceptible to corruption. Independent observers agree that the judicial system is ineffective, often unable to ensure a fair trial and - especially at its highest levels - highly politicised. Public opinion of the judiciary's ability to resolve problems is reportedly very low. The *de facto* impunity for both human rights violators and common criminals in turn favours the resort to violence to resolve personal problems. According to the UN independent expert on Guatemala, Argentinean professor Mónica Pinto, practically all members of the «human rights community» said they had received death threats.

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## **Constitutional Reform**

In order to render all democratic institutions more efficient, President de León Carpio initiated changes to the Constitution that were approved in a constitutional referendum in January 1994, although at a turnout of no more than 6%. Under the revised Constitution, the terms of office for the President and for the members of Congress have been reduced to four years. Congress will allow only 70 members, compared to 116 before the referendum.

Under the new Constitution, the number of judges in the Supreme Court has been increased from 9 to 13. Also, the election process for judges has been reformed: Judges for the Supreme

Court are now elected for a period of five years by a two-third majority of Congress from a list of 25 candidates drawn up by a commission. The Commission consists in equal parts of deans of the law schools, representatives of the bar association (Colegio de Abogados), and representatives of judges from the Court of Appeals, plus a representative for the rectors of universities. The process for the election of judges for the Court of Appeals is similar.

Whether or not the changes lead to a stronger and more efficient judiciary remains to be seen. The first election of a Supreme Court under the new rules in October 1994 seemed promising. After that, a number of judges were transferred to posts in the interior of the country in an effort to purge the judiciary. It was not clear, however, whether all procedural rights in what some called «cold destitutions» had been kept. All these steps will only have a chance of success, though, if all branches of government start to tackle the question of impunity of both human rights violators and common criminals. The extent of this impunity is best illustrated by the fact that, as of January 1995, nobody has been brought to justice for any of the attacks against the judges and lawyers listed below.

**Cecilia Alvarez Paz, Oswaldo Enríquez, Fernando René de León Solano:** Lawyers, members of the Guatemalan Jurists Association (*Asociación Guatemalteca de Juristas, AGJ*). All three lawyers reportedly received death threats. One received a package bomb.

Fernando de León Solano, secretary of the Association's executive board, reported in early July 1993 that he had been followed by two men wearing military boots and with military style haircuts. On 21 and 23 July 1993, two employees of a funeral home visited the AGJ offices, responding to anonymous phone calls requesting services for de León Solano. Oswaldo Enríquez, director of the AGJ, also received various death threats. Finally, on 10 September 1993, a package bomb exploded in the AGJ offices. The bomb had been intended for Cecilia Alvarez Paz. Fortunately, nobody was injured, but serious damage was caused to furniture and documents..



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**Mario Cabrera Ramazzini:** Lawyer working for the Public Ministry (*Ministerio Público*) in the department of Sololá. On 9 September 1993, Mario Cabrera Ramazzini received several anonymous telephone calls and was reportedly told to renounce his profession and leave Sololá, or he would be killed. Local press reports suggested the threats might be connected to Cabrera Ramazzini's investigations into the murder of a youth in the San Antonio district of Sololá.

**Edgar Ramiro Elías Ogáldez:** Judge at the First Court of First Instance (*Juzgado Primero de Primera Instancia*) in the town of Chimaltenango, 50 kilometres west of Guatemala City. On 20 August 1994, Judge Elías Ogáldez was shot down execution style in front of the agronomy department of the University of San Carlos in Guatemala City. The judge was inside his car with his secretary, Telma Ortiz de Sagastume, when three armed men approached them and shot them both. Judge Elías Ogáldez was killed instantly, his secretary was severely wounded.

Although all sources agree that his assassination was connected to cases he had been investigating, descriptions vary to a certain degree. According to information provided by the Human Rights Office of the Archbishopdom of Guatemala (*Oficina de Derechos Humanos del Arzobispado*), the judge had ordered the detention of an army officer in connection with the 13 July 1994 murder of Blanca Flor Marroquín Flores shortly before his assassination. The Human Rights Office deduces from their investigations that this military officer, who has close connections to the High Command (*Estate Mayor*) of the Armed Forces, is responsible for the murder.

According to information provided by Amnesty International, another order by Judge Elías Ogáldez that could also have a connection with the assassination is the detention of a military commissioner and of the CVDC chief of San Martín Jilotepeque because of the latter's alleged participation in a murder of an indigenous leader, Pascual Serech. The military commissioner had been arrested, but was released after the assassination. According to one testimony, the sons of that commissioner later announced publicly that they would kill

anyone who tried to take action against him, as they had already done with the judge.

Relatives of Judge Elías Ogáldez reported that they received threats throughout November 1994 after pressing for an investigation.

**Edgar Epaminondas González Dubón:** President of the Constitutional Court (*Corte de Constitucionalidad*). González Dubón, 62, was assassinated on 1 April 1994 when he returned from a walk with his wife and his young son. He had been followed by armed men in a red car.

Although the government portrays the murder as a common crime, human rights groups suggest that González Dubón had been targeted because of his participation in important decisions of the Court: In May 1993, the Court ruled that the attempted *autogolpe* (self-coup) of President Jorge Serrano Elías was unconstitutional. That decision played an important part in the struggle for Serrano's resignation, especially since the Court also called on the army to enforce that decision. In another ruling, just days before the murder, the Court decided that congressional deputies were not authorized to amend the law governing elections and political parties in order to prolong their tenure in office.

Another case that was before the Court at the time of the assassination concerned the extradition to the United States of a former high-ranking army officer accused of cocaine trafficking. According to one source close to the case, González Dubón had prepared a draft decision allowing the extradition days before his death. After the murder, the extradition was held to be unconstitutional.

As of January 1995, authorship of the crime had not been established. According to a report by Human Rights Watch /Americas, the police and the investigating judge during interviews showed a «notable lack of interest in seriously investigating the murder of the nation's highest judicial authority.»

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**Patricia Ispanel Medimilla:** Lawyer. Patricia Ispanel Medimilla is representing the victims of an alleged violent armed attack by members of a civil patrol in a case before the Inter-American Commission of Human Rights. In the incident, members of the CVDC (former PAC) of the town of Colotenango, Huehuetenango department, allegedly attacked the unarmed participants of a human rights demonstration on 3 August 1993. Both Ispanel Medimilla and the witnesses received death threats, prompting the Inter-American Court of Human Rights to issue a Provisional Measure ordering the Government to protect them.

**Roberto Lemus Garza:** Lawyer and former First Instance Judge in Santa Cruz del Quiché. Judge Lemus in 1991 ordered the arrest of the PAC leaders of Chunimá, who are now serving thirty-year prison terms. Because of threats and harassment, Judge Lemus was obliged to flee the country and now resides in the United States.

**Fernando López, Marco Vinicio Mejía Dávila, Otto Peralta, Juan José Rodil Peralta:** On 5 October 1993, a death list was reportedly circulated in Guatemala City stating that «the war has started against a group of communists, which is why we have ordered a summary trial for treason ... the traitors must be executed.» The 22 people on the list were given 72 hours to leave the country or risk being considered «military targets.»

Among the people on the list, which included journalists, trade unionists, development workers and human rights activists, were the following jurists: Fernando López, a law professor at the University of San Carlos, lawyer Marco Vinicio Mejía Dávila, then director of the Human Rights Office of the Archbishop of Guatemala, Otto Peralta, executive co-ordinator of the Centre for Popular Action and Legal Defence (*Centro Popular para Acción y Defensa Legal*, CEPADEL) and then Supreme Court President Juan José Rodil Peralta. The threat against Rodil Peralta was not limited to his person but pertained to «all the workers in the justice system who are involved with the guerrillas.» The list was signed in the name of the «Roberto Lorenzana Anti-Communist Movement» (*Movimiento Anti-Comunista Roberto Lorenzana*).

**Luis Mazariegos:** President of the Association of Judges and Magistrates (*Asociación de Jueces y Magistrados*) and formerly an investigating judge in Guatemala City. After speaking out publicly about the corruption and political cronyism in the Supreme Court, the Supreme Court reportedly charged him with making arbitrary and unprofessional rulings in a number of criminal cases and removed him from his post on 22 December 1993. Judge Mazariegos has received extensive support from the judiciary as well as from the Guatemalan Bar Association (*Colegio de Abogados y Notarios*). No information could be obtained on whether the new Supreme Court has re-instated the judge.

**Luis Montefar:** Justice of the Peace (*Juez de Paz*) in the town of Chajul, El Quiché department. Judge Montefar reportedly received various threats and now fears his life is in danger after he had ordered the exhumation of three bodies in San Gaspar Chajul on 8 October 1993. The corpses were identified as those of three men who had been kidnapped by members of local CVDC groups in December 1989.

**Yolanda Auxiliadora Pérez Ruiz:** First Instance Judge (*Jueza de Primera Instancia*) at the Second Investigating Court (*Juzgado Segundo de Instrucción*) in Chimaltenango. On 11 February 1994, an unidentified man took photographs of the staff and the buildings of the Chimaltenango court. A week later, Judge Pérez received an anonymous phone call informing her that she would be kidnapped. These attempts at intimidation continued with a bomb threat in the court on 25 February. According to one report, the court was under continuous surveillance by unknown men. During the months of March and April, Judge Pérez received at least two more anonymous calls, one threatening to kill her and the other threatening to kill her mother.

The intimidation and threats against Judge Pérez apparently stem from her work on the case of José Mercedes Similox Telón. In order to serve a writ of habeas corpus filed on his behalf on 3 February 1994, the Judge went to Military Zone 302 army base where Similox Telón was being held. Initially, an officer of the military base instructed one of his subordinates to respond to the

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writ and produce the detained. However, when Judge Pérez went to the courtyard of the base, neither she nor a delegate from the office of the Human Rights Ombudsman was able to see the prisoner.

In addition to the threats, Judge Pérez was also put under official pressure from the military. On 7 February 1994, the local commander filed a formal complaint with the Supreme Court, demanding the Judge's removal. On 21 February, Judge Pérez was informed that she was to be transferred from Chimaltenango to the jurisdiction of Chiquimula in eastern Guatemala as a result of the complaint. On 8 September 1994, Judge Pérez was suspended without pay. Two weeks later, however, she was reinstated in her position as judge.

**Gustavo Vásquez:** Lawyer for the Council of Ethnic Communities (*Consejo de Comunidades Etnicas*) «Runujel Junam,» an organisation working for the rights of the indigenous people and peasants in Guatemala. Gustavo Vasquez received a telephone call on 17 October 1994 in which he was warned that he would be executed if he kept working for the Council. In a public statement, the Council said that the death threats against Gustavo Vásquez were connected with an increase in acts of repression and intimidation against the entire peasant community.

**María Eugenia Villaseñor:** Magistrate at the Third Chamber of the Court of Appeals (*Sala Tercera de la Corte de Apelaciones*) in Guatemala City. Judge Villaseñor and her two colleagues **Héctor Raúl Orellana** and **Mario Salvador Jiménez**, have all been involved in reviewing appeals in a number of controversial cases of alleged human rights violations. One of these cases is the murder of anthropologist Myrna Mack, a case which has been highly publicised inside and outside of Guatemala. All judges received various death threats during the month of July 1994. On 16 July, male voices were heard outside the homes of Judge Villaseñor and Judge Orellana. Aimed at Villaseñor, somebody reportedly cried «We are going to kill her.» On 17 July, Judge Orellana's car was shot at when he was leaving the home of a relative together with his wife and two children. On 19 and 20

July, Judge Villaseñor received several threatening phone calls both at her home and in her office and the tires of her car had been slashed. As a result, on 26 July 1994 the Inter-American Commission of Human Rights requested that the Government take measures to protect the lives and physical integrity of the three magistrates. The Government then decided to assign them police protection.

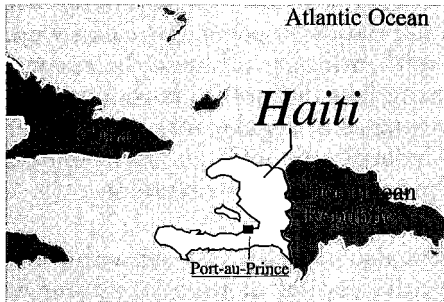
On 29 August, Judge Villaseñor's bodyguard reported he was abducted by three men in plain clothes as he headed for a store near the judge's home. They beat him, interrogated him about the Judge's movements and then advised him to leave his job. They also vowed to kill the people living in Judge Villaseñor's house, who include the lawyer **Carlota Gordilla**, the counsel for Helen Mack, sister of murdered anthropologist Myrna Mack.

After that incident, Judge Villaseñor decided to leave the country for Costa Rica, but returned a month later.

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# Haiti

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Hopes for the future of Haiti have been raised by the return from exile, in October 1994, of President Jean-Bertrand Aristide. Under the military regime which ruled Haiti until October, the judiciary was dominated by the influence of the military; this influence rendered the

1987 constitutional guarantees of judicial independence and fair public trial virtually meaningless.

Serious and extensive violations of human rights have been committed with impunity by the military, allied to the Duvalierist paramilitary group known as the Front for the Advancement and Progress of Haiti (FRAPH). Together, these elements have practised torture, detention without charge or trial, and searches without warrants. The judiciary was largely incapable of preventing or punishing such actions. Those judges who opposed the military did so at great personal risk. Dominance of the judicial system by the military was caused in part by the lack of an independent police force in most areas.

The judicial system operates at a level of confusion which facilitates abuses of human rights. Proceedings in court are reportedly often informal and disorganised. The judiciary in general is weakened by the often poor education of judges, by inadequate resources and a lack of essential materials, and by the pervasive corruption which dependence on the military and low judicial salaries has inevitably engendered. In some departments, juries cannot be convened because of lack of funds to pay their expenses.

The United Nations/Organisation of American States International Civilian Mission, which monitored the human rights situation in Haiti until it was expelled by the military Government in July 1994, reported widespread bribery, corruption, extortion, intimidation and interference involving judges and the military. The outcome of many cases was apparently dictated by the military. Bribes given to judges in relation to particular cases were reportedly sometimes shared with military officers. In several departments it was reported that judges did not, as is required by law, visit prisons and detention centres at regular intervals, either from fear of the military, or complicity with it. This leaves detainees extremely vulnerable to torture and ill-treatment.

A shortage of judicial officers also causes problems within the system. In Hinch, for example, the capital of the *département du centre*, there has been no investigating judge since 1991; instead the Chief Justice also acts as an investigating judge. This means that the same judge habitually acts as investigator and then as judge in the same case, a situation which is contrary both to Haitian law and to international fair trial standards.

**Guy Malary:** Lawyer and Minister for Justice in the Malval government. On 14 October 1993, the day before the scheduled resignation of General Cedras, Malary, his driver and one of his bodyguards were shot and killed and another bodyguard wounded as they left Malary's private law office on Avenue Jean Paul II in Port-au-Prince. As they drove from the office, a barrage of gunfire was heard; the driver then lost control of the car, which crashed into a wall. The victims were apparently shot at close range after the crash. Armed police and civilians reportedly chased away witnesses immediately after the shooting. Photographers at the scene were also threatened. The International Civilian Mission was prevented from approaching the scene of the crime for over an hour.

Malary had been appointed Minister of Justice by Jean-Bertrand Aristide in July of 1993. As Minister for Justice, Malary had worked closely with the International Civilian Mission. He had also been responsible for the planned creation of



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a new police force under the control of the Ministry of Justice. He had been attempting to negotiate the resignation of the Supreme Court President Emile Jonaissant, an ally of the army later installed as President. Prior to his appointment as Minister for Justice, Malary had represented several victims of military violence. He had also acted as a consultant to the International Civilian Mission and had helped in the training of observers.

**Laraque Exantus:** Substitute public prosecutor in Port-au-Prince. Exantus disappeared from his home in the Delmas area of Port-au-Prince during the night of 12 February. His house was ransacked, documents searched and some valuable objects were taken. Those responsible for the abduction have not been identified.

**Robert Antony Italis:** Magistrate in Chantal. Italis was among those arrested in a wave of detentions in the south-western part of the country in February 1994. The government cited their possible complicity with a group of armed rebels; however, there appears to be no evidence that any such group exists. Italis was detained at Gabion prison in Les Cayes, held for over a week, and released without charge on 21 February.

**Belizaire Fils-Aimé:** Magistrate in Le Borgne, North Department, and FNCD mayor of Le Borgne. On 10 April 1994, Fils-Aimé, together with his wife, parents and other friends and members of his family, was arrested at his home by the armed forces. Fils-Aimé was taken to the military barracks at Limbe, where he was reportedly badly beaten. The nine others arrested with him were taken to Au Borge military barracks. All ten were subsequently released.

**Charles Jean Baptiste:** Attorney General. On 6 September 1994, Jean Baptiste was assassinated as he entered the *Palais de Justice*, located in front of the Dessalines military barracks. The same day, the Bar Association of Port-au-Prince issued a public statement calling for a lawyers' strike until concrete actions were taken by the authorities to investigate the crime. The CIJL, in a letter to the Haitian authorities, expressed its concern at the

assassination and urged the authorities to bring the perpetrators of the crime to justice.

**Robert Cassagnol:** Assistant Justice of the Peace in Thiotte, south-eastern Haiti. On 27 October 1993, Cassagnol was reportedly attacked by a group of soldiers and armed civilians, who forced him to abandon his post, apparently because he was a supporter of Jean Bertrand Aristide.

**G rard Dalvius:** Lawyer and Secretary of State at the Ministry of Justice. It is reported that, on 17 July 1993, Dalvius was attacked and threatened by a group of armed men as he entered his home. Dalvius reportedly stated he believed state agents to be responsible for the attack.

**Kesner Od us:** Judge of the civil court of St. Louis du Sud in Southern Haiti. It is reported that, on 4 July 1993, Od us was attacked by six armed men. Both he and his wife were beaten; their house was destroyed. After the attack, a new judge was appointed to Od us' post, though Od us received no formal notification of his dismissal.

**Gaston Tanis:** Justice of the Peace in Thiotte, south-eastern Haiti. It is reported that, in October 1993, Tanis was threatened by soldiers and armed civilians who accused him of being a supporter of Jean Bertrand Aristide. On 22 October, he was reportedly shot at and his house damaged after he refused to resign his post.

**Anonymous Judges in D partement du Nord, Cap-Ha tien.** The judges, working in an isolated village, issued three *mandats de comparution* (subpoenas), in an attempt to arrest an attach  involved in a case of alleged harassment. The attach  did not respond to any of the warrants. When the judges one day saw the attach  in front of the courthouse, they immediately issued an arrest warrant, charging him with contempt of court. However, when they asked a member of the military to arrest the attach  he refused. The judges then wrote to the prosecutor in Cap-Ha tien, as well as senior military officers, complaining that their authority

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had been undermined by an agent of the military. The following day their houses were stoned.

**Anonymous Judge de Paix in Département du Centre.**

The judge presided in a case concerning an 18 year old boy who had been beaten by two soldiers. He granted provisional release to the boy. On the evening of the boy's release, the soldiers involved in the case went to the judge's house and threatened both the judge and his family. They also issued threats to the victim's mother, saying they would shoot at her house if the judge did not ensure that the victim was turned over to them immediately. The judge was forced to go to the victim's home and deliver him into the hands of the soldiers. The victim and the judge were then escorted to the barracks, where the judge was arrested.

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# Honduras

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Honduras is a democratic republic with a presidential system of government. On 28 November 1993, noted human rights defender Carlos Roberto Reina, of the centre-right Liberal Party (*Partido Liberal de Honduras, PLH*), was elected President. During the campaign, the question of the large number of Hondurans and foreigners who had been disappeared in the 1980s was one of the main topics. One of Carlos Roberto Reina's campaign promises was the creation of a «a moral revolution» to rid government of corruption.

To fulfil this promise, the new President has to overcome major obstacles. Honduras is a highly militarised society in which the armed forces play an important role. Judges' salaries are low and this is conducive to corruption. Members of the military and the wealthy class enjoy almost complete impunity. Prison conditions, especially for the poor, are reportedly appalling. Even though the Constitution calls for prompt appearance before a judge, Human Rights Watch / Americas reported that only 12 % of the prison population had actually been sentenced. They also reported that in one case, a man had spent seventeen years in jail because his release order (*carta de libertad*) had never been processed.

Under the new President, some progress towards improving the administration of justice has been made. An independent Public Ministry under the guidance of a civilian attorney general was created by a December 1993 law and set up in June 1994. Within this new office, responsibilities are distributed between a

corps of special prosecutors in the areas of human rights, consumers' rights, women's rights, children's rights, ethnic affairs, the environment, and anti-corruption affairs. However, due to the economic problems facing Honduras it is badly understaffed and already faces a large backlog of cases. Budgetary restraints also slowed down the Government's plan to replace unqualified local Judges of the Peace (*Jueces de Paz*) with qualified *Jueces de Letras*.

Another step in the right direction was the decision by Congress to abolish the ill-famed military-controlled *Departamento Nacional de Investigaciones* (DNI) in May 1994. Again, a lack of resources delayed the establishment of the planned successor, the new civilian Department of Criminal Investigation (DIC). This has left the country with almost no investigative police. However, reports received in December 1994 indicated that the DIC is due to start work in late January 1995.

Despite the lack of an investigative unit, the Attorney General has been pressing for investigations into cases of disappearances. He could base his work on a report titled «The Facts Speak for Themselves» (*«Los Hechos Hablan por Sí Mismos»*), a landmark study published in December 1993 and prepared by the National Commissioner for the Protection of Human Rights. It describes 184 cases of alleged forced disappearances of Hondurans and foreigners during the 1980s.

At the end of 1994, additional reform projects were introduced to Congress or were being prepared. Among them is a draft constitutional amendment that would reduce the number of parliamentarians from 128 to 80. A draft for a new Code of Criminal Procedure (*Código de Procesamiento Penal*) was due to be presented at the end of January 1995. The new code aims to introduce oral trials in the Honduran criminal judicial system.

**Leo Valladares Lanza:** Lawyer and the National Commissioner for the Protection of Human Rights (*Comisionado Nacional para la Protección de los Derechos Humanos*). On 1 March 1994, Valladares Lanza received an anonymous phone call threatening to kill him. Similar threats had been made at the end

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of December 1993, around the publication of the report «The Facts Speak for Themselves» (see above). Among the persons namely responsible for human rights violations figure two former Presidents and the present head of the armed forces, General Luis Alonzo Discua. At the end of January 1994, Valladares Lanza drew attention to the fact that police authorities had «warned» him of the existence of plans for an attempt on his life.

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# India

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India, though a Federal State, has a unified judicial system. The Indian judiciary is strong and highly respected. At the apex of the judicial structure is the Supreme Court, with extensive jurisdiction, both original and appellate. The court has appellate jurisdiction where the High Court certifies that an interpretation of the Constitution is involved (Article 132 of the Constitution), where the High Court certifies that the case involves an important question of law which should be decided

by the Supreme Court (Articles 133-134), or where the Supreme Court itself grants special leave to appeal (Article 136). Under Article 32 of the Constitution, the court has original jurisdiction where the case is one involving fundamental rights. By Article 131, the court is accorded an important role in the life of the federal state: it is given original jurisdiction in cases of legal disputes between a state and the central government, or between two states. The court may also give an advisory opinion on issues submitted by the President (Article 143) and may undertake judicial review of legislation.

The Supreme Court's extremely heavy caseload provides evidence of an encouraging public confidence in the judicial system. Nevertheless, this, together with the wide extent of its jurisdiction, creates problems for the court. On a day when applications are being heard for leave to appeal, for example, each of eight of the nine separate benches of the court (comprised of two or three Justices) must hear in the aggregate 300-400 of such

applications. Burdensome caseloads are a problem reflected at all levels of the Indian judicial structure.

Beneath the Supreme Court there are the state High Courts, which are the highest judicial authority in each state. There are also subordinate courts, including the District Courts. The conditions of service of members belonging to the lower judiciary vary from state to state. In general, however, the conditions are inadequate.

The Constitution provides that judicial appointments and transfers are the responsibility of the President, who, however, must consult the Chief Justice of the Supreme Court in making the appointment. A 1982 decision in the case of *Gupta v Union of India* (known as the First Judge's Case) 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 (Second Judge's Case) a nine judge bench 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 in relation to judicial appointments was entitled to «primacy» and that the opinion of the executive did not have supremacy over that of the Chief Justice. Furthermore, the court held that, where the appointment was to the Supreme Court bench, the Chief Justice must consult with two senior colleagues. The Constitution does not prescribe criteria for the appointment of the Chief Justice; however in the Second Judge's Case, the majority held that the senior most judge of the Supreme Court should be appointed to the post. This judgement is now constitutionally binding on the government.

Appointments to the state High Courts are made by the President, in consultation with the Chief Justice of the Supreme Court, the High Court, and the governor of the state. By Article 224 (1), additional judges are appointed for a maximum period of two years. In the past this Article has been misused, and the lack



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of tenure of these judges exploited. Interpreting this Article in 1981, however, the Supreme Court held that additional judges were only to be appointed where there were no permanent vacancies in the High Court and when additional judges were required to deal with backlogs of cases. The number of judges on each High Court is, by Article 216, to be determined by the President, in consultation with the High Court and the Chief Justice.

Judges of the District Courts of a state are appointed, under Article 233 (1), by the governor of the state in consultation with the High Court. The consultation with the High Court is mandatory and must be meaningful and purposive.

### **Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA)**

The most serious threat to the Rule of Law in India is represented by TADA. Under this Act, extraordinary powers are granted to the security forces to detain, search, arrest, interrogate and try those suspected of terrorist activities. Prolonged pre-trial detention is permitted: police may hold a suspect for up to sixty days and detention without charge or trial may be for as long as six months in certain cases. Under TADA, prisoners may be remanded in custody by an executive, rather than a judicial, order. The risk of torture and ill-treatment is increased by the fact that detainees remanded in judicial custody may be taken back into police custody for further interrogation. Trials are heard *in camera* before special courts. The act casts the burden of proving innocence of a terrorist act on detainees where they are from a «terrorist affected area» (so declared by the central or state government). Although TADA was originally intended to apply only in states where armed insurrections were in progress, it is now in force in 22 of India's 25 states, and its application was extended in May 1993 for another two years. There are reports that the Act is being used to detain those suspected of ordinary

criminal offences unrelated to terrorist acts and, in some states, to arrest peaceful political opponents of the government. Security forces also have wide powers of detention under the Armed Forces (Special Powers) Act and the National Security Act (NSA).

No legal reforms have been implemented with respect to the Armed Forces (Special Powers) Act or the NSA between June 1993 and December 1994; however, TADA has been scrutinised by the country's highest court. The Supreme Court of India delivered a judgement on 11 March 1994 upholding the constitutional validity of TADA. The court suggested, however, that screening or review committees consisting of officials from government departments should be set up to review all cases under TADA and all police action taken under the act. The Federal Government has subsequently issued instructions for the setting up of such committees, and they have been established in a number of states. In the states of Maharashtra, Andhra Pradesh and the Union Territory of Delhi, such committees have reportedly requested the withdrawal of many cases brought under TADA.

The Rule of Law is under particular threat in Jammu and Kashmir. There, the conflict between government forces and groups such as the Jammu and Kashmir Liberation Front (JKLF), has resulted in disappearances, extra-judicial killings and practices of torture. The Jammu and Kashmir Public Safety Act 1978 allows for extensive powers of detention without trial: persons may be detained «with a view to preventing [them] from acting in any manner prejudicial ... to the security of the state and the maintenance of public order.» Detention without trial under the act may be for up to two years in certain cases. Against this background of conflict and executive power, the judiciary has been rendered largely ineffective. The courts are subject to pressure from both the Government and from militant secessionist groups. As a result, access to the courts is difficult for those detained under the emergency legislation, a factor which contributes to the prevalence of torture in the prisons. There are often long delays in the hearing of cases. Bail applications are

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often not heard. The role of the Kashmiri courts is further undermined by the authorities' practice of transferring cases to other Indian states.

A National Human Rights Commission was established in 1993, to investigate cases of human rights abuse. The Commission can inquire into violations of human rights or the abetment of such violations; or negligence in the protection of, or violation of, human rights by a public servant. Human Rights advocates in India have been initially critical of the Commission, as the government placed severe limitations on the Commission's powers, mandate, and methodology. The Commission can only make recommendations to the government regarding human rights violations. A further limitation is that, under its terms of reference, the Commission may only examine cases which are not more than one year old. The most serious constraint, however, is that where the Commission finds that there has been abuse of human rights by army personnel, the case cannot be immediately published and reported to parliament, as happens under the normal procedure, but must only be «reported» to the central government. As the Commission publicly and frequently draws attention to human rights abuses and calls for explanations from the authorities, there is a growing public respect for the work of the Commission.

## **The Government's Response**

On 13 March 1995, the Government of India provided an extensive response and asked that the full text of its comments be incorporated in the report. For reasons of space, this is not possible.

The government debated that the conditions of services of members of the lower judiciary are generally inadequate. It stated, however, that the rules governing the appointment and service conditions of these courts are made by the states concerned and that there «may be variations in the conditions of service from

state to state». The government also disagreed with the CIJL statement that the appointment of additional judges has been misused in the past and the lack of tenure of these judges exploited.

The government made a long statement explaining its position on TADA. It stated that «due safeguards have been built in the legislation to ensure fair trial commensurate with international human rights instruments.» It said that the remand or detention of individuals is not carried out on the basis of police action, but by a court of competent jurisdiction. Under national law, the executive magistrate examines remand cases only «if a judicial magistrate is not available.»

The government also stated that holding in camera trials under TADA is not an absolute requirement. It added that «the Supreme Court delivered its judgements on TADA on 11.3.94. It directed that the TADA cases should be reviewed by Review Committees constituted by states. In pursuance of this, Review Committees have been constituted by all the states which regularly hold review meetings.»

As for the Jammu and Kashmir Public Safety Act, the government says the maximum period of detention is two years, and that safeguards are provided. It goes on to say «terrorists have killed six judicial officers in Jammu & Kashmir and nine in Punjab with the view of intimidating the whole judicial system.» As for the CIJL statement that bail applications are often not heard, the government said that 1,591 persons arrested under TADA have been released by courts on bail between 1990 and 1994. The response mentioned the various steps to be taken to give the National Human Rights Commission authority over the army.

**Sukhwinder Singh Bhatti:** Lawyer in Chandigarh, Punjab. On 12 May 1994, while travelling on a bus from Sangrur to his home village of Badbar following a court appearance, he was abducted by armed men in plain clothes. The armed men took Bhatti away in a van without number plates, which was allowed

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to travel past two police posts without being stopped. He has not been seen since the date of his abduction. A *habeas corpus* petition was filed at the Chandigarh High Court on 23 May; there is no further information on the result of this petition. Although the police have registered this as a case of kidnapping, responsible advocates in Chandigarh believe the kidnapping registered by the police is false and that Bhatti has been killed. Bhatti had defended several Sikh men reportedly imprisoned in Sangrur jail on political grounds. On 17 June the Punjab and Haryana High Court directed the Central Bureau of Investigations (CBI) to inquire into the «disappearance» of Bhatti. The CBI was ordered to present its report within three months.

In its response to the CIJL, the government said that «the CBI investigation is still going. Since the matter is sub-judice in Punjab and the Haryana High Court, it will be improper to say anything more on this case.»

**Kulwant Singh Saini:** Lawyer practising in the District Court of Ropar, Punjab. Saini, his wife and young son were found dead after they had disappeared on 25 January 1993 (see *Attacks on Justice 1992-1993*). There were suspicions of police involvement in the killings. On 2 December 1993, the Supreme Court of India ordered the Central Bureau of Investigation to conduct an inquiry into the disappearances. The result of the inquiry is not yet known.

In its response to the CIJL, the government said that «the CBI investigation is still going. Since the matter is sub-judice in the Supreme Court of India, it will be improper to say anything more on this case.»

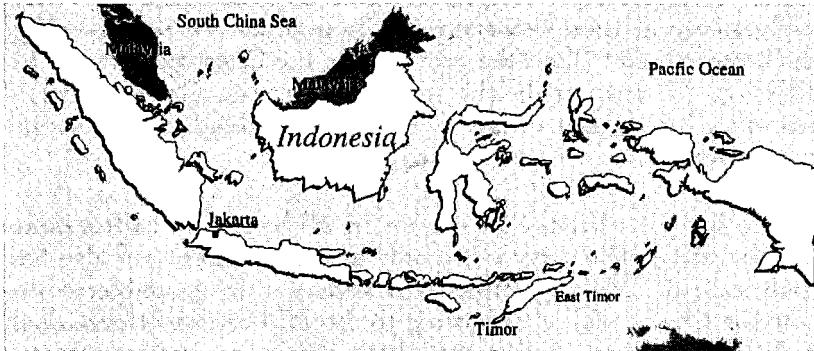
**Jaspal Singh:** Lawyer and human rights activist associated with Justice Bains (see *Attacks on Justice 1991-1992*). Jaspal Singh was detained by the police outside his Chandigarh home on 16 August 1993. He was subsequently released. Jaspal Singh's house was raided several times by the police.

In its response to the CIJL, the government denied that Mr. Singh had been detained by the police or that his house had been raided several times.

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## Indonesia and East Timor

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The problem of extensive human rights violations in Indonesia continues to be compounded by the subjugation of the judiciary to military and governmental power and by the inefficacy of the law in bringing the perpetrators of human rights violations to justice. There are many reports of detentions without trial, extra-judicial executions, torture and ill-treatment of detainees. In the weeks leading up to the APEC summit in Jakarta in November, the police in the capital initiated a crack-down against crime which reportedly involved the detention without trial of many suspected criminals. Elsewhere, the suppression of independence movements in East Timor and Aceh has resulted in systematic human rights abuses which the judicial system has failed to remedy.

The Indonesian Constitution is informed by the state ideology of Panscalia, which includes principles of Indonesian unity, belief in a Supreme God, humanity, democracy and social justice. Under the Constitution, supreme state power is vested in the People's Consultative Assembly, which elects the President. The Assembly is composed of elected members of the House of Representatives, as well as nominees of the President and the government, and delegates from the regional assemblies. Though

the office of the President is constitutionally subordinate to the Assembly, effective executive power rests largely in the hands of the President. The Constitution does not acknowledge the separation of the legislative, executive and judicial powers; instead it applies the theory of the division of the three powers which involves co-operation between them. In practice it is the executive which is dominant. Thus the provision in the Constitution that the judiciary is «free from the influence of the Government's authority» does not create a substantial degree of judicial independence.

Military influence is strong in all areas of Indonesian administration. The army is not only a security agent but also has a political role. Military influence is apparent, for example, in the Supreme Court, where, according to the ICJ report *Indonesia and the Rule of Law*, a significant proportion of judges are former army officers.

## The Courts and Judiciary

There are four court systems in Indonesia: first the general courts, which include District Courts and High Courts, with the Supreme Court having appellate jurisdiction on all issues of law referred from the District and High Courts. There are systems of religious courts, of administrative courts and of military courts. The military courts have a jurisdiction normally confined to cases against army personnel.

The Chief Justice of the Supreme Court is appointed by the President for a five year term of office. Other judges and justices are appointed by the President on the advice of the Minister of Justice. The Minister of Justice is responsible for the promotion and transfer of judges and for the allocation of funds to all sections of the judiciary. According to law N° 14 of 1970 and law N° 2 of 1986, judges are supervised jointly by the Minister for Justice and the Supreme Court. In practice, the role of the



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Minister of Justice in supervising the courts tends to endanger judicial independence.

Presidential Decree N° 82 of 1971 requires all civil servants and state employees, including judges, to be members of the Indonesia Civil Service Corps (KORPRI), an association for government employees under the chairmanship of the Minister for Home Affairs. KORPRI is affiliated to the ruling party Golkar; all members of KORPRI are automatically members of Golkar also. The association requires its members to comply with its rules and policy guidelines, which are enforceable by sanctions. Such requirements undermine the political neutrality of the judicial power.

A recent controversy over dismissal from judicial office concerns the dismissal of Judge Sarwono from the post of deputy to the chief of the Surabaya District Court in early 1994. Judge Sarwono's expected promotion to the post of chief of the Madan district court was also postponed indefinitely. The government took this action against Judge Sarwono in response to allegations that he had received bribes in connection with a case in which he acquitted three businessmen of tax evasion charges. The Chief Justice, Purwoto Gandasumbata, said in April that Judge Sarwono would be investigated and given an opportunity to defend himself against the allegations. However it appears that Sarwono was dismissed from his post without the institution of proper disciplinary procedures.

## **Criminal Procedure**

Legal safeguards which protect the rights of detainees and ensure fair trials are contained in the Criminal Procedures Code (KUHAP) but in practice these are often ineffective or disregarded entirely. KUHAP makes provision for a right to legal representation. However this right is sometimes largely illusory. Defendants are sometimes informed of their right to counsel only

at a very late stage. Defence lawyers in criminal cases also experience problems obtaining information necessary for the defence, are frequently left with inadequate time to prepare a defence and may be refused permission to call important witnesses (see account of the trial of Nuku Soliman, below).

Issues of the fairness of trials and access to defence lawyers were raised during the trial of the East Timor rebel leader, Xanana Gusmao, who continues to be held in detention. He was sentenced to life imprisonment after an unfair trial in early 1993 (see the ICJ *Report on the Trial of Xanana Gusmao*). The trial was attended by an ICJ observer. Xanana Gusmao was not permitted to be represented by a lawyer of his choice. The lawyers given power of attorney by his relatives were not permitted to visit him. On 30 September 1994, the Working Group on Arbitrary Detention adopted an interim decision requesting the government of Indonesia to permit a visit by the Working Group to enable it to ascertain the facts in the case.

The trials of labour activists, arrested in the wake of a wave of strikes and labour unrest in 1994, also provide evidence of the potential for abuse of the Indonesian judicial system. The charges against many of the defendants have been brought under Articles 160 and 161 of the Indonesian Criminal Code rather than the Anti-Subversion Law; they nevertheless appear to be politically motivated. Many of those arrested have been charged with non-violent acts which are in fact protected by the Indonesian Constitution. The trial of Dr. Mochtar Pakpahan, a trade union leader, was characterised by apparent judicial bias against the defending counsel. The judge refused to allow defence lawyers a copy of the interrogation deposition, as required under Article 72 of the Code of Criminal Procedure.

Some of those arrested in relation to the labour demonstrations at Medan were not legally represented at their trials: the first four of the activists to be brought to trial had initially given power of attorney to the Legal Aid Institute in Medan but later revoked this power; there was some evidence that they had been pressured to do so. Two other defendants in

the trials retained the Legal Aid Institute Lawyers as their counsel but stated that their lawyers had not been present at their interrogation; they further stated that they had been told their sentences would be lighter if the lawyers were not present during the interrogation.

The trial of Nuku Soliman, a student and human rights activist, arrested during a demonstration in November 1993, also gives cause for concern. He was charged under Article 134 of the Indonesian Criminal Code, which criminalises insults to the head of state; this is an offence punishable by imprisonment for up to six years. His trial, in January and February 1994, was characterised by a heavy police and military presence in and immediately outside the court. The court refused to hear the testimony of all but one of the seventeen witnesses called by the defence, a decision which prompted the defence lawyers to walk out in protest, urging that the trial be postponed and the issue referred to the Supreme Court. This request was, however, ignored by the court. Nuku Soliman was sentenced, on 24 February 1994, to four years imprisonment. In September 1994 the United Nations Working Group on Arbitrary Detention adopted a decision declaring the detention of Nuku Soliman to be arbitrary, and requesting the Indonesian Government to take the necessary steps to remedy the situation.

Article 510 of the Code of Criminal Procedure states that any gathering of more than five people requires prior police permission. This provision has been used to prevent lawyers from meeting with their clients (see case of Munir, below) and to harass NGOs, including legal and human rights organisations. In September 1994, the Indonesian Legal Aid Institute (LBH), an organisation whose activities have been interfered with by the operation of Article 510, brought a case against the government arguing that the provision was unconstitutional. A draft presidential decree, prepared in February 1994, is likely to restrict the activities of Indonesian NGOs even further: it requires all NGOs to adopt the state ideology of *Pancasila* and to report all their activities to the Ministry of Home Affairs.

An additional threat to the Rule of Law is the 1963 Anti-Subversion law, which criminalises acts which distort, undermine or deviate from State ideology, or which could disseminate or arouse hostility, disturbances or anxiety amongst the population. The law allows many of the safeguards contained in the Criminal Procedures Code to be bypassed for those charged under its provisions.

Problems of arbitrary detention and unfair trials are especially acute in East Timor and in Aceh. There are reports of many political opponents of the government being detained by the military and held in military detention centres where there is little possibility of access by lawyers. Many have reportedly been convicted and sentenced to long terms of imprisonment after unfair trials. In June 1994 three East Timorese (Pantaleao Amaral, Miguel de Deus and Isaac Soares) were sentenced to 20 months imprisonment for «expressing anti-Indonesian sentiments in public» after a trial in which none of the three was legally represented.

**Maiyasyak Johan:** Human rights lawyer and executive director of the Indonesian Institute for Children Advocacy (LAAI). Maiyasyak Johan was arrested, along with three others, following widespread labour unrest in Medan, North Sumatra, in April 1994. Maiyasyak had represented workers charged with criminal offences after the protests. His work with the LAAI involved support for child labourers. The LAAI had also represented several workers arrested at an industrial strike on 11 March, 1994. He was interrogated for several days between 18 and 22 June, then released without charge.

On 18 September, one day before he was due to answer a police summons, he was again arrested. No warrant for his arrest was presented, as is required by the code of criminal procedure. Maiyasyak Johan was taken to Medan Police headquarters where, in protest at the illegality of his detention, he went on hunger strike and refused to speak to police interrogators. His trial began on 18 October, after the court had rejected his request for a pre-trial hearing. He was charged with inciting criminal

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action by workers under Article 160 of the Indonesian Criminal Code, convicted, and sentenced to nine months imprisonment. His arrest and prosecution are in clear contravention of the UN Basic Principles on the Role of Lawyers which stipulate that lawyers shall not be identified with their client's causes as a result of performing their professional duties (Article 18).

**Ahmad Jahari:** Lawyer in Bogota, West Java, working for the Ampera branch of the Indonesian Legal Aid Institute (LBH-Ampera). Jahari was involved in representing a group of farmers whose land was threatened by the proposed construction of a golf course near Bogor in East Java. On 24 September 1993, Jahari took part in a protest against the proposed development. Immediately following the demonstration he was arrested (along with 300 others who had also been present) and was reportedly held in detention until 27 September. LBH-Ampera, together with other human rights organisations, then filed a case, claiming that the arrest had been illegal.

On 6 October, at 2:00 a.m. in the morning, Jahari's house was attacked by ten men who left a note warning him to leave the area or «be ready to die like a dog». Ahmad Jahari was not at home at the time. His wife and child were in the house but suffered no physical harm. There has been some suspicion of government complicity in the attack.

**Dedi Ekadibrata:** Lawyer at LBH-Ampera and co-ordinator of United Action Against Golf Course Development. Like Ahmad Jahari (see above) he had been involved in providing legal advice to farmers whose land was threatened by a proposed golf course development. A warrant was issued for his arrest and on 8 November 1993 he turned himself over to the police. It is unclear whether any charges were brought.

**Munir:** Human Rights Lawyer at the Surabaya office of the Indonesian Legal Aid Institute (LBH), an independent human rights organisation. Munir was arrested on 19 August 1994 at about 11:00 p.m. at Malang, East Java, during a meeting with 14 workers whom Munir was providing with legal assistance. He

was interrogated at the local police station for approximately two hours, then released. His interrogators accused him of arranging a meeting without the necessary police permission, contrary to Article 510 of the Indonesian Criminal Code. He was ordered to attend for further questioning on August 25. He was later found guilty of holding a meeting without a permit, and fined. The workers with whom Munir had been meeting had taken a case for unfair dismissal against PT Sido Bangun Lawang. An April 1994 decision of the Supreme Court in favour of the workers is now being challenged by the company; the meeting at which Munir was arrested had been to discuss the pending case. There are concerns that Munir's detention may have been an attempt to intimidate him and to prevent him and other lawyers from assisting the workers in their case.

**Dr. Adnan Buyung Nasution:** Human rights lawyer and Director of the Indonesian Legal Aid Institute. In December 1993, he was banned from speaking at two seminars.

**Ellyasa Budiarto:** Lawyer. He was detained by security forces on 21 September in Central Jakarta along with three others, after they had released balloons bearing slogans such as «uphold the rights of workers» and «The 1945 Constitution guarantees freedom to organise». The four were interrogated and tortured over a period of two days, under the supervision of high ranking military officers; they were severely beaten and reportedly subjected to electric shocks. They were initially taken to the Jakarta Police headquarters, then transferred to the Central Jakarta District Military Command, and then to the regional headquarters of the military Co-ordinating Agency for the Maintenance of National Stability.

**Sabam Siburiam:** Lawyer and dean of the faculty of law at Nommensen University in North Sumatra. He represented the Batak Protestant Christian Church, in a case in which they challenged the intervention of the military in the appointment of their archbishop. It is reported that, in December 1993, Sabam was assaulted whilst changing a flat tire at a roadside station. His assailants attacked him with the blunt end of a machete. As a

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result of the attack, he remained unconscious for several days. The police were requested to investigate the incident, but took no action. Sabam has since resigned from the case due to ill-health and fear for his safety.

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# Iraq

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## *The Judiciary*

The Constitution of Iraq, as is the case in many constitutions, subjects the judiciary to the law. It states that the composition, levels and jurisdiction of the courts as well as the conditions for the appointment, transfer, promotion, legal responsibility and retirement of public prosecutors and their deputies shall be determined by law.

However, the main problem in Iraq is that the legislative power itself is not independent from the executive. This is so because the Revolution Command Council (RCC), the supreme executive body, is endowed with an essential legislative power. According to Article 42 of the Constitution, the RCC has the power to promulgate legislation and decisions having the force of law. Also, Article 43 vests the RCC with the sole authority to promulgate legislation concerning defence and public security matters.

This is against the principle of separation of powers which dictates that the parliament should be the principal legislative power. Thus, an independent judiciary should be able to guarantee that the legislative power is not vested in the hands of the executive, that laws are constitutional, and that laws are respected by everybody, including the executive.

The RCC interferes in the administration of justice by promulgating decisions that have the force of law and that lead to



obstacles to the independence of the judiciary.<sup>2</sup> The RCC drafts, for example, legislation that governs the mode of appointment, transfer, dismissal and discipline of judges. This is worsened by the fact that decisions of the RCC are final and are not subject to any form of judicial or political control and the courts must respect and apply them even if they are contrary to the Constitution.

The Organization of the Judiciary Act (the Judiciary Act) provides that judges are appointed by a presidential decree. Moreover, the Minister of Justice specifies in which court a judge is to work. The Council of the Judiciary has the capacity to promote judges, according to specific conditions.

As to the discipline of judges, proceedings can be instituted against a judge, on the basis of a decision by the Minister of Justice, before the Committee on Judicial Matters. The decision should contain the facts and the evidence, and should be notified to the judge and the Public Prosecutor. The Committee on Judicial Matters consists of three members appointed by the Council of the Judiciary. The proceedings are conducted in camera and are attended by a representative of the Minister of Justice and by the Public Prosecutions or his representative. The judge is required to appear in person and may avail himself of the services of a lawyer. The Minister of Justice, the Public Prosecutor and the judge have the right to appeal the Committee's decision before an expanded session of the Court of Cassation within 30 days from the date of notification. The expanded session may ratify, annul or modify the Committee's decision on this matter and its decisions are final.

The Judiciary Act states that Judges cannot be transferred to a non-judicial post without their written consent. However, the same Act provides that a judge can be dismissed or transferred to

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2. See the report *Iraq and the Rule of Law*, issued by the ICJ in September 1994.

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a civil post by presidential decree, based on a decision by the Council of the Judiciary and the proposal of the Minister of Justice, if his promotion is deferred on more than two successive occasions in the same grade.

Also, the Minister of Justice can appoint a judge from the Court of Cassation, with the judge's written consent, to a legal counsellor post in the RCC, in the Office of the President of the Republic or in the Ministry of Justice, or to teach at a university or in the Judicial Institute. This is on the condition that the judge would not lose his judicial title or his rights. The period of appointment should not exceed three years, renewable for another.

However, on 20 March 1993, the RCC adopted an amendment allowing the Minister of Justice, with the approval of the Presidential Courts, to appoint qualified judges for the Court of Cassation, to complete the quorum. Another amendment adopted in 1993 reduced the number of judges sitting in the expanded session of the Court of Cassation from ten to six members.

## **The Penal Code**

On 4 June 1994, the RCC promulgated Decision N° 59. The Decision amended Penal Code N° 111 of 1969, and introduced corporal punishment in the Iraqi legal system. The Decision states the following:

- Any person who commits a crime of theft as enacted in Articles 440, 441, 442, 443, and 445 of the Penal Code, and Article 117 of the Military Criminal Law N° 13 of 1940, and the crime of car theft shall be punished by amputating his right hand from the wrist. In the case of repetition of this crime, the author's left foot will be amputated at the joint.

- In situations where the person commits armed theft, the punishment is the death penalty.
- Amputation is excepted if the value of the object stolen does not exceed 5,000 dinars; if the theft took place between two married people, or between relatives of the third degree; or if the author of the theft is a juvenile.
- If the court determines that the circumstances of the author or the circumstances surrounding the crimes enacted in Article 2 (a, b) of this Decision constitute mitigating circumstances, it shall render a verdict of life imprisonment instead of the death penalty.

The ICJ expressed its concern that the corporal punishment introduced constitute cruel and inhuman punishments under both international law and Iraqi domestic law. Also, the ICJ and other human rights organisations expressed their concern that the judiciary has already applied corporal punishment based on Decision 59. Reportedly, this decision was applied in late June 1994 in two cases. Two men convicted of stealing carpets from Bahriz al Kabir mosque were sentenced to the amputation of a hand by the Criminal Court in Baghdad. It is not clear when the sentences will be executed, or whether the defendants will have a right to appeal.

The ICJ is also concerned by Decision 86 adopted by the RCC on 13 July 1994. This Decision allows the Court, if the circumstances of the crime or of the author do not call for mercy, to pronounce the death penalty even if the author is over the age of 18 and not yet 20.

## **The Government's Response**

On 12 June 1995, the Government of Iraq responded to *Attacks on Justice*. The response stated that the Revolutionary Command Council is the highest legislative authority in Iraq. This

legislative authority is also shared with the National Council. As for the executive authority, the response stated that it is held by the President and the Council of Ministers.

The response also stated that judicial independence is guaranteed by the Constitution and that promotion, transfer and dismissal of judges are regulated by specific laws. Judges have the opportunity to challenge these decisions before the Court of Cassation.

As for decision N° 59 of 1994, the government stated that the embargo increased crime, and that consequently, the state took tough measures to combat crime. It said that in two cases in which corporal punishment applied, such punishment was overruled by the Court of Cassation.

# Ireland

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The independence of the Irish judiciary is guaranteed by Article 35.2 of the 1937 Constitution, which provides that all judges «shall be independent in the exercise of their judicial functions and subject only to the Constitution and the law.» Article 35 also provides that judges of the Supreme Court and the High

Court may only be removed from office for «stated misbehaviour or incapacity.» Under Article 35.1 of the Constitution, judges are appointed by the President, acting on the advice of the government.

The country's highest court of appeal is the Supreme Court, which also has the power to rule on the constitutionality of Bills referred to it by the President (Article 26). The Supreme Court is constituted of the Chief Justice and four ordinary judges; also the President of the High Court is an *ex officio* judge of the Supreme Court, by virtue of the Courts (Establishment and Constitution) Act 1961, section 1(3). Beneath the Supreme Court is the High Court, which, under Article 34.3.1, has wide jurisdiction: it has «full original jurisdiction in and power to determine all matters and questions, whether of law or fact, civil or criminal.»

Problems with the judicial appointments process were highlighted in 1994 when an unprecedented political crisis arose over the appointment of the then Attorney General, Mr Harry Whelehan, to the post of President of the High Court. The crisis demonstrated the political nature of the judicial appointments process.

The appointment of Mr Whelehan, who is perceived as a conservative on social issues, was supported by the majority party in the coalition government, *Fianna Fáil*, but was strenuously opposed by the minority Labour Party. The Labour Party proposed a rival candidate; however, that candidate later stated that she had not been consulted about her candidature, and was in fact not interested in the post. A Cabinet sub-committee was appointed in an attempt to resolve the dispute; it recommended legislative changes in the judicial appointment process but failed to make any progress on the issue of Whelehan's appointment. Months of deadlock between the coalition partners on the issue, which threatened to bring down the government, was abruptly broken on 11 November when the *Taoiseach* (Prime Minister), Albert Reynolds, took the decision to recommend the appointment of Mr Whelehan without the consent of the Labour Party. The decision on the appointment was taken at a Cabinet meeting which the Labour Party members had left in protest.

Controversy over Mr Whelehan's appointment reached new heights when information came to light regarding the role of the Attorney General's office in the extradition of a Catholic priest to Northern Ireland on charges of child sexual abuse. Mr Whelehan was Attorney General at the time the extradition order was required to be prepared; however it appeared that the papers concerning the case had remained at the Attorney General's office for seven months without any action being taken on them, thus jeopardising the extradition process. Amidst mounting public indignation over the extradition case, the *Taoiseach* defended Mr Whelehan in the *Dáil* (Parliament), maintaining that the delay had resulted from the incompetence of subordinate officials at his office, and that the unique circumstances of the case were such that extensive legal research was required before the extradition order could be made. The same day, 15 November, Mr Whelehan was sworn in as President of the High Court. It later became apparent, however, that the delay in the extradition may not have been justified. Mr Reynolds then stated in the *Dáil*, on 16 November, that he regretted the appointment of Whelehan, and that he would not have recommended the appointment had the full facts been at his disposal.

Immediately prior to his swearing in, Mr. Whelehan was contacted by the new Attorney General, Eoghan Fitzsimons, who asked him, at the instigation of the government, to postpone his swearing in for several days and to «consider his position.» On 15 November, after Mr Whelehan's swearing in, Fitzsimons was reportedly contacted by a government Minister who stated that there was a grave danger that the Northern Ireland peace process might break down if Mr Reynolds had to resign. The Minister reportedly stated that it was the view of Ministers that, if Whelehan resigned, the *Taoiseach* could remain in office and the peace process could be saved. According to Mr Fitzsimons' own account, the Minister requested Mr Fitzsimons to transmit a message to Mr Whelehan that he should resign in the national interest. Mr Fitzsimons then went to Mr Whelehan's home and gave the message. Mr Whelehan refused the request to resign. On 17 November, however, he did resign as President of the High Court. He gave as reasons for his resignation his wish to preserve the public's respect for the independence of the judiciary, and the need to protect the office of the President of the High Court from becoming politicised. Mr Reynolds resigned as *Taoiseach* the same day.

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# Israel & The Occupied Territories

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New prospects for a resolution to the decades-old Israeli/Palestinian conflict surfaced on 13 September 1993 when the Israeli government and the Palestine Liberation Organization (PLO) signed the *Declaration of Principles on Interim Self-Government Arrangements* (the Oslo Declaration). The Oslo Declaration envisaged a process of negotiations that would take place in three stages, the conclusion of which would determine the permanent status of the occupied territories of the West Bank and the Gaza Strip and their estimated two million Palestinian inhabitants.

On 4 May 1994, Israel and the PLO signed a second agreement in Cairo, the *Agreement on the Gaza Strip and the Jericho Area*, which saw the implementation of the first stage as envisaged by the Oslo Declaration. Accordingly, Israel withdrew its troops from 60% of the Gaza Strip and from Jericho, and transferred some of its jurisdiction to a newly set-up Palestinian Authority, a body headed by Mr. Yasser Arafat and composed of 24 Palestinian ministers. Excepted from the transfer of jurisdiction were external security, settlements, Israelis, foreign relations, and «other mutually agreed matters.»

The second stage of negotiations consists of an interim period of five years during which a new agreement is to be signed and will govern the election of a Palestinian Council and a gradual transfer of some of the powers exercised by Israel in the West Bank and the Gaza Strip. Although elections to the Council were to have taken place by 13 July 1994, disagreements between



Israel and the Palestinian Authority over the powers of the Council and an increasingly precarious security situation saw 1994 end without the two parties reaching such agreement.

The third and final stage of negotiations, according to the Oslo Declaration, shall start not later than the beginning of the third year of the interim period. These negotiations will be conducted over the permanent status of the West Bank and the Gaza Strip and shall cover issues such as Jerusalem, refugees, settlements, security arrangements, border relations, and co-operation with Arab neighbours.

In December 1993, a few months after the Oslo Declaration was signed, the International Commission of Jurists (ICJ) and the CIJL sent a mission to the West Bank and the Gaza Strip to study the status of the Palestinian civilian courts. The findings and recommendations were published in a report entitled, *The Civilian Judicial System in the West Bank and Gaza: Present and Future*.

## **The Legal System in the Occupied Territories**

There are three sets of laws that apply in the occupied West Bank. They are: the British Mandate Emergency Regulations, introduced in 1945 during the British Mandate but kept in force by Israel; Jordanian Law, applied in the West Bank by Jordan during its administration of the West Bank between 1948 and 1967 and kept in force by Israel; and Israeli Military Orders, issued by Israeli military commanders since 1967. Additionally, since 1967 Israeli law has been applied illegally in occupied Jerusalem.

The application of the British Mandate Emergency Regulations and Israeli military orders since 1967 has had dire consequences on the Rule of Law and have lead to grave human rights abuses. Israel has invoked the Emergency Regulations to accord its military in the occupied territories virtually unlimited

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power over the Palestinian civilian population. Over the years, scores of civilians were deported to Jordan and Lebanon, thousands of houses were demolished, and whole communities experienced various sorts of collective punishments. On the other hand, Israeli military commanders in the West Bank have, since 1967, issued over 1400 orders granting their troops wide powers to arrest, search, confiscate property, and restrict Palestinian social and economic development.

According to Article 4 of the Oslo Declaration, once a Palestinian Council is elected, it will be able to legislate and exercise the powers transferred to it. However, the *Agreement on the Gaza Strip and the Jericho Area* has kept in force the laws and military orders mentioned above and accorded the Palestinian Authority in the two areas some power to repeal them or to legislate new laws. A long and restrictive procedure was set up allowing Israel veto power over all new legislation. It is not immediately clear whether future agreements will grant the Palestinians independent legislative powers.

## **The Civilian Judiciary**

The civilian judicial system in the West Bank derives from the Jordanian judicial system. Accordingly, there are three types of courts: the regular, religious, and specialised courts.

The regular courts that function in the West Bank today are magistrate, first instance and appeal courts. There are eight magistrate courts that deal with minor offences and small civil claims. There are also three courts of first instance that deal with civil and criminal matters that fall outside the competence of magistrate courts and act as appeal courts from the magistrate courts. One Court of Appeal, sitting in the city of Ramallah, hears appeals in civil and criminal matters from the courts of the first instance. It also acts as a High Court of Justice in limited matters.

Religious courts comprise Muslim *Shari'a* courts and the courts of five Christian denominations. Before 1967, specialised tribunals were created to hear cases concerning land and water disputes. The Israeli occupation authorities, however, suspended the function of these courts. Today, the only specialised courts that function in the West Bank are municipal courts. These courts deal with violations of municipal laws, town planning, and public health and safety.

The Israeli Officer in Charge of the Judiciary is charged with all the powers that were exercised by the Jordanian Minister of Justice during the Jordanian administration of the West Bank. A military committee was entrusted with the functions normally accorded to a High Council of the Judiciary. This has included the appointment, promotion and dismissal of Palestinian judges of regular courts. Furthermore, a number of military orders were issued to grant the Israeli occupation authorities sweeping powers over the judiciary in the West Bank. According to these orders, the authorities may close an investigation file or order a court to refrain from proceeding with a certain case. In several cases, the Israeli authorities released convicted prisoners after sentencing or before the end of their prison term, usually in return for their co-operation with the military, causing danger to the personal safety of the judges, and undermining the fair administration of justice. These problems and others have made the public lose confidence in the judicial process.

Access to justice has also been restricted by a disproportionate increase in court fees and a strict military control of the entrances to some courts. Additionally, the lack of staff and facilities has put constraints on the court system.

## **The Military Justice System**

The Israeli occupation of the West Bank and the Gaza Strip in 1967 saw the introduction of an Israeli military justice system. Consequently, the Palestinian legal and judicial institutions

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tremendously suffered. Many matters falling within the jurisdiction of the Palestinian courts have over the years been taken over by the Israeli military courts and tribunals. The Israeli military reserved for itself the right to decide which cases are dealt with by the Palestinian courts and which ones are treated by the military tribunals. Matters, such as taxation, traffic violations and land disputes, have frequently been transferred to military tribunals much to the dismay and the disadvantage of the Palestinian population. The military tribunals have facilitated the illegal take-over of Palestinian lands by Israeli settlers over the years. Additionally, military tribunals have continued to try Palestinian civilians accused of political or anti-occupation activities.

There are five military courts located in the major cities in the West Bank. One military officer presides over cases where punishment does not exceed five years imprisonment, while a panel of three officers may pronounce larger sentences. Appeals of military courts' decisions are limited to petitions which are reviewed by Military Objections Committees. The discretionary jurisdiction of the military courts is not subject to control or review by an adequate court except in the case of excess of power beyond that prescribed in the military order.

On 24 November 1994, an Israeli military court in the city of Jenin, in the northern West Bank, sentenced a Palestinian to death. Sa'id Badarneh, from Ya'bed, near Jenin, was accused of planning suicide bomb attacks against Israelis. Israeli Military Order N° 378 of 1970 provides for the death penalty to be imposed in security-related cases.

## **Restrictions on Lawyers**

In May 1993, Israel cut off Jerusalem from the rest of the West Bank. On several occasions, the whole West Bank was sealed off and Palestinians from the West Bank were prevented from entering Israel. Palestinian lawyers, who needed to travel to

Jerusalem or to Israel to visit their detained clients, were required to obtain special permits issued by the Israeli military commanders. At times of high tension, even these permits could not enable the lawyers to cross. Hence, thousands of Palestinian prisoners who are detained in the various Israeli prisons and military detention camps are often deprived of their right to meet with their lawyers.

In the West Bank, lawyers defending Palestinian security prisoners have to wait long hours before being allowed into Israeli military courts. Often, they are thoroughly searched and are prevented from using telephones and toilet facilities in these courts. Member lawyers of the Arab Lawyers Committee went on strike between 29 June and 10 July 1994 to protest these measures.

**Mohammed Abu Sha'ban:** Lawyer, former treasurer of the Gaza Bar Association and former director of the Gaza Centre for Human Rights. On 21 September 1993, he was fatally shot by an unidentified gunman in the city of Gaza. Mr. Abu Sha'ban was on his way home after attending a public rally held in support of the Israel/PLO agreements. A masked gunman approached him and shot him twice before escaping with several accomplices who observed the killing from two vehicles parked nearby. He was pronounced dead on arrival at the hospital. The identity of his killer or the motive were never found out.

**Riyad Aardeh:** Lawyer. In January 1994, he applied to the Israeli authorities in the West bank town of Jenin for a permit to travel to Israel to visit clients held in Israeli prisons. The officer in charge of issuing permits told him that he was forbidden from entering Israel. When he tried again in February, he was given a one-week permit which entitled him to visit one prison only. He has since refused to accept cases in which potential clients are held in prisons inside Israel.

**Mohammed El-Ghoul:** Lawyer. He was arrested at his home in the Shati' refugee camp in the Gaza Strip on 19 March 1994 by Israeli security authorities. He was held for eleven days at the

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interrogation centre in Ansar II military detention camp and later transferred to Ketziot military detention camp in the Negev desert. He was held in administrative detention without charges or trial until his release on 2 August 1994. El-Goul is the director of *Dar Al-Haq Wa El-Qanoon*, a Gaza legal and human rights unit.

**Talal Dweikat:** Lawyer. He was fatally shot on 28 February 1994 by Israeli troops during a confrontation between Israeli army units and the residents of Mo'askar Al-Balad, near Nablus, in the West Bank.

**Samir Ramadan:** Lawyer. In the morning of 28 June 1994, he arrived at Jneid prison, near Nablus in the West Bank, in order to visit his detained clients. At the prison gate, he was told to wait while a guard confirmed his pre-arranged appointment with the prison authorities. At 3 o'clock in the afternoon, and after several attempts to encourage the guards to contact their superiors, he insisted on speaking directly with the prison director. At this point, an Israeli man in civilian clothes, later identified as a prison official, approached him, pushed him and began insulting him. Another officer came out and threatened to prevent the visit if he would not wait quietly. Soon, a police car arrived at the prison gate. Two policemen searched Mr. Ramadan and ordered him to come along to the Nablus police station where he was charged with obstructing a prison guard from carrying out his duty. He was told that the police will ensure that his lawyer's licence will be withdrawn. He was released at 8 o'clock in the evening.

**Fo'uad Shnewra:** Lawyer. On 16 March 1994, he was arrested at his home in the Beach Refugee Camp in the Gaza Strip by Israeli security authorities. His house, and his brother's house, were thoroughly searched. He was placed under administrative detention without formal charges or trial in the Ketziot military detention camp in the Negev desert. He was released on 9 June 1994.

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# Italy

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The 1947 Italian Constitution sets forth an independent judiciary by declaring in Article 101(2) that «Judges are only subject to law.» Judicial independence is supported by a wide range of other provisions in the Constitution and relevant regulations. For example, the Constitution states that the appointment, posting and discipline of judges are to be administered by the High Council of the Judiciary. The High Council is a thirty-three member administrative body, with twenty members elected by judges, ten members elected by Parliament, and three members being permanent: the President of the Republic, the Chief Justice of the Court of Cassation and the Attorney General of the Supreme Court.

The Constitution gives the High Council the power to discipline and remove judges; the Minister of Justice cannot discipline judges directly. The Minister's role is limited to requesting that the disciplinary department of the High Council initiate an investigation of a judge.

The ordinary courts (which do not include administrative courts and a special court called the Court of Accounts) consist of a trial court level (*Tribunali*), an appeals court level (*Corti d'Appello*) and the Supreme Court (*Corte Suprema di Cassazione*).

The Supreme Court is a forum where all the decisions of the lower courts can be appealed on the basis of unlawfulness. Aside

from the Courts, yet considered part of the Judiciary, are the public prosecutors offices (*Procure della Repubblica*), whose members are appointed in the same manner as court judges and deal with criminal matters.

The Constitution also provides for the creation of a Constitutional Court, which has the authority to determine the constitutionality of regional and national laws, conflicts of power between top agencies of Government or between the national and regional governments, and to preside over judges' impeachment proceedings. The decisions of the Constitutional Court are final and cannot be appealed. The Constitutional Court consists of fifteen members: five selected by a three-fifths vote of Parliament, five are chosen by the President, three chosen by the Supreme Court, and one by the Court of Accounts.

Each judge serves for a non-renewable nine year period, and cannot be removed before the end of the term, unless two-thirds of the Court members approve the removal and good cause is shown.

Administrative Courts are a separate body of Courts created to decide administrative cases, and their jurisdiction is restricted to deciding the lawfulness of administrative acts. There are two levels of such Courts: the trial level (*Tribunali amministrativi regionali*) and the appeals level (*Consiglio di Stato*).

The Court of Accounts (*Coprite dei Conti*) is a separate Court created to check the accounts of public officials and resolve pension disputes. Italy also has Military Courts which have jurisdiction over offences committed by members of the armed forces.

## **Civil and Criminal Cases**

The ordinary courts have jurisdiction over civil and criminal cases. Principles of Italian law have been developed to distinguish



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which cases are held before the ordinary judiciary or before the administrative courts.

First, any case which involves an administrative action or regulation which affects interests relating to the community as a whole, and not the individual, is considered *interessi legitimi* and is heard by administrative courts.

If an administrative action or regulation violates, however, an individual right, considered *diritto soggettivo*, then the case belongs to the ordinary courts.

In the latter situation, the ordinary court cannot nullify an administrative regulation, but can preclude the application of such regulations in the particular case in question. The jurisdiction of the Constitutional Court is exclusive in interpreting and applying the Constitution. A judge must refer a case to the Constitutional Court if, during the course of the proceedings, a party raises a constitutional issue.

A court may on its own initiative refer a case to the Constitutional Court if the case involves a constitutional issue. The judicial proceedings are suspended until the Constitutional Court settles the constitutional question. A national law may be challenged before the Constitutional Court by a regional government and the national government may likewise challenge the constitutionality of regional legislation.

## Judges

The judges are appointed by public competition which is opened only to qualified doctors of law. The promotion of judges is based on seniority and is made by the High Council. Some top appointments need the assent of the High Court Justices and the Chief Public Prosecutor. Article 106 of the Constitution does allow for the situation where a law professor or a senior law

practitioner may be appointed to the High Court without moving through the lower ranks. Judges may not be removed from office, or dismissed, suspended or transferred from their duties or posts. Judges must retire at the age of seventy. Disciplinary proceedings are made by the High Council of the Judiciary.

## Attacks on Judges

For many years, judges in Italy, particularly those who fight against corruption and organised crime, have been a target of pressure, harassment, and violence. As reported in *Attacks on Justice 1991-1992*, since 1971 eight judges and prosecutors have been murdered; the Mafia is believed to be responsible for these deaths. Most recently, Judges Giovanni Falcone and Paolo Borsellino were killed in 1992. Over the last year and a half the pressure has continued, although in less violent forms.

Since 1992, revelations of pervasive corruption at the highest levels of Italian industry and politics has destabilized the country. The events have brought down government after government, discredited traditional political parties, and forced a political overhaul. Major industrialists, Government Ministers, and political party leaders have been entangled in the web of bribes and influence-peddling. In the autumn of 1993, it became clear that certain judges, notably the head of the Commercial Court of Milan, were involved as well.

The independence of the Italian judiciary is a central issue in the current crisis. With the exception of certain individual judges who were implicated in the corruption, the Italian judiciary has been the driving force behind the investigation and prosecution of crimes of corruption, and behind the efforts towards «clean hands» (*mani pulite*). Since investigation begun in early 1992, the judiciary, notably a group of Milan magistrates, has won the intense support of the general population; a position that has brought it in almost constant conflict with the Government.

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A low point in the relationship came in July 1994. On 13 July, then Prime Minister Silvio Berlusconi issued an emergency decree to lift the pre-trial detention of those suspected of corruption. The decree, which released over 1,000 remand prisoners, provoked immediate outcry. Milan magistrates, led by **Antonio Di Pietro, Piercamilio Davigo, Francesco Greco and Gherardo Colombo**, threatened to resign. Reportedly, it was the action of the magistrates, followed by public outrage, that forced the government to back down: on 18 July, Berlusconi rescinded the decree.

The problems, however, were not over. In November 1994, Judge Di Pietro decided to investigate Prime Minister Berlusconi for corruption. On 6 December, however, the Judge resigned. According to his resignation letter, «I feel used, exploited, pulled in all directions, thrust into the headlines everyday, either by those who wish to use me against their enemies or by those who wish to see a political agenda in my work which does not exist .... I am leaving the judiciary with death in my heart.»

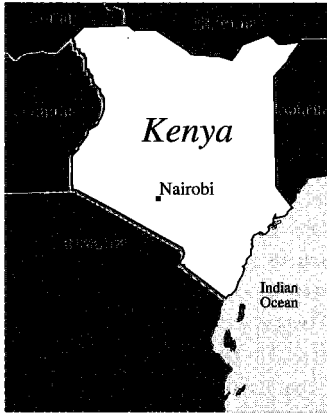
Other judges complained of similar pressure. On 12 December, a senior Court of Appeals judge, **Arnaldo Valente**, resigned to protest accusations made by the media and certain political figures that he had favoured Berlusconi in a case. **Certain magistrates in Milan and Palermo** have reportedly been «in open revolt» against what they call political interference by the Minister of Justice, Alfredo Biondi. The magistrates complain that the Minister sent inspectors to search for possible improprieties in the «clean hands» operation undertaken by the magistrates.

Most recently, on 22 December 1994, Prime Minister Berlusconi, heralded as the politician to bring Italy out of the present crisis, resigned under clouds of his own involvement in corruption.

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# Kenya

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Despite democratic reforms instituted in 1992, the governing Kenya African National Union (KANU) continues to be intolerant of political opposition. The government exercises extensive and often repressive executive power, including considerable control over the judiciary. The courts are ill-equipped to remedy the serious violations of human rights which beset Kenya; they are vulnerable to executive interference and manipulation for political ends.

The court system consists of a Court of Appeals, a High Court, and magistrate courts. The High Court has original jurisdiction in all civil and criminal matters. The High Court is composed of a Chief Justice and other judges. There is a Court of Appeal which, according to the Constitution, may review appellate decisions of the High Court, as well as some of the High Court's original jurisdiction cases. It does not, however, have jurisdiction to review Constitutional law cases. The courts are traditionally conservative in interpreting the extent of their powers, and are reluctant to enforce fundamental rights guarantees against the executive.

Under section 61 (1) of the Constitution, the Chief Justice of the High Court is appointed by the President. Other judges of the High Court are appointed by the President on the advice of the Judicial Service Commission (Section 61(2)).

Constitutional provisions for the security of judicial tenure were suspended by the government in 1988, but were reinstated,

with minor changes, two years later. Section 62 (3) of the Constitution provides for the dismissal of judges on grounds of incapacity or misbehaviour. A judge of the High Court may be removed from office on the referral of the question by the President to a tribunal, whose members are appointed by the President from among those who hold or have held judicial office. This provision allows the President to retain substantial control over the dismissal of judges from office.

Security of judicial tenure is particularly threatened by the practise of appointing judges on short-term contracts with the government. Constitutional procedures for the dismissal of judges from office may not be complied with in the case of contract judges. In a recent controversy over this issue (see the case of Mr. Justice Edward Torgbor, below) the Registrar of the High Court, Mr Jacob ole Kipury, distinguished between those judges appointed on permanent and pensionable terms under the Judicature Act and those appointed on contracts with the government. He is reported to have stated that where a judge was appointed on a fixed term contract, the validity of the contract was determined by the government, as the employer. This view would seem to except contract judges from the security of tenure safeguarded by Article 62.

Controversy surrounded a ruling of March 1994 in which the Court of Appeal refused an injunction to five dismissed lecturers from the University of Nairobi; the injunction would have prevented the university from evicting them from their residences. In its judgement, the court appeared to prejudge another case being taken by the lecturers, which dealt with the issue of wrongful dismissal; it was suggested by the court that the lecturers would also fail in that action. Fears that the ruling had been given under pressure from the executive were fuelled by the Chief Justice's use of his prerogative to constitute a bench of five judges to hear the case, rather than the usual three, and by the fact that separate rulings were not given by the judges. The ruling in the case followed statements by President Moi promising firm action against the lecturers, who had been attempting to form a union, the Universities Academic Staff Union (UASU), in the

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face of strong governmental opposition. In January 1994, while the case was still pending before the court, President Moi reportedly stated that the registration of UASU would not be permitted.

### **The Trial of Koigi wa Wamwere**

Issues of judicial independence and the fairness of trials in Kenya were highlighted by the arrest and trial of Koigi wa Wamwere, a human rights activist and former Member of Parliament, whose opposition to the present government has resulted in a long-running campaign of harassment against him. In November 1993 he was arrested, along with five others, on charges of attempted robbery with violence under Section 297(2) of the Penal Code and of being in possession of firearms without a certificate. The arrest followed a raid on Bahati police station in Nakuru three days earlier. There are concerns that the charges against Koigi wa Wamwere were fabricated in an attempt to silence him and to suggest that the ethnic violence in the Rift Valley is the responsibility of the Kikuyu community, of which Koigi wa Wamwere is a leader. Originally, 15 people were charged in connection with the case; Koigi wa Wamwere is now being tried along with three others: Charles Kuria Wamwere, James Maigwa and G G Njuguna Ngengi.

The trial, originally scheduled to begin on 4 December 1993, was preceded by numerous adjournments granted by the presiding magistrate to the state, apparently on dubious grounds. Also controversial was the decision to hold the trial in Nakuru district, despite claims by the defence that Koigi wa Wamwere could not obtain a fair trial there. These concerns were swept aside, first by the magistrate and later by the Court of Appeal; there were allegations that the courts were acting on executive instructions in this matter.

The trial began on 12 April 1994 at Nakuru Magistrate's court, before principal magistrate William Tuiyot. An ICJ

observer attended hearings of the trial in June. The magistrate reportedly made many unnecessary interventions during cross-examination of the prosecution witnesses. Repeated requests by defence counsel Paul Muite for a daily or weekly record of the proceedings were denied by the trial judge.

The defence was hampered by the court's refusal to hear any arguments which it considered «political.» During hearings of the trial in September, the judge objected to the arguments of the defence counsel which attempted to show that the charges were fabricated by the government and security forces. The judge reportedly said that he would not allow the name of the government and its senior officials to be maligned in court.

Also in September, the defence requested the court to summon the President to testify in the case. Judge Tuiyot dismissed this application, ruling that it was intended to cause embarrassment and damage to the institution of the Presidency and should therefore not be allowed. The judge referred to the high respect accorded to the institution of the Presidency in Kenya and stated that, under section 14 of the Constitution, the President could not be compelled to appear in court. However, the defence argued that section 14 did not prevent the head of state from being summoned as a witness. Defence counsel Paul Muite was reported to have described the ruling of the court as a deliberate attempt to muzzle his client.

A further disquieting aspect of the case concerns the forcible removal, on 27 September, of twelve supporters of Koigi wa Wamwere who were observing the trial from the public gallery. The twelve were members of a pressure group, Release Political Prisoners (RPP) and were wearing T-shirts which identified them as such. The judge refused to proceed with the case in their presence. Officers of the Criminal Investigations Department then forcibly removed the RPP supporters from the courtroom and brought them to Nakuru central police station. Defence counsel Paul Muite walked out in protest after the judge had refused him permission to address the court on the incident.

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The trial is still continuing. If convicted, Koigi wa Wamwere and his three co-defendants face a mandatory sentence of death.

**Justice Edward Torgbor:** Judge of the Kenyan High Court. Torgbor, who had been appointed on a short-term contract with the government, retired after a letter from the head of the Public Service, Prof. Philip Mbithi, informed him that his contract would not be renewed. The contract was due to expire on 13 May 1994. The Kenya chapter of the ICJ expressed concern that the communication had come from the executive branch of government, rather than from the judicial services commission. Justice Torgbor had previously presided over a case in which an application by President Moi had been dismissed. **Justice J. A. Couldrey**, who had also presided in that case, resigned some months previously. He had also been appointed on the basis of a government contract.

**George M Kariuki:** Human rights lawyer. Kariuki was charged with contempt of court after he was quoted in the 'People' newspaper as saying that the court's ruling in the UASU case (see above) represented «judicial lynching and blackmail tailored to meet the political expedience of the Executive.» Kariuki was misquoted: He had in fact stated, in an article in 'Society' magazine, that the ruling of the court could have been seen in this way by many. There are fears that the charges stem from his work in providing legal representation to critics of the government. The case was heard in the Court of Appeal, the highest court in the state, with the result that Kariuki had no opportunity to appeal the initial conviction. Two of the three judges who heard the case against him had themselves been members of the court injured by the alleged contempt. Furthermore, the charges were brought within a short space of time preventing adequate time to prepare a defence.

Kariuki was ordered to publish an apology and pay a fine of 6000 pounds.

**Mirugi Kariuki:** Human rights lawyer in the Nakuru area of Kenya. Kariuki was detained on 18 September 1993 and his car



was searched by the police. He was charged with possession of illegal firearms allegedly found in his car, with entering a prescribed area, and with possession of seditious publications. He was released on bail of 300,000 Kenya shillings on 19 October, but was forbidden entry into the «restricted security zone» of Nakuru district and was ordered to report twice weekly to the police. The case is still pending. Kariuki has been involved in representing victims of ethnic clashes in the Nakuru area of the Rift Valley as well as victims of human rights abuses by the government.

**Martha Karua:** Lawyer for George B M Kariuki in the contempt of court case against him, and MP for the Democratic Party (DP). Mrs. Karua was ejected from the court by the presiding judges and forced to withdraw from the case. She was herself threatened with contempt of court charges, after filing an affidavit questioning the neutrality of one of the judges.

On 5 March 1994, Mrs. Karua organised a public meeting in her constituency of Gichugu, Kirinyaga District. The meeting was cancelled by the authorities hours before it was due to begin, despite a licence to hold the meeting which had earlier been granted. The licence was retracted by the local district officer although, by law, such a licence can only be retracted by a district commissioner. Mrs. Karua reassembled the meeting outside the offices of the district officer concerned; the participants at the meeting were surrounded by police dressed in riot gear and armed with tear gas.

**Taib Ali Taib:** Human rights lawyer in Mombasa. It is reported that, in December 1993, Mr. Taib was beaten by police at his office. He was then taken to the police station and charged with sedition, on the evidence of pamphlets which the police claimed to have found in his office. The arrest followed an incident the previous day in which the police attempted to search the house of a client of Taib's without a search warrant, and Taib had forbidden them entry. The police then threatened Taib «would be dealt with .»

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**Ng'ang'a Thiong'o:** Lawyer. It is reported that Thiong'o was denied access to his client, Francis Kipyego Rotich, who was charged with sedition for making a derogatory remark about police officers. When the lawyer was permitted to see his client, prison officers reportedly refused to allow them to speak in private, thus impeding the preparation of the defence case. Such action is in contravention of both the National law (the Prison Act) and the UN Basic Principles on the Role of Lawyers (Article 8).

**Gibson Kamau Kuria:** Lawyer, legal counsel for the lecturers in the UASU case (see above). On 14 January 1994 he was prevented from entering the university compound by security officials, who told him they had orders from the Vice-Chancellor to bar him from the campus.

**Onesmus Githinji:** Former Nairobi Chief Resident Magistrate. He was the trial judge in the case of the «Ndeiya Six» who were arrested in connection with a raid on the Ndeiya Chief's Camp in October 1993, and charged with robbery with violence. The magistrate dismissed the case, refusing to accept the confessions of the six which he stated had clearly been obtained by means of torture. The magistrate condemned the behaviour of the police in the case and directed the Commissioner of police to take immediate action against those responsible for the torture. Onesmus Githinji was subsequently transferred from Nairobi to Kitui, 130 km west of Nairobi.

**Paul Muite:** Defence lawyer in the Koigi Wa Wamwere trial (described above) and FORD Kenya MP. Following the ejection of members of RPP from that trial (see above) Muite was required to attend Nakaru police station and asked to make a statement about the RPP. Police officers reportedly accused him of paying the RPP members to attend the trial to help Koigi Wa Wamwere escape. In June 1994 Muite complained officially to the Director of State Intelligence and Security of constant security police surveillance.

On 8 March 1994 Muite was forced out of part of his Kikuyu constituency, when he went there with a film crew to investigate allegations that land was being sold off by local officials. The local district officer evicted Muite and the journalists accompanying him.

**Jacob Mutua:** Lawyer and member of the DP. In April 1994, Mutua was arrested, along with five other DP members, at the office of Kyale Mwendwa, national officer of the DP. The six were first taken to Kilimani police station and then transferred to several other police stations. They were held *incommunicado* overnight, released the following day, and later charged with holding an illegal meeting.

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# Lebanon

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Between early 1975 and October 1990, Lebanon witnessed a brutal civil war. The war featured a complete lack of central governmental control and gross violations of human rights, including indiscriminate shelling, summary execution, disappearances, and displacement of population.

In October 1989, the Taif Accords were signed. The Accords, a charter for national reconciliation proposed by the Arab League, were endorsed by some Lebanese Deputies in Taif, in Saudi Arabia. At the beginning of 1991, a Government of National Unity was established under the presidency of President Elias El-Hrawi. In June 1991, Syria and Lebanon signed a treaty of «Brotherhood, Co-operation and Co-ordination». Amongst the main measures to implement the Taif Accords, was the appointment in June 1991 of an enlarged Parliament comprising of 40 members, with equal seats for Christians and Moslems. In the summer of 1993, parliamentary elections were held. In August 1991, the Government announced a general amnesty covering crimes committed prior to 28 March, including politically motivated crimes.

During the last three years, the Lebanese army and Syrian army units jointly disarmed many militia units and took control of areas previously controlled by them. Other armed factions such as *Amal* and *Hizbollah* continued to control several areas in Lebanon. Also, the South Lebanon Army (SLA) maintained its control over the Jezzine area. Israel and the SLA kept the area known as the «security zone» along the Lebanese/Israeli borders under their

control. Additionally, Syrian troops are still present in the country.

Moreover, these different forces maintain their own command structures, security organizations, detention and interrogation centres, and quasi-judicial systems outside the reach of the law. For example, the intelligence branch of the Syrian army (*moukhabarat*) maintain a number of such centres in Lebanon and often transfers its prisoners to Syria. Among them are two centres in Beirut, one in Tripoli, one in Hazmia, and several centres in the Bikaa Valley. Israel and the SLA maintain the notorious jail of Khiam in the Lebanese South. Finally, *Hizbollah* runs two jails, one in the southern suburban Beirut, and the other in Baalbek, in the Bikaa Valley.

## The Judiciary

There is High Council of the Judiciary in Lebanon to supervise the independence and functioning of the judiciary. The High Council is composed of 10 members, of whom 3 are appointed *ex officio*, and seven are appointed, based on the nomination of the Minister of Justice.

Judges are appointed by a presidential decree based on the suggestion of the Minister of Justice following the approval of the High Council of the Judiciary. Their subject matter jurisdiction is determined by a decree of the Minister of Justice with the approval of the High Council of the Judiciary. Between 1993 and 1994, three presidential decrees were issued providing for a general re-appointment to judicial positions around the country, followed by decrees for the determination of their subject matter jurisdiction. Reportedly, the choices made were heavily influenced by politics.

As to the discipline of judges, the High Council of the Judiciary is in charge of establishing a Disciplinary Council. The

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latter is composed of the President, or Vice-President, of the High Council of the Judiciary, and four other members who are appointed yearly. Moreover, the law states that the transfer and dismissal of judges is governed by law.

However, during the last two years, governmental pressure has been exerted on judges who oppose the Government to push them to resign. Reportedly, about 40 judges have resigned because of such pressure.

Judges receive their income from three different sources. Their regular salaries are determined by law and follow the same guidelines as those of the civil service, although generally higher. Additionally, a second unofficial payment is provided to them out of the Judicial Solidarity Fund which is financed by compulsory contributions collected from petitioners by court bailiffs. A third compensation is paid to the judges in return for functions they perform on committees or for secondment. Membership of committees and secondments remains the acknowledged way of rewarding favoured judges.

One of the most important challenges to the independence of the judiciary in Lebanon has been Law N°. 117 of 1991. This law led to the creation of a private company, Solidere, which received unprecedented concession over the entire old downtown section of the city of Beirut. Under the said law, which has been severely criticised for its unconstitutionality, Solidere appropriated the rights of landlords and leaseholders in downtown Beirut and was to compensate them in the form of its stocks.

Two commissions were appointed, one to estimate the value of the real estate rights on a lot-by-lot basis, and the other to distribute the amounts among the claimants. These commissions were called primary commissions, and each one of them came under a higher commission of appeal which would render final decisions. The commissions were headed by judges, many of whom are presidents of courts of appeal.

These commissions operated and made decisions, *in camera*

without holding any hearings or observing any rules of civil procedure or of evidence. When challenged before the General Assembly of the Court of Cassation, it was ruled that the commissions, though presided over by judges, were not of a judicial nature and that, consequently, it could not review the actions or inaction of the judges involved.

The said commissions placed extremely low value on property that was generally regarded as some of the most expensive. In spite of the public uproar opposing their rulings, the commissions continued to operate outside the judicial system.

Of particular concern is the fact that the judges involved in the commissions received no compensation from the government but were compensated privately, usually by lump sums of money per decision issued, by Solidere and its official founder, the National Council on Reconstruction, who are the adversaries of the disadvantaged claimants. This has clearly undermined the independence of judges. Additionally, a number of court bailiffs and process servers were employed as support staff and were privately rewarded by the same source.

Many lawsuits challenging the constitution and practices of Solidere were filed as of December 1993 and are still pending without any answer from Solidere. Lawyers for the plaintiffs have not been allowed access to the files concerning their clients despite several demands.

## **Military Courts**

During the period June 1993 to December 1994, the military system handled nearly 22,000 cases, mostly involving civilian defendants. In justifying such action, military prosecutors accuse regular prosecutors and regular criminal courts of laxity in the pursuit of justice. The arrests are largely made by intelligence personnel who have no legal authority or by military police. In

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many cases, no arrest warrants are issued at the time of the detention. Also, the trial procedures prescribed by law are not respected.

Apparently, the military sometimes expands its «judicial» role beyond the military court system so as to interfere in the regular judiciary. This took place in the case of militia chief Samir Ja'ja'. The case was pending before the highest criminal forum, constituted of the Judicial Council sitting as a criminal court of the first instance, with no right of appeal. The Minister of Defence issued a decree keeping custody of the defendants at a special jail he created at the Ministry of Defence. All efforts made by lawyers of Mr. Ja'ja' to have him removed to a regular jail failed. In protest, his lawyers withdrew from the case. The Court asked the Bar Association to appoint new lawyers for Ja'ja'.

The intervention of the military in the judiciary has been worsened by the decision of the Court of Cassation. On 24 February 1994, the Court decided that the civil justice system lacked any authority over military justice. Consequently, the Court concluded that it has no jurisdiction to review alleged violations of law committed by civilian judges, appointed in the military court system as prosecutors or as investigating magistrates.

## **The Foreign Connection**

Powerful foreign forces, both military and political, exercise authority in Lebanon in a manner that often overrides the country's laws and institutions. Syria maintains strong influence over Lebanese affairs and has an influential military presence there. Israel occupies almost 10% of Lebanese territory. *Hizbollah* is the main active militia opposing the SLA and the Israeli troops inside Lebanon. The Israelis, on their side, support the SLA, a militia force mixed with Lebanese army elements which operates within the Israeli-occupied «security zone.» The dominance of



foreign powers over Lebanon has a two-fold effect. First, there are large areas in Lebanon where national laws are not permitted to be implemented. Second, politicians and lawmakers in the country can neither provide any appreciable support for the independence of the judiciary nor guarantees for the physical safety of lawyers and judges.

The example of the former Chief of the Judicial Investigation Bureau, who retired in July 1993, served as a strong and negative message to judges and lawyers in Lebanon. He had brought disciplinary action against two high judges for breaching their duty of independence and integrity by giving political speeches supportive of Syrian leaders at a large dinner party held in honour of the Syrian Minister of Defence. In reaction to the Chief of the Investigation Bureau's action, the Syrian security forces, reportedly, immediately surrounded his house in Beirut and attempted to take him by force to one of their interrogation centres. The attempts took the proportions of a major scandal. The forces finally ceased attempting, when the Syrian command aborted the mission. The two judges concerned were soon cleared of the disciplinary charges and they continue to hold high positions. One is an appellate chief judge, and the other is a judicial inspector general.

**Mohammed Muqraby:** Human rights lawyer. He is representing defendants who are on trial before the military court in Beirut. On 18 June 1994, an assistant military prosecutor spoke before the military court denouncing Mr. Muqraby for arguments he made in the pleadings of a previous case concerning the status of Israel in South Lebanon. Mr. Muqraby had said that Israel is not an enemy of Lebanon. The assistant military prosecutor, subsequent to the trial in which the said statement was made verbally and in writing, stated that such comments were not excusable and constitute an offence against state security for which he should be punished.

The Centre for the Independence of Judges and Lawyers (CIJL) has expressed its concern that lawyers should be free to make arguments in court on behalf of their clients without fear of

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being prosecuted themselves. The CIJL's concern was without prejudice to its position that South Lebanon is an occupied territory.

On 5 July, while Mr. Mugraby was meeting with the Chief Military Prosecutor, the same assistant military prosecutor reportedly made similar remarks. The comments made against Mr. Mugraby have been published in several Lebanese newspapers.

In September 1994, another assistant military prosecutor summoned Mr. Mugraby to appear in his office on 10 October 1994. The summon stated that Mr. Mugraby was to be questioned for arguments he has made before the military court during the month of July. Acting mainly upon the advice of the Bar Association that the summon was unlawful, Mr. Mugraby did not comply. Subsequently, another summon was made for 20 October 1994 and was published in local newspapers. He ignored it.

In November 1994, the Beirut Bar Association received two official requests to approve the prosecution of Mr. Mugraby. The first request was made by the military prosecutor. He alleged that statements made by Mr. Mugraby in his arguments before the military court were in violation of the Penal Code and disturbed Lebanon's relations with a friendly country, meaning Syria. The second request was made by the Minister of Defence through the Beirut public prosecutor. He accused Mr. Mugraby of spreading information defaming the Lebanese Government through his correspondence with international human rights organizations.

After conducting its own investigations into the merits of the two accusations, the Council of the Beirut Bar Association decided to reject both requests.

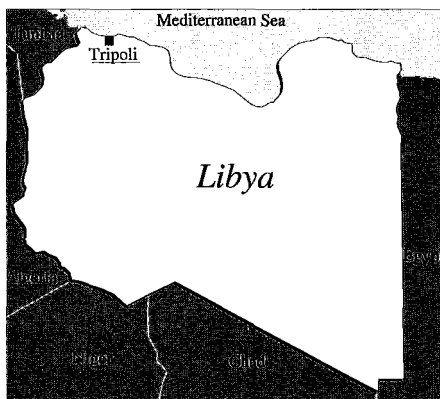
**Ghassan Sheet:** Lawyer and a member of the Beirut Bar. In June 1994, Mr. Sheet appeared at *Hizbollah's* jail in Beirut's southern suburb to seek the release of a client. The result was that he was detained himself for 65 days. The Bar Association was alerted, but was unable to take any decisive steps to obtain his

release sooner. Sheet has not brought any complaint against *Hizbollah* for fear of reprisal.

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# Libya

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**Mansur Kikhiya:** Lawyer and board member of the Arab Organization for Human Rights. On 11 December 1993, Kikhiya disappeared from his room at al Safir Hotel in Cairo, Egypt. He left behind him his medication and personal belongings. He is diabetic and needs regular medication.

Kikhiya was in Egypt to attend the General Assembly of the Arab Organization for Human Rights. He was elected to be a member of its executive committee.

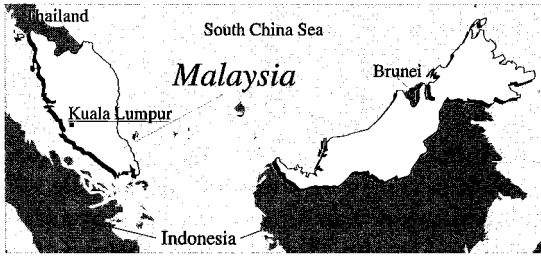
Between 1975 and 1980, Kikhiya was Libya's Permanent Representative before the United Nations in New York. In 1980, he resigned in protest against his Government's execution of political opponents. Since then, he has been an active opponent of the Government. He was living in exile in France.

Human rights organizations have expressed fear that he may have been abducted by Libyan Government agents, and taken back to Libya.

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# Malaysia

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Malaysia is a federal parliamentary monarchy. The head of state is the *Yang di-Partuan Agong*, a monarch elected every five years by the nine hereditary Malay rulers from

among their own number. A cabinet, headed by a Prime Minister, is appointed by the head of state. There is a bicameral legislature at the federal level, comprising of a Senate and a House of Representatives. Members of the Senate are nominees of either the *Yang di-Partuan Agong* or of the state assemblies; the House of Representatives is directly elected. Residual legislative power vests in the state assemblies. There is a history of tension between the federal parliament and the monarchy. The Constitution (Amendment) Act of 10 May 1993 reduced the monarchy's powers. The Act removed the monarch's powers to delay legislation and stipulated that the monarch must follow the governments «advice.»

The Malaysian Federal Court, called the Supreme Court until the changes effected by the 1994 Constitutional (Amendment) Act, exercises final appellate authority and also has jurisdiction to interpret the Constitution. The Constitutional (Amendment) Act 1994 established a Court of Appeal. Below this are two High Courts: the High Court of Malaya, which has jurisdiction for peninsular Malaysia, and the High Court of Borneo, which has jurisdiction for the states of Sabah and Sarawak. The Chief Justices of the two High Courts sit on the Supreme Court bench, together with the Lord President of the Court and seven other Supreme Court judges.

Since a dispute between the judiciary and the government which culminated in 1988 with the suspension of six Supreme Court judges and the subsequent removal of three of them including the then Lord President of the Supreme Court, the judiciary has been seriously weakened, both in relation to its capacity to maintain independence in the face of government pressure, and with regard to the scope of the powers allowed to it under the Constitution. The dispute arose out of a series of decisions of the higher courts unfavourable to the government. The Prime Minister, Mahathir Mohamad, responded by publicly criticising the judiciary and initiating a series of constitutional and legislative amendments which severely circumscribed the role of the courts. In 1988, the Constitution was amended to remove the judicial power which was vested in the High Courts. Instead the High Courts are now vested with «such jurisdiction and powers as may be conferred by or under Federal Law.» This means that the extent of the jurisdiction of the courts may be determined by the legislature rather than by the courts themselves. The amendment allows parliament to enact legislation limiting or prohibiting judicial review. A second amendment to Article 145 allows Parliament to enact laws which permit the Attorney General to determine which court will hear a particular criminal case, or to transfer a case from one court to another. According to the amended Article, such legislation may «confer on the Attorney General power to determine the courts in which or the venue at which any proceedings which he has power ... to institute shall be instituted or to which such proceedings shall be transferred.»

The Constitution (Amendment) Act 1994 includes clauses which further consolidate government control over the judiciary. The Act provides for the drawing up of a judicial code of ethics. Clause 3A states : «The *Yang di-Pertuan Agong* on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Justice of the High Courts, may, after consulting with the Prime Minister, prescribe in writing a code of ethics which shall be observed by every judge of the Federal Court.» Clause 21 of the Act amends Article 125 of the Constitution by enlarging the grounds for the removal of a judge. Previously, where the possible removal of a judge was at issue,

representations could be made to the *Yang di-Pertuan Agong* to appoint a tribunal to enquire into the judge's conduct on the grounds of «misbehaviour or inability, from infirmity of body or mind or any other cause, to properly discharge the functions of his office.» Under the new amendment, these criteria have been replaced; such a tribunal may now be convened on the grounds that the judge has breached any of the provisions of the code of ethics to be drawn up under Clause 3A. Thus, the Prime Minister's involvement in the drawing up of the code of ethics allows him considerable influence over the dismissal of judges. The president of the Malaysian Bar Council has been sharply critical of the amendment; he has argued that the involvement of the Prime Minister in the drafting of the code of ethics will «remove any separation between the Judiciary and the Executive.»

The former Lord President of the Supreme Court (now the Federal Court) Tun Hamid Omar, who chaired the tribunal in 1988 which recommended the removal of the then Lord President Tun Salleh Abas, retired in November 1994 under several allegations of corruption. Despite police reports lodged on the matter by lawyer and Member of Parliament Wee Choo Keong, to date no action has been taken against Tun Hamid.

A further cause for concern relates to the appointment and promotion of judges. In at least two recent cases of judicial appointments, in the Federal Court and in the Court of Appeal, junior judges have superseded their more senior colleagues. Such supersessions give rise to the fear that the appointments process is influenced by political considerations.

In the past, there has been conflict between the Bar Council and the government as a result of the criticism of the government by the council (see *Attacks on Justice 1991-1992*). However, the Bar Council, as evidenced by the comments quoted above, continues to maintain its independence and to be a vocal critic of government policy regarding the judiciary and the legal profession.

The Rule of Law in Malaysia continues to be impinged upon by the government's resort to emergency legislation for which little justification now exists. The Internal Security Act of 1964 (ISA) was originally enacted to deal with the now defunct communist insurgency. The Act has continued in force and can be repealed only by a resolution of both houses of parliament. The State of Emergency proclaimed in May 1969 is still in existence in Malaysia, resulting in many emergency laws still being invoked and enforced. The ISA, the Emergency (Public Order and Prevention of Crime) Ordinance of 1969 and the Dangerous Drugs Act of 1985 all permit detention without trial or judicial review. The ISA provides for prolonged detention without trial: an initial period of 2 months' detention may be extended for a period of two years, renewable indefinitely, on the authorisation, in writing, of the Ministry for Home Affairs. An Advisory Board exists which may receive representations against the detention order but it has power only to make recommendations. In 1988, the Amendment to Article 121 of the Constitution, described above, removed judicial review of detention orders save in regard to any question relating to procedural requirements. Similar restrictions were imposed in relation to the Emergency (Public Order and Prevention of Crime) Ordinance 1969 and the Dangerous Drugs Act of 1985. On a more general level, the courts have been reluctant to undertake any substantial review of ISA ministerial detention orders. They have been content to impose a subjective test of the reasonableness of the orders, with the result that the Ministerial power in this area remains effectively unchecked. This approach is against that taken by many Commonwealth countries, where the objective test is now widely applied. The giving of often inadequate or irrelevant grounds for detention, and the courts' declared inability to review such grounds, effectively subverts Article 151 of the Constitution, under which detainees must be informed of the grounds of their detention.

Judicial power is also restricted in relation to the press. The 1988 amendment to the Printing Presses and Publications Act 1984 provides that, where the Minister for Home Affairs c



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or suspends a licence or permit under the Act, the courts have no jurisdiction to hear a challenge to such a decision.

Where the Attorney General invokes the Essential (Security Cases) Regulations of 1985, there is some derogation from the fair trial standards which usually prevail. The regulations are usually applied only in firearms cases. Under the Regulations, the authorities may detain alleged offenders for an indefinite period of time before bringing formal charges. There are also less stringent standards for accepting self-incriminating statements by defendants.

In November 1993 the State Assembly of Kalanten passed a law to introduce the *shari'a* penal system. In order for the law to take effect, an amendment to the Constitution was required.

**Cecil Rajendra:** Lawyer, human rights activist and poet. It is reported that, on 5 July 1993, his passport was confiscated by the Ministry for Home Affairs, preventing him from travelling to London and Vienna to read his poetry. Though the Malaysian authorities first invoked the Official Secrets Act and refused to give reasons for the confiscation, they later announced that their action was a result of Mr. Rajendra's «anti-logging activities.» Mr. Rajendra has provided legal aid and assistance to the rural and urban poor in Penang and Province Wellesley. His passport was returned to him in August 1993. However, the authorities have said that the case against him is still under investigation.

**Khairrel Anuar Ujang:** Legal director of the Islamic group Al Arquam. Khairrel Anuar Ujang was arrested along with other members of the group in September 1994, under the ISA. The arrests were part of a crackdown by the government on Al Arquam; the group may have been seen as a political threat to the government. The leader of the group, Ashaari Muhammad, was released on 28 October, but Khairrel Anuar Ujang remains in custody.

**Zabaidi Mohammed:** Legal Advisor to Al Arquam and former magistrate. He was detained by the authorities on 6 September 1994.

**Wee Choo Keong:** Lawyer and Member of Parliament. Wee Choo Keong was sentenced by the High Court in Kuala Lumpur to two years imprisonment for contempt of court for allegedly disobeying an ex-parte court order which many considered to be a gag-order preventing Wee and two others from publishing matters relating to «improprieties, irregularities and illegalities» in two public listed companies. Later public disclosure revealed that the managing director of these companies was closely associated with the former Lord President of the Supreme Court, Tun Hamid Omar. Tun Hamid had presided in interlocutory appeals before the Supreme Court in the same action where Wee was one of the defendants. Wee appealed to the Federal Court against his conviction and sentence. The appeal began on 17 January 1995 and lasted for five days; judgement was reserved. He alleged the bias of the trial judge as one of the grounds for appeal. The CIJL sent an observer to the hearing of the appeal.

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## Mauritania

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The legal system of Mauritania faces enormous obstacles, including an omnipotent executive branch, a lack of material resources and of adequate training, and a society rigidly divided on racial and ethnic lines. In 1994, however, a law was passed which formally established a measure of judicial independence, at least theoretically. Law N° 94.012 of 17 February 1994 provides that judges are irremovable (art. 8), that nominations of judges must be by proposition of the High Council of the Judiciary (art. 4), and that the High Council is to include members elected from the judiciary by their colleagues (art. 48).

The effects of this progress, though, remain to be seen. It is argued that as a practical matter the judiciary remains a dependent power. In December 1994, the *Ordre National des Avocats* released its Memorandum on the state of Justice in Mauritania, in which it calls for urgent reform of the judicial system and the legal profession. The *Ordre* calls for, among others, the improvement of judicial training and salaries, the reform of substantive legal provisions, and a reinforcement of the role of the Supreme Court.

The rapid increase of the number of lawyers is also a concern. While there were 25 lawyers in the country in 1986, there are approximately 250 today, an increase of 1000 percent in less than ten years. This increase is due to the lack of adequate regulation of admission to the profession; some, notably the *Ordre National des Avocats* itself, say that this had led to the «banalisation» of the profession.

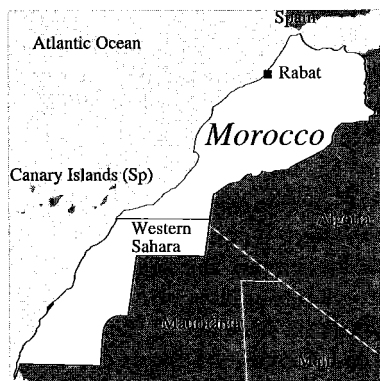
**Dia Abderrahmane:** *Juge d'Instruction*. In April 1994, Judge Abderrahmane was removed from office by the Minister of Justice. The Judge had provisionally released a man from detention accused of having attacked two French priests in the Church of Nouakchott in August 1993. The provisional release, apparently on the grounds of lack of mental fitness, was controversial.

**Bâ Mohamed El Ghali:** Judge. Beginning in August 1993, Judge El Ghali was designated by the Minister of Justice to preside over a Commission to elaborate texts concerning the status of notaries and bailiffs. The resulting draft adopted by the Commission displeased a certain member of the Commission, Mr. Mohamed Ould Boudida, clerk of the *Tribunal de la Wilaya* of Nouakchott. Mr. Boudida began disrupting the meetings and verbally attacking the judge, and on 22 December he allegedly called Judge El Ghali a black African racist. In January 1994, Judge El Ghali lodged a complaint with the Minister of Justice, the State Prosecutor and the President of the Republic. Apparently, no action was taken on the complaint.

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# Morocco

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During the last few years, the Moroccan Government has made considerable progress in the area of human rights. It ratified a number of international human rights conventions. Although accompanied with reservations, the ratification is considered a step forward. Two important institutions concerned with human rights were created. The first, the *Conseil consultatif des droits de l'homme* (Human Rights

Advisory Council), was appointed by the King in 1990 and includes representatives of political parties, professional bodies and two human rights groups. The second, the Ministry for Human Rights, was created in November 1993.

Moreover, the number of political prisoners has been significantly reduced through royal amnesties. In 1991 amnesty was granted to 230 individuals who were arrested in the context of the Western Sahara conflict. In the summer of 1991, 28 military detainees, who were detained in the notorious secret detention centre of Tezmamart, benefited from this action. In 1994, the death penalty imposed against 195 individuals was commuted.

Despite these improvements, major human rights concerns remain unresolved. Disappearances have taken place during the last 25 years in Morocco. Many Moroccans who have disappeared in the 1960s and 1970s, reportedly continue to be incarcerated in appalling conditions in secret detention centres away from judicial control.

Another current human rights concern in Morocco is the question of compensating victims of past human rights abuses. The case of those who were detained in Tezmamart is particularly compelling. As is known, at least 30 persons died in this detention centre before it was eradicated two years ago. Twenty-eight other detainees, who were released from there by virtue of a royal amnesty are suffering from serious physical and psychological ailments. This raises another concern regarding government compensation for them and other victims of human rights abuses. Also, the death penalty is still applicable for thirty crimes.

In June 1993, the Moroccan Government ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, the text is yet to be published in the Official Gazette - a necessary condition for judicial enforcement of the Convention in Morocco. Torture is considered a crime under the Penal Code. Moreover, it is considered an aggravating circumstance which necessitates a harsher sentence if torture is committed by a judge, a public officer, an official, or a member of the public force, while on duty. However, only on rare occasions did the government pursue state officials who committed acts of torture. Also, psychological torture is not considered incriminating. In practice, torture continues to take place with impunity.

On 16 November 1994, the Moroccan Government sent a delegation to Geneva to represent it before the UN Committee Against Torture. The delegation included the Director of the Central Administration of National Security, Mr. Yousfi Kadouri. As it turned out, Mr. Kadouri was previously responsible for a detention centre known as Derb Moulay Cherif in Casablanca. This centre is notorious as a place where political prisoners experienced various forms of torture during the seventies and the eighties.

## The Penal Code

Before 1992, arrested persons could be held in *garde a vue incommunicado* for periods extending indefinitely. The 1992

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amendments to the Penal Code, however, restricted the detention to 96 hours. In cases where the security of the State is endangered, the period of *garde a vue* may be extended for another 96 hours. In contrast, those detained under the Code of Military Justice remain subject to *garde a vue incommunicado* detention for 10 days, renewable as long as it is deemed necessary.

Preventive detention was also restricted to two months and cannot be extended more than five times, for the same period. This period remains long, therefore violating international standards. Additionally, the rules regulating prisons are undergoing revision. Prison conditions have so far been governed by the *Dahirs* (decrees) of 1915 and 1930, both contradictory to the UN Minimum Standards for the Treatment of Prisoners.

## The Judiciary

According to the Constitution, the separation of powers and the independence of the judiciary are guaranteed. A High Council of Judiciary supervises the functioning of the judiciary.

The High Council of Judiciary is presided over by the King and is composed of ten members: six members are elected and four are appointed *ex officio*. The judges in Morocco are appointed by a Royal Decree based on the nomination of the High Council of Judiciary. The Council is also in charge of disciplining the judges.

In reality, however, the executive authority interferes in the judicial administration. In contradiction to the law, the High Council of the Judiciary does not convene twice a year. In fact, not a single meeting was convened between January 1991 and July 1993. This has allowed the Minister of Justice to act on behalf of the Council as provided by the law. In November 1993, for example, 200 judges were appointed by the Minister of Justice independently of the High Council as prescribed by law.

Moreover, the law relative to the Organisation of the Judiciary, as modified by the *dahir* of November 1974, states that the Minister of Justice can transfer judges for a limited period. In practice, however, the judges transferred by the Minister remain in their posts for unlimited periods. Also, the Minister may suspend, at once, any judge who has committed «a grave error.» According to the law, however, the Minister is under no duty to explain his decision. The High Council, thus, enjoys only a consultative role as to what proceedings can be taken concerning judges. Additionally, presidents of courts have the right to supervise judges working in their area of jurisdiction. The Ministry of Justice keeps files on every judge; these files include administrative papers, the judge's grading, and any comments regarding the judge.

**Aminah Massoudi:** Lawyer. On 21 June 1994, Massoudi arrived at the judicial police in Casablanca, at the request of a close friend, to assist his arrested son. Upon her arrival, Mrs. Massoudi was detained and interrogated on alleged offences of insult, defamation and denouncement. Her briefcase and documents were also searched. When she demanded that the *Bâtonnier* of Rabat be present, her request was denied by the police who stated that the presence of the *Bâtonnier* was a needless legal formality. The officer at the judicial police refused to inform Mrs. Massoudi's family of her arrest. The following day, she was transferred to the Public Prosecution office in Casablanca, where she was insulted again by a prosecutor with whom she had had previous problems. Again she requested, without success, that the *Bâtonnier* of Rabat be present. She was referred back to the judicial police, where she remained in custody until the *Bâtonnier* intervened on her behalf.

It appeared that the problem arose when, earlier on, Mrs. Massoudi refused to represent two individuals who were apparently connected to certain police officials in Casablanca. As a result of her refusal, they repeatedly insulted and threatened her, her family and her colleagues. Consequently, Mrs. Massoudi complained against them in a Rabat court. They continued to harass her, and later, went as far as bringing an apparently



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baseless claim against her to the attention of the judicial police in Casablanca. Although the two are residents of Rabat, they submitted their complaint to the Casablanca police to ensure the non-intervention of the Bar Association of Rabat, to which Mrs. Massoudi belongs.

**Ahmed Abadarrine:** Lawyer. In May 1993, Mr. Abadarrine was representing a university student accused of participating in a demonstration. The student claimed he was in another city when the demonstrations took place and that he had an alibi. The prosecutor objected to bringing the alibi to court on the basis that there was a confession and that this was a *procès verbal*. The Court accepted the prosecution's point despite the lawyer's objections.

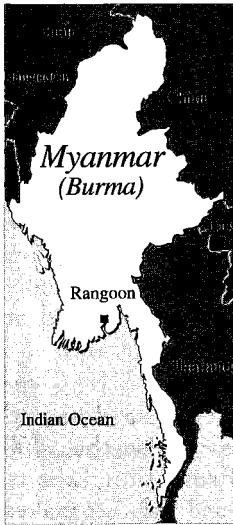
Two weeks after the end of the trial, the public prosecutor summoned Mr. Abadarrine, and asked him to explain terms he used when making the objection in court. Abadarrine refused to answer questions and requested that the *Bâtonnier* be present. He unsuccessfully demanded to put on record his objection to being interrogated by the prosecutor on a matter that occurred during legal proceedings. He was eventually released without further proceedings.

On 19 October 1994 during another trial, the judge called Mr. Abadarrine a liar when he made some legal objections. While questioning witnesses, he was continually subjected to insults. Consequently, he left the courtroom. The judge requested that Court's record show that the lawyer insulted the Court and left without permission.

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## Myanmar (Burma)

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Since September 1988 Myanmar has been governed by SLORC, the State Law and Order Restoration Council, which abolished all constitutional governing bodies and subordinated the judicial system to the executive. SLORC governs by decree with little regard for human rights standards. Its all-pervasive power renders the effective and independent functioning of the judiciary and legal profession impossible.

A National Convention, whose purpose is to prepare a new Constitution, was convened on 9 January 1993 and has continued to meet periodically since then. The Convention is dominated by delegates of SLORC, who comprise 70% of the participants. There are also delegates from the National League for Democracy (NLD), the party which won the cancelled 1990 elections, and other opposition parties. However non-SLORC participants at the conference have been harassed by the authorities and their participation in the Convention has been severely restricted. The six guiding principles outlined by SLORC for discussion at the National Convention include the continued participation of the military in the «leading role of politics in the State of the future.»

Since the abolition of military tribunals in 1992 (see *Attacks on Justice 1992-1993*) judicial power has been largely in the hands of the civilian courts, which are regulated by the Judicial Law N° 2/88 of September 1988. The Supreme Court, composed of a Chief Justice and not more than five judges, hears appeals from the state and divisional courts; it also has original jurisdiction in some areas. Judges of the subordinate courts are appointed by the

Supreme Court with the approval of SLORC. At all levels, the judiciary lacks guarantees of security of tenure or protection against removal from office. A significant proportion of judges, in both the higher and the subordinate courts, have insufficient legal education or qualifications.

The Judicial Law based judicial proceedings on international fair trial standards, stipulating that trials must be public and that the defendant has the right to argue his case and to appeal to a higher court. However, in practice, trials are often summary in nature, with the verdict predetermined by the executive. Delays in processing cases and in hearing appeals are frequent. Though most defendants are legally represented, the role of defence lawyers is often restricted to that of bargaining with the judge for shorter sentences. Prior to trial, political prisoners are usually held *incommunicado*, with access by defence lawyers denied or severely restricted.

Though many opponents of the government are detained arbitrarily and without trial, SLORC continues to use the 1950 Emergency Powers Act and the 1975 State Protection Law to arrest those critical of its regime. Section 5 of the 1950 Act makes it an offence to disrupt or hinder the activities of the government or military, to disrupt the morality or the behaviour of the public or the stability of the union. Large numbers of dissidents, including lawyers have been arrested under these provisions for activities such as disseminating anti-government literature.

The leadership of the Bar Council was replaced by SLORC on 31 August 1989. The Bar Council, which had previously been independent, is now headed by the Attorney General and staffed by government officials.

## **The Government's Response**

In its response to *Attacks on Justice* of 11 May 1995, the government said that the independence of the judiciary and the right to a fair trial are adequately guaranteed by the laws of Myanmar. The government cited provisions of various laws to

illustrate its point. These laws include judiciary law N° 2 of 1988 and the Code of Criminal Procedures. The government also said that «the administration of justice is carried out in public courts in strict observance of the above-mentioned ... principles ..., and that there is absolutely no control or influence exercised by State Law and order Restoration Council over the administration of justice by the judiciary.»

The government said that the Attorney General has been the head of the Bar Council since it was constituted in 1929. It added that according to law No. 22 of 1989 which amended the bar Council Act, «six of the eleven-member Bar Council are chosen from among the advocates of the High Court.» The government also commented on the cases of several lawyers.

**Ten Anonymous Lawyers:** The licences of ten lawyers were revoked by order of the High Court on 30 July 1993 as a consequence of convictions by military tribunals for various offences under the 1950 State Protection Act.

**Nay Min:** Lawyer (see *Attacks on Justice 1992 -1993*). Also known as Win Shwe. He was arrested without a warrant in October 1988 while awaiting a call from the BBC, for whom he worked as a journalist. He was initially held at the Myanmar Military Intelligence Headquarters in Yae Kyi Aing where he was tortured. He was charged with violating the Emergency Provisions Act 1950 and with «sending false news to foreign agencies to cause alarm and create disturbances.» Nay Min was sentenced to fourteen years of hard labour after an unfair and summary trial before a military tribunal; in January 1993 his sentence was reduced to 10 years by an amnesty law. He is reportedly still held in Insein prison in Yangon (Rangoon).

In its response to the CIJL, the government stated that Mr. Min was found guilty under the Emergency Provisions «for providing false news and rumours to the BBC (British Broadcasting Corporation)». They said he was sentenced after due process.

**Bawk La:** Lawyer, member of the National League for Democracy (see *Attacks on Justice 1991-1992*) Bawk La was a member of the Lawyers Committee established in Yangon (Rangoon) at the beginning of the pro-democracy movement in 1988. He was arrested in October 1988 outside the offices of the NLD in Myitkyina, Kachin State, and charged retroactively with violating Order N° 2/88, which bans gatherings of more than five people. Although his sentence should have ended in 1992, he reportedly remains in prison.

In its response to the CIJL, the government stated that Mr. La was found guilty under the Emergency Provisions «for setting fire to photographs of the national leaders and for creating disturbances in Myitkyina during the disturbances in 1988.» They said he was sentenced after due process.

**U Thein Than OO:** Lawyer from Mandalay, former joint General Secretary of the National Political Front, a party banned from competing in the 1990 elections. He was arrested in June 1990 for alleged underground contacts with the Communist Party of Burma (CPB). He was sentenced to 14 years imprisonment. He was first held at Mandalay prison, where he was kept in solitary confinement and tortured. He is now reportedly held at Obo Camp, under a forced labour regime.

In its response to the CIJL, the government stated that Mr. Than OO was found guilty under the Emergency Provisions «for his involvement in the underground movement of the Burma Communist Party.» They said he was sentenced after due process.

# Nigeria

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The Presidential elections which took place in June 1993 were subsequently annulled by General Ibrahim Babangida. The government's decision not to disclose the results of the elections was accompanied by contradictory orders on the issue from courts all over the country. The judiciary was thus polarised along political lines. After enormous international and domestic pressure, Babangida was forced to resign in August 1993. He handed power to the Interim National Government (ING), the members of which he had appointed himself. On 17 November 1993, the ING leader was ousted in a coup by Defence Minister General Sanni Abacha who dissolved the Senate and house of Representatives, dismissed the 30 State Governors and prohibited all political activity.

Under the military regime which the Abacha coup established, parts of the 1979 Constitution remain in force; however, by decree N° 107 of 1993 (the Constitution (Suspension and Modification) Decree) the Constitution is subordinate to executive decrees. A Constitutional Conference, convened by General Abacha, shows little real prospect of facilitating a return to civilian rule.

## The Courts and Judiciary

There is a dual judicial system in Nigeria with both ordinary courts and special tribunals founded by the military. In the

ordinary court system at the state level, the lowest courts are Customary or Area Courts, followed by the Magistrate and District Courts. The superior courts include the State Customary and *Shari'a* Courts of Appeal, State High Courts and the Court of Appeal. There is a similar structure at the Federal level. The Court of Appeal and the Supreme Court of Nigeria exercise appellate authority for decisions of courts across the country.

The Rule of Law under the military has been damaged through the establishment, by decree, of numerous military tribunals. Tribunals set up by the military since 1984 were not independent or impartial: until 1991, they were staffed by military personnel. There was no appeal to a higher court, only to a Special Appeal Tribunal, the decision of which was subject to confirmation by the Armed Forces Ruling Council (AFRC). The tradition of establishing military tribunals to consolidate executive power has continued under the Abacha regime. One such tribunal has been set up in Ogoniland, where unrest has been provoked by the exploitation of the area's oil resources. The government's Internal Security Task Force has indiscriminately arrested members of the Ogoni community, and has carried out a program of attacks against Ogoni villages, resulting in at least 50 deaths in 1994. In April 1994 a special court, the Civil Disturbances Tribunal, was set up in Rivers State, under the Special Tribunal (Offences Relating to Civil Disturbances) Edict, 1994. In the context of Nigeria's previous experience of military tribunals, there are fears in relation to the fairness of trials before the new court: it is chaired by a retired judge, but its other members may include those without legal qualification and members of the military. There is a right of appeal to the High Court, though in the current climate of repression this may not be a meaningful safeguard.

The independence of the judiciary has been progressively undermined by governmental control over judicial appointments. A judicial bench has been established which is, in large part, reluctant to offend presidential authority. Decree N° 1 of 1984 authorizes the AFRC to appoint judges to both the state and federal courts. By the decree, certain appointments may be made

on the authority of the AFRC alone, while others must be made in consultation with the Advisory Judicial Committee (AJC) or senior judicial officers. However, the AFRC is under no obligation to follow the advice of the AJC, resulting in judicial appointments produced from unrestrained executive power.

At the state level, a similar degree of influence is exercised by state governors. Many judges are appointed from the ranks of the Civil Service and these «Civil Service judges» often continue to see themselves as answerable to the executive. The military has also been given the power to remove a judge summarily from office. At the level of the inferior courts, judicial tenure is particularly precarious: state judges of the inferior courts may be removed on the sole authority of the chief judge of the state.

Thus, the unhealthy state of the Nigerian judicial system is not merely a product of the Abacha regime; the malaise is one that has developed over a decade of military government. However, since its immersion in the political turmoil of 1993, the judiciary's independence appears to have deteriorated still further. General Babangida's parting gift, in August 1993, of limousine cars to judges of the Supreme Court, has given rise to the unedifying spectacle of judges suing a newspaper for alleging that the gifts are evidence of a lack of independence. The case was inexplicably transferred to a new court half-way through the hearing.

Under the Abacha regime, the judicial system has remained the subject of constant executive interference. Orders of the courts have routinely been ignored by the government. An order by a court for the release of Chief Frank Kokori, secretary of the trade union NUPENG, arrested on 20 August, was ignored by the authorities. Similarly, an order of 18 August 1994 by Justice Belgore, Chief Justice of the Federal High Court; Lagos, that the police vacate the premises of Concord Press, whose publications have been banned by the government, was not complied with.

In a further development concerning NUPENG, Judge Mamman Kolo of the Lagos Federal High Court restrained a government appointed administrator of the union from assuming



his duties. However, the following day the head judge of the Federal High Court, apparently acting on executive instructions, addressed a press conference at which he provided «clarification» of Judge Kolo's order, to the effect that the order did not in fact restrain the administrator or the government. This interpretation of the order was enrolled on the court registry. Twenty lawyers who had been present in court on the day the judgement was read filed affidavits to the effect that the Judge Kolo had indeed granted an injunction.

The government has also been willing to ignore court orders made in the course of the treason trial of Chief Abiola, the apparent winner of the 1993 elections. At the outset of the trial, the government ignored several federal high court orders to produce Abiola in court. On 4 July the presiding judge described this inaction as a «blatant and unconstitutional challenge to [his] judicial authority.» Abiola finally appeared in court two days later. The trial has been characterised by disputes as to jurisdiction. The Constitution (Suspension and Modification) (Amendment) Decree N° 5 of 1994 allows treason cases to be tried before the Federal High Court; there are concerns that this decree was enacted specifically to prejudice the trial of Abiola. At the close of 1994, Abiola remained in detention; a Court of Appeal order for his release on bail was reversed, by the same court, apparently under pressure from the government.

### **Decrees Limiting the Judicial Power**

The Abacha administration has promulgated an impressive array of legal provisions which authorise its assumption of absolute power and prevent the courts from enquiring into its actions. Under Section 5 of the Constitution (Suspension and Modification) Decree N° 107 of 1993, signed on 21 November 1993, no question as to the validity of any decree or edict may be entertained by any court of law. Subsequent decrees promulgated by the government make full use of this freedom from accountability. Decrees of September 1994, backdated to June

and August of that year, consolidate government power by authorising the prescription of newspapers and the dissolution of the executive councils of several trade unions. Decree 11 of 1994, enacted at the same time, amends Decree N° 2 of 1984 so that the Inspector General of Police, in addition to the Chief of General Staff, may order the detention without charge or trial of any person considered a threat to the security of the state, for an initial period of three months. The detention is not subject to judicial review at the end of the three month period; in practice it appears that the detention may continue indefinitely. A decree of November 1994 removes the right of *habeas corpus*.

Decree N° 12 of 1994 finally dispels any illusion as to the existence of the Rule of Law in Nigeria. In a direct attack on the judicial power, decree N° 12 ousts the jurisdiction of the courts in relation to governmental action. It states that: «No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict.» The decree further provides that issues of the violation of fundamental rights contained in Chapter IV of the Constitution shall not be justiciable.

The timing of the decree and its backdating to August prevent the courts from hearing several cases which challenged actions of the military regime. In one case, officials of the National Labour Council (NLC) and other unions were challenging their dismissal by the government. On 23 August the Federal High Court in Lagos ordered the officials to be reinstated pending the full hearing of the case. However, on 7 September, following the enactment of Decree N° 12, the judge held she had no jurisdiction in the case. Two cases challenging the legality of Abacha's regime, one brought by six human rights organisations, were also overtaken by the decree. The Attorney General and Minister for Justice, Dr. Olu Onagoruwa, expressed his opposition to the September decrees, stating they were promulgated without his knowledge. On 12 September he was dismissed by General Abacha.

## The Role of Lawyers

A decree promulgated by the Babangida administration, the Legal Practitioners Decree N° 21 of 1993, interfered with the management of the Nigerian Bar Association and transferred its administrative powers to an unrepresentative Body of Benchers, dominated by political appointees of the government. The decree also included a provision which stated that a lawyer who challenges the provisions of the decree by filing any suit in court would be guilty of an offence and was liable to imprisonment for a year or fine or both. The decree was repealed by the Abacha regime.

Lawyers, particularly those who undertake human rights cases against the government, regularly face serious harassment by the authorities, by the security forces and by government supporters. The situation is especially difficult in the eastern and northern states of Nigeria, where frequent death threats have reduced the number of lawyers willing to undertake cases against the government.

**500 Lawyers:** On 7 July, over 500 members of the bar association were attacked by police as they engaged in a peaceful protest against continued military rule, disrespect for the Rule of Law and disregard of court orders. The lawyers sought to register their protest with the Attorney General. In front of the Lagos High Court, the police shot tear gas canisters at the lawyers and disrupted the procession. Lawyers in Lagos went on strike on 12 July 1994, in protest of the government's disregard for court orders; the strike forced the courts to close down temporarily.

**Ameh Ebute:** Lawyer, former President of the Senate and member of the National Democratic Coalition (NADECO). Ebute was arrested on 2 June 1994 for convening a meeting of the disbanded Nigerian Senate. On 6 June he was charged with treason and with conspiring with others still at large to undermine the government. He has now been released on bail. His trial continues.

**Ledum Mitee:** Lawyer, deputy president of the Movement for the Survival of the Ogoni People (MOSOP), chairman of the Rivers State branch of the Civil Liberties Organisation (CLO). Mitee was arrested on 28 December 1993 and detained at an undisclosed location until 4 January 1994. On 22 May 1994 he was again detained, along with Ken Saro-Wiwa, president of MOSOP. It appears he was arrested solely on account of his ethnic origin and non-violent political views. Mitee, who suffers from asthma, has been denied medical treatment for a chest infection and fever. Mitee and those arrested with him are being held at the Bori military detention camp. A military tribunal has been set up to try them. The first hearing of the case was on 16 January 1995. The judge adjourned the trial until the first week of February, saying he had not received any charges against the detainees.

**Femi Falana:** President of the National Association of Democratic Lawyers and executive officer of the Campaign for Democracy. He was arrested, along with Gani Fawehinmi, on 7 July 1993 (see *Attacks on Justice, 1992 - 1995*). The two were charged with sedition and conspiracy to incite violence. Two court orders to the detainees in court were ignored. On 14 August they were released on humanitarian grounds and all charges against them were dropped.

Femi Falana was again arrested on 13 April 1994 by security agents for allegedly being in possession of seditious materials and anti-Abacha posters. He was later released. His office was searched and some posters were removed. Following his representation of Turner Ogboru, the detained brother of a fleeing coup suspect, Falana became a target of close government surveillance.

On 12 January 1995, Femi Falana was arrested outside his office, and his office was searched. Falana had recently returned from Canada where he had accepted an International Freedom Award on behalf of the campaign for democracy and had lectured about human rights abuses in Nigeria. Two other members of the campaign for Democracy, Beko Ransome-Kuti and Sylvester

Odhion-Akhaine, were also detained. All three were held without charge. Falana and Beko Ransome-Kuti were released on 24 January.

**Chief Gani Fawehinmi:** Human rights lawyer and member of the Campaign for Democracy. He was arrested on 7 July 1994, along with Femi Falana (see above) and held for over a month on charges of sedition and conspiracy to incite violence before being released. On 9 August, Fawehinmi's house was raided while he was still in detention.

On 26 August, the law chambers of Gani Fawehinmi were attacked by armed men; guards at the chambers were shot and seriously wounded. In the course of the attack the assailants reportedly said: «We will kill you, kill your boss. So that you people will stop opposing government.» The same day Fawehinmi's home was the subject of a firebomb attack. Fawehinmi was representing the oil unions in cases against the government. The police have reportedly initiated an enquiry into the attack. On 1 October 1994, Gani Fawehinmi was again arrested. On 18 October, he was charged with forming a new political party, the National Conscience Party, in contravention of the ban on political parties. He was also charged with unlawful assembly. He was released on bail on 24 October.

**Bello Osagie:** Lawyer, affiliated with the Campaign for Democracy. In September 1993, he was arrested for distributing anti-government leaflets. He was subsequently released without charge.

**Titus Mann:** Lawyer and co-ordinator of the Civil Liberties Organisation (CLO) in Plateau State. He was arrested on 12 August 1993, for distributing literature protesting the cancellation of the June 1993 elections. He was released on bail on 17 August after 5 days in detention.

**Faith Osadolar:** Lecturer in law at Edo State University in Ekpoma and Edo State Legal Secretary of the CLO. Osadolar was arrested in the wake of student protests at Benin on 18 and

19 August 1994. Some 45 people in all, mostly students, were also arrested following the protests; the detainees were reportedly held for several weeks in police stations in Benin City, where they were routinely beaten.

**Chief G O K Ajayi:** Senior Advocate of Nigeria, defence lawyer for Chief Abiola. On 3 August 1994, Chief Ajayi applied for bail for Abiola; his request was rejected by the then trial judge, Abdullahi Mustapha. The case was then adjourned until 16 August. Two days after the adjournment, after Mustapha was flown by government jet from Benin to Abuja to hear the case, a fresh application for bail was purportedly made on Abiola's behalf. However, neither Abiola nor Ajayi was present at the hearing. The judge granted bail on very stringent conditions Abiola found unacceptable. Ajayi then called a press conference at which he denounced the bail hearing as a farce and a fraud. On 23 August, Ajayi was trailed by unknown persons from his office in central Lagos to his residence in Surulere where he was attacked. As a result, he was hospitalised for several days. It is believed that the attack was the work of government agents attempting to frighten Ajayi into discontinuing his representation of Abiola.

In late August or early September 1994, Ajayi's home was firebombed. It is suspected that government agents were involved in the attack.

**Chief Sobo Sowemimo:** Senior Advocate of Nigeria. His passport was seized on 7 July 1994 at Murtala Mohammed Airport; preventing him from travelling. Sowemimo is a member of NADECO and the Democratic Forum. This and other similar seizures took place despite a recent ruling of the Federal Appeal Court that the possession of a passport is a constitutional right.

**Oronto N Douglas:** Lawyer and member of the CLO; and **Uche Onyeagucha:** Lawyer and member of Democratic Alternative. On 26 June 1994, they were detained, along with a British environmentalist, Nick Ashton-Jones, by members of the military, after they tried to visit detainees at Bori camp in Port

Harcourt. In particular, they had been attempting to visit Leedum Mittee (see above). They were kicked and beaten by soldiers, then detained for three days in Port Harcourt.

**Kolawole Olaniyan:** Head of Legal Services of the Constitutional Rights Project (CRP). Olaniyan was attacked by police officers while attempting to secure the release of a woman who had apparently been illegally detained. On learning that Olaniyan was a staff attorney at the CRP, a police sergeant verbally abused him, threatened to kill him, and hit him with the butt of his gun. He ordered other officers to arrest the lawyer, who was then pushed into a crowded cell. The following day Olaniyan was treated for injuries at Lagos General Hospital.

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# Pakistan

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Pakistan is a federal republic in which executive power vests in the President and in the Prime Minister, the head of the National Assembly. During the period 1977 to 1988, Pakistan was ruled by the military government of President Zia ul Haq, which instigated a process of the Islamization of Pakistan's legal system. A new government, led by Ms Benazir

Bhutto, took office in 1988. Under the subsequent government of Prime Minister Nawaz Sharif (1990 to 1993) the Islamic nature of the legal system was again reinforced. After a period of political instability in 1993, President Ishaq Khan and Prime Minister Mian Nawaz Sharif resigned in July of that year. Federal and provincial elections took place in October 1993, and a new federal government was formed by the Pakistan People's Party (PPP), led by Benazir Bhutto.

Although the 1973 Constitution contains some assurances of judicial independence, the separation of the judicial power from the executive is incomplete. Article 175 of the Constitution contemplates that: «The judiciary shall be separated progressively from the Executive within 3 years from the commencing day.» This period was first prolonged to 5 years through a Constitutional amendment in 1976 and then to 14 years in 1985 by a President's order. As a result, the constitutional obligation in Art. 175 has not yet been fully complied with.

The incomplete separation of the executive and judiciary is particularly problematic at the level of Magistrate's Courts. Magistrates have some executive as well as judicial functions. The



weakness of the lower courts allows the practise of torture by the security forces to continue unchecked; there is virtual impunity for members of the police who ill-treat detainees. There are reports that magistrates frequently ignore evidence of torture of detainees brought before them.

There is a complex system of provincial and federal courts, including structures of Civil Courts (Civil Courts, District Courts, High Courts and the Supreme Court) and Criminal Courts (Magistrates, Sessions Courts, High Courts with the right of appeal to the Supreme Court). The Federal *Shariat* Court was established by amendment to the Constitution by presidential order in 1980. The 1980 presidential order also created the *Shariat* bench of the Supreme Court, which hears cases on appeal from the Federal *Shariat* Court.

There are also special courts, established by the 12th amendment to the Constitution in 1991 (see *Attacks on Justice 1991-1992*); cases may be referred to these courts by the federal government. Other special courts, established under the Suppression of Terrorist Activities (Special Courts) Act 1975 and the Special Courts for Speedy Trial Ordinance of 1991 and 1992 were abolished by the government in July 1994.

The many parallel jurisdictions, as well as the arbitrary nature of the referral to special courts by the executive, represent an encroachment on the principle of equality before the law. There are concerns regarding the fairness of trials in special courts, in particular that there may not be adequate time to prepare a defence and that the presumption of innocence is not assured.

Recent political violence in the northern provinces of Malakand and Swat centres around demands for the introduction of Islamic law. The violence occurred in the context of a legal vacuum created by a February 1994 Supreme Court decision, which abolished long-standing regulations in place since the British colonial era in these provinces. Twice in 1994, in May and early November, the government of the North Western Frontier

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Province responded to the violent disturbances by acceding to the rebels' demands. Following the November protests, the provincial government promulgated an ordinance which allowed for the replacement of sessions court and lower court judges with Islamic legal experts. It remains unclear whether these changes will be implemented; similar proposals put forward by the administration in May were not put into practice. In the course of the November disturbances, some 200 tribesmen took large numbers of hostages, including two judges.

## The Judiciary

The appointment of judges is under the authority of the president. By Art. 177 of the Constitution the Chief Justice of the Supreme Court is to be appointed by the president; the other judges of the Supreme Court are to be appointed by the president in consultation with the Chief Justice. Judges of the High Courts are appointed by the president in consultation with the Chief Justice, the Chief Justice of the High Court and the governor of the province concerned (Art. 193). The president also has power to transfer High Court judges; transfer to another High Court may be without the consent of the judge concerned where its duration is to be less than two years.

According to the Constitution, the age of retirement for High Court judges is 62 and the age of retirement for Supreme Court judges is set at 65 (Art. 179(1)). The Constitution provides, by Art. 181 (2), that retired High Court judges may be appointed to the Supreme Court as temporary Acting Judges. By Art. 181 (2) the president may terminate these appointments at will, creating an insecurity of tenure which gives cause for serious concern. In addition, Art. 182 allows for the appointment of *ad hoc* judges to the Supreme Court where there is a shortage of regular judges. *Ad hoc* judges may be retired Supreme Court judges who have ceased to hold office within the previous three years. The tenure of *ad hoc* judges is not secure; they serve on the Supreme Court «for such period as may be necessary» (Art. 182 (b)).

A further difficulty concerns Art. 203 (C) of the Constitution, which is the product of an amendment (by President's order N° 1 of 1980) during the term of office of President Zia ul-Haq. Art. 203 (C) provides that a judge of the High Court may be appointed, without his consent, for a period of one year (extended by a later amendment to two years) to the Federal *Shariat* Court. A High Court judge who does not accept appointment as a judge of the Federal *Shariat* Court shall be deemed to have retired from office. Judges of the Federal *Shariat* Court are particularly vulnerable to executive interference. Under Art. 203 (C) (4B) the President may modify the terms of appointment of a Federal *Shariat* Court judge, as well as assign a judge to any other office.

In June 1994, the appointment of two judges, Justice Nasir Aslam Zahid and Justice Abdul Hafeez Mernon, was challenged before Sindh High Court. Justice Zahid had been appointed as *ad hoc* judge of the Federal *Shariat* Court and Justice Mernon as Acting Chief Justice of Sindh High Court. Prior to his appointment, Mernon had been dismissed from his post as *ad hoc* judge of the Supreme Court. He then resumed his former position as judge of the Sindh High Court but was also dismissed from that post. It was argued that, under the Pakistani Constitution, these dismissals precluded him from holding his present position. It was also claimed that the process by which the Federal Ministry of Law and Parliamentary Affairs in Islamabad had arranged the appointment of the judges had been irregular, failing to comply with Art. 193 and 196 of the Constitution. Allegedly, the office to which Justice Mernon was appointed was not vacant at that time but was occupied by Justice Zahid; the vacancy was subsequently created by the elevation of Zahid to the Supreme Court.

**Asma Jahangir, Naeem Shakir, Mahboob Ahmed:** Lawyers of the Human Rights Commission of Pakistan (HRCP) in Lahore, and one Anonymous lawyer in Gujanwala. All four were involved in the defence of three persons accused of blasphemy: Salamat Masih, Manzoor Masih and Rehat Masih.

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The first hearings in the case were before the District and Session judge in Gujanwala. The council engaged by the accused in the bail application refused to appear in court as the complainant party threatened to kill him and burn down his house. The defence of the three accused was later undertaken by Asma Jahangir, Naeem Shakir and Mahboob Ahmed.

The case was transferred from the District and Session Judge, Gujanwala, to the District and Sessions Court, Lahore, after the Lahore High Court accepted a plea by the HRCP that the accused and their defence counsel faced harassment by the complainants.

On 5 April 1994, Manzoor Masih was assassinated outside the office of Naeem Shakir, after a court hearing of the case in Lahore. Two of Manzoor Masih's alleged accomplices, one a boy about thirteen years old, were also injured. On the day of the assassination, the police had escorted the accused persons from the court to Shakir's office; the attack occurred shortly after the police had left. The HRCP said that it feared the attack was intended as a signal to those defending the accused. It stated: «our lawyers now do not feel safe as threats have already started pouring in».

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# The Palestinian Autonomous Areas

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Israel and the Palestine Liberation Organization (PLO) signed the *Declaration of Principles on Interim Self-Government Arrangements* on 13 September 1993. The Declaration envisaged three phases for the resolution of the Israeli/Palestinian problem. The first phase was implemented following the signing of the *Agreement on the Gaza Strip and the Jericho Area* on 4 May 1994, according to which, the powers that have been vested in the Israeli military government in Gaza and Jericho were transferred to the Palestinian Authority: a quasi-government led by Mr. Yasser Arafat, and composed of 24 ministers from the Palestinian community from exile and the Occupied Territories. Certain matters relating

to external security, settlements, Israelis, and foreign relations, however, remain under the jurisdiction of Israel. The second phase consists of an interim period of five years during which a gradual transfer of certain responsibilities that were under the jurisdiction of Israel is to take place. These responsibilities are education, culture, health, social welfare, direct taxation and tourism. Jurisdiction over Jerusalem, Israeli settlements, foreign relations and border control, are not to be transferred during this phase. The final phase deals with the permanent status of the West Bank and Gaza. Negotiations on the permanent status, according to the agreements, are to start no later than the beginning of the third year of the interim period.

## The Prevailing Legal System

According to the Israeli/Palestinian Agreements, the laws

that were in force in the Gaza Strip and Jericho before the implementation of the Agreements continue to apply, unless repealed in accordance with the provisions of the Agreements. As a result, the following laws are still in force in the two areas: British Mandate Laws (applicable in the Gaza Strip), Jordanian Law (applicable in Jericho), and Israeli-imposed Military Orders. Additionally, while existing laws, especially the Israeli Military Orders, grant wide powers to the military apparatus in these areas, the newly-installed Palestinian authorities have frequently invoked the PLO Revolutionary Criminal Procedures. In addition to being harsh, these laws are not part of the laws of the land.

The May 1994 *Agreement on the Gaza Strip and the Jericho Area* includes a provision that kept the Israeli Military Orders in force in the Gaza Strip and Jericho. Military Orders have been issued since June 1967 by Israeli occupation authorities and cover all aspects of life in the West Bank and the Gaza Strip. Totalling almost 1400 in the West Bank and 1100 in the Gaza Strip, many of these Orders were issued as amendments to existing laws and have severely undermined the Rule of Law and the functioning of the judicial system in both areas. The Palestinian power to redraft these orders or to enact new laws is governed by long and cumbersome procedures which were spelled out in Art. 7 of the Gaza/Jericho Agreement. Accordingly, the Palestinians are required to notify Israel of every proposed legislation. Israel may, within 30 days, request that the joint committee decide whether the proposed legislation conforms to the Israeli/Palestinian Agreements. Should the joint committee fail to reach an agreement, joint appeals committees are formed. Months can pass before the proposed legislation goes into effect. Israel reserves the right to veto the legislation if it sees that it threatens a «significant Israeli interest.»

## **The Judiciary in Gaza and Jericho**

The judicial system in the Gaza Strip follows the structure established early this century during the British Mandate. It is composed of Magistrate Courts, District Courts, Criminal Courts, Land Courts, and a High Court.

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During 26 years of Israeli occupation, Jericho had a Magistrate Court. Under Palestinian rule, a District court has been established. This court is composed of one member, in contradiction to the law which requires that cases be heard by a panel of judges.

In the past, the decisions of the Jericho court were subject to appeal before the Ramallah Court of Appeal, situated in the city of Ramallah in the occupied West Bank. Since the Ramallah court is still under Israeli rule, there is a confusion on how to appeal the decisions of the Jericho courts. Despite the differences in the legal system, appeals have been made before the Gaza High Court sitting as a court of appeal. This court, however, has been returning the cases to the Jericho court without examining them. Hence, appeals of decisions of the Jericho courts have been frozen.

Furthermore, during the occupation, Palestinian judges were appointed, promoted and dismissed by Israeli military officers. Under Palestinian rule, however, the legal rules on who has the authority to appoint, dismiss and promote judges have not been clarified. As a result, several controversial judicial appointments have been made.

Mr Yasser Arafat has appointed a Gaza lawyer who had returned from forced exile after the implementation of the Gaza/Jericho Agreement as Chief Justice of the Gaza Strip. Mr Arafat also appointed an Attorney-General.

A legally trained Palestinian from outside the Occupied Territories was appointed as head of the Jericho magistrate court. Contrary to accepted judicial practice, the appointment was made by the Minister of Municipal Affairs. The judge does not possess adequate knowledge of the existing laws in the area. As a result, legal errors have reportedly been committed. Additionally, confusion has reigned as to the proper venues for appealing this judge's decisions. Such errors render the question of appeal even more pressing.

## The Prosecutor

In Jericho a new prosecutor has been appointed. He is a Palestinian from outside the area and does not have adequate knowledge of the legal systems prevailing in the West Bank and the Gaza Strip.

In practice, the legal basis for arresting or detaining a person is made without respect for criminal procedures. The authorities do not identify themselves when making an arrest and they use civilians cars. The arresting authorities do not notify the arrested person of his legal status, nor do they inform the family of the place of detention. As a result, a number of persons have been arrested for long periods without their cases being submitted to court. Release on bail is subject to the whim of the prosecutor. While the majority of political prisoners are well-treated, those suspected of common crimes are beaten at random. In July 1994, Farid Jarbou', who was arrested for collaboration with Israel, was the first Palestinian to die in the custody of the Palestinian Police.

The following case illustrates the manner in which the administration of justice is carried out in the Gaza and Jericho areas. On 13 June 1994, the Palestinian police in Jericho arrested three brothers, Abdel Fattah, Amjad, and Ahmad Badwan, who were involved in a brawl with a brother of a Palestinian security official. The three were referred to the Military General Prosecutor who issued an order to detain them for 14 days by virtue of the PLO's Revolutionary Criminal Procedures. After the 14 days expired, the detainees were referred to the civil police authorities who refused to accept them for lack of proper arrest procedures. The detention order was then renewed by the military prosecutor for an additional 14 days. After the second 14-day period ended, the three brothers were kept in detention without renewing the detention order. On 14 July 1994, the military prosecutor visited them in their detention cell. When one of them asked why they were kept in detention and why they had not



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been shown to a judge, the military prosecutor began to shout and insult them and threatened to call fifty soldiers to beat them up. He then said that he would refer them to a military court within a few days. The three were, however, released without trial on 1 August 1994.

## **The Palestinian Security Forces**

There are five known security forces which operate in the Jericho and the Gaza Strip areas. These forces play a significant role in undermining the judiciary. They are known to conduct arrests without warrants or legal ground.

In addition, these forces have been involved in conflict resolution in so-called arbitration agreements. Several cases, either while undergoing court examination or after a verdict, have been arbitrated by the Palestinian Authority. The arbitrators, who normally do not possess adequate legal training, often reach conclusions which differ from those of the court. Contrary to the requirements of the applicable Law on Arbitration, in which the consent of the parties is a fundamental matter, the arbitration agreement often states that the arbitration decision is binding on the parties, that appeals can only be made to the Palestinian Authority, and that only the Palestinian authorities can execute the decision.

## **ICJ / CIJL Mission**

In December 1993, the International Commission of Jurists and the CIJL sent a mission to Israel and the Occupied Territories to study the civilian judicial system in the West Bank and Gaza. After having examined the situation in Jericho and the Gaza Strip, the mission made several recommendations that remain valid today. They include the following:

- The Palestinian authorities incorporate international human rights norms within the new legal system;
- The widest possible consultation of all sectors of society be exercised at every stage when drafting various Palestinian legal instruments, including basic laws, without discrimination;
- Judges and lawyers be fully consulted about questions relating to the judiciary and the legal profession;
- The establishment of an independent legal profession be encouraged in view of its centrality to the principles of the Rule of Law;
- The development of legal competence in the areas of the West Bank and the Gaza Strip be strengthened and encouraged through initiating and carrying out appropriate measures such as programmes for applied legal studies;
- The urgent setting-up of a committee of Palestinian judges and lawyers from the West Bank and Gaza Strip to study the different laws in force in the Occupied Territories and propose a harmonised legislation covering both territories.
- There be strict separation between the executive, legislative and judicial powers in the future Palestinian authority;
- The independence of the judiciary be guaranteed and enshrined in the constitution and different laws;
- The judiciary be given full powers over all matters of a judicial nature, especially those relevant to human rights;

- A High Council of the Judiciary be established with the power to appoint, promote and dismiss judges;
- The power of judicial review on civil, administrative and constitutional matters be exercised by the highest judicial authority, either by establishing a Court of Cassation or a Supreme Court;
- The Palestinian police force be required to follow the Code of Conduct of Law Enforcement Officials and to respect human rights norms;
- The independence of Palestinian human rights NGOs be respected and that they be allowed to function without the interference of the authorities.

**Jibril Abu Doqa:** Lawyer. In the morning of 9 July 1994, he went to the police station in the city of Khan Younis, in the Gaza Strip, to request the release of several of his clients on bail. At the police station, he was told that his clients were not held there, and was referred to the office of the Assistant to the Commander of the Southern District. There he was told he could not be helped because the Commander was not present at the time. He then travelled to the office of the Military Prosecutor where he was again told he could not be helped. As he left the office, soldiers stationed outside told him that his clients might have been taken to the headquarters of the Palestinian military and intelligence corps in the city. On arrival there he requested an interview with the officer in charge of interrogating detainees. He was led to the second floor, asked about his name and profession and told to wait in a room. Soon, a man in civilian clothes entered and began to slap and beat him and threw his files and documents to the floor. Another man ordered him to keep his arms down and not to defend himself against the blows of the first man. A while later, the first man, who had left the room for a few minutes, returned and slapped him again, saying that he was under arrest for possession of a weapon. He then ordered him to lay on his stomach and called three other men to beat him. This continued for about ten minutes after which he was thrown into a small,

dirty prison cell. Several hours passed before he was ordered out of the cell and into an interrogation room where, under the threat of a gun, he was ordered to clean up. The first man returned and apologised saying he was not aware that he was a lawyer and that he must not tell anyone what had happened to him. He was then let go. On 11 July 1994, Mr. Abu Doqa filed an official complaint at the office of the Commander of the Southern District and at the office of the Military Prosecutor who ordered the arrest of the officers who carried out the beating. Several days later, a computer centre that belongs to his brother was vandalised by a gang of twenty men and other members of his family received threatening phone calls. Furthermore, police jeeps patrolled his neighbourhood in a provocative manner which frightened him and his family. Upon the advise of his colleagues and because of pressure from his family, he agreed to withdraw his complaint and to request that the Military Prosecutor drop all charges against the officers.

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# Peru

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In December 1993, the Democratic Constituent Congress (*Congreso Constituyente Democrático*) promulgated a new Constitution. The Constituent Congress, an 80-member, single-chamber assembly, replaced the two-chamber Congress disbanded by President Alberto Fujimori in his *autogolpe* in April 1992. Under this Constitution, executive power is vested in the President, and legislative authority is vested in a unicameral 120-member National Congress. In a break with tradition, the President can now be immediately re-elected.

## Situation of the Judiciary

The Judiciary consists of a three-stage court system with a Supreme Court of Justice (*Corte Suprema de Justicia*) as the court of last instance. The Constitution foresees the establishment of a Constitutional Court (*Tribunal Constitucional*) to replace the Tribunal of Constitutional Guarantees (*Tribunal de Garantías Constitucionales*) which was dissolved during the *autogolpe*. Despite its majority in Congress it took the Government almost one year to pass the laws necessary to install the Constitutional Court, which was finally published on 10 January 1995. This delay has had grave consequences. More than 500 petitions for *habeas corpus* or similar protective measures have remained unresolved for almost three years, as no competent court exists.

All court judges are appointed by the National Council of the Judiciary (*Consejo Nacional de la Magistratura*). On 7 December 1994, a law was finally published to establish this Council, and for the first time in Peruvian history the executive will have no direct influence in the nomination of judges. According to the Constitution, the Council is independent from the three branches of government. Different groups, including the judges of the Supreme Court, the Bar Association, and the deans of Universities, each elect one or two members of the Council. Besides the nomination of judges and disciplinary control over them, the Council has the duty to review the performance of judges every seven years. In the case of a negative evaluation, a judge can never again be employed in the judiciary. Whether this review leads to a de-politicisation of the judiciary will depend on the guidelines applied.

Just like the Constitutional Court, the Council had yet to function as of January 1995. After the dismissal without formal charges of over 500 judges by President Fujimori in 1992 (see *Attacks on Justice 1992-1993*) 60% of all judges now work on a provisional or substitute basis.

Moreover, while the new Constitution calls for the establishment of an Ombudsman (*Defensor del Pueblo*), such an institution does not yet exist. Congress adjourned in December 1994 without voting on the relevant bill, although it had already been approved by its Judicial Committee. Instead, the Special Prosecutor's Office for the Defence of the People and Human Rights (*Fiscalía Especial de Defensoría del Pueblo y Derechos Humanos*), which had been closed in June 1994, was re-installed in November 1994. This clearly illustrates the lack of a political will by the President and the majority of Congress to fulfil the constitutional mandate to create such an office.

In a blow to the financial independence of the judiciary, the constitutional obligation of the state to allocate no less than 2% of the budget to the judiciary was eliminated. The fact that the General Law of the Budget of the Republic for 1994 assigned a mere 0.94% of the budget to the judiciary may seriously affect its

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already precarious material situation. It should be kept in mind that in 1991 (the last year for which figures are available,) 73.2 % of prison inmates had not been convicted, due in part to a lack of resources needed to process their cases efficiently.

## **Military Jurisdiction over Civilians**

Among the justifications for President Fujimori's *autogolpe* in 1992 were the apparent strength of two guerrilla movements and the fading confidence in the judiciary. The two movements are the Communist Party of Peru-Shining Path (*Sendero Luminoso*) and Túpac Amaru Revolutionary Movement (*Movimiento Revolucionario Túpac Amaru*.)

Consequently, the most noteworthy difference of the new Constitution is that it permits military courts to try civilians accused of «crimes of terrorism» and «treason.» This is a clear breach of Art. 5 of the United Nations Basic Principles on the Independence of the Judiciary, which provides that «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.»

Another change in the new Constitution is the applicability of the death penalty. Art. 140 broadens the scope of the death penalty to include the crimes of «treason» and «terrorism» in case of war «in accordance with the treaties to which Peru is a party.» Under the old Constitution only treason in times of external war could be punished by the death penalty. The consequence of this change is, however, unclear. The extension of the death penalty would be a clear violation of the non-derogable Art. 4 (2) of the Inter-American Convention of Human Rights (ICHR), to which Peru has been a party since 1978. Art. 4(2) ICHR states that the application of the death penalty must not be extended to crimes to which it does not presently apply. The effect of the broadened scope is unclear; it is not «in accordance with the treaties to which Peru is a party» and, therefore, contradicts the new constitution.

The composition of the military courts is also problematic. Military courts consist of only one legally trained officer - the other four members are active duty officers. As the latter form part of a military chain of command, they are not independent. In cases involving military personnel, they have generally insured impunity for even the most severe violations of human rights. On the other hand, in «treason» cases a conviction rate in excess of 90% is reported.

In cases where both the military and the civilian courts claim jurisdiction over a case, the Constitution calls for the Supreme Court of Justice to decide the dispute. However, due to government interference and the weakness of the Court this power has been greatly diminished. This was best illustrated in the *La Cantuta* case, where members of the armed forces had been accused of abducting and killing nine students and a professor of the National University of Education *Enrique Guzmán y Valle* on 18 July 1992. The case was started in a civilian court; however, when it appeared that the highest military authorities, including the commander of the army, might be involved, the military courts claimed jurisdiction. While the Supreme Court was deciding on the jurisdiction, Congress interfered in the case *sub judice* by passing an openly unconstitutional law (Law 26,291) which lowered the number of votes necessary within the Court to take a decision. This led to the case being referred to the military courts. There, mostly lower-ranking officers were sentenced to prison-terms. The role of the army commander and other military leaders was not investigated. The trials were not open to the public. Throughout the case, both the investigating prosecutor, Victor Cubas Villanueva, and a Supreme Court judge were harassed (see below.)

Apart from compromising itself by not objecting to the «Cantuta-law,» the Supreme Court has little power to review the ruling of the military justice system after a final sentence declares a case closed. Once such a case has been closed it cannot be reopened and passed to civilian jurisdiction. The court hesitates to exercise even the limited powers granted to it.



## «Crimes of Terrorism» and «Treason»

A «terrorist», as defined in Decree Law 25,475, is an individual who «carries out acts against the life, physical integrity, health, freedom and security of individuals». The law includes persons who «by whatever means» incite the commission of terrorism-related crimes, are seen to favour or excuse such crimes, or obstruct the investigation of crimes of «terrorism» and judicial procedures associated with them. The definition of «treason,» to be found in Decree Law 25,659, is based on the definition of «terrorism» but links it to the means employed (e.g. car bombs, explosives, etc.) and their effects on property and life. In addition, those accused of being members of an armed opposition group, and anyone who aids and abets «traitors» may be charged with «treason.» Under Decree Law 25,880 even such acts of non-violent expression as teaching in a way that is considered subversive can be regarded as «treason» and thus be tried by a military court.

Neither of these legal definitions is precise enough to meet international standards. There is no clear distinction between a common crime and a «crime of terrorism,» and it is not possible to objectively differentiate between «terrorism» and «treason.» The latter can be fatal, as «crimes of terrorism» are tried in civilian courts, but «treason» in military courts.

Even in cases of common crimes that do not fall under any of the aforementioned categories, Art. 2(24.g) of the Code of Criminal Procedure grants police the power to hold persons *incommunicado* for up to ten days if it is considered indispensable for the clarification of a crime. However, in cases of alleged «terrorism» or «treason» the police are authorised to hold a prisoner for up to 15 days in order to exercise their virtually unlimited powers to question suspects and to formalise charges. They merely need to inform a judge in conjunction with the Public Ministry of their decisions regarding detentions. The detainees are only allowed access to a lawyer when they make declarations before a representative of the Public Ministry. In many cases, lawyers cannot talk to their clients in private nor do they have proper access to their clients' files.

Another violation of international norms lies in the fact that an accused awaiting trial may be held in detention for inordinately lengthy periods: 30 months if it is a terrorism-related case «of a complicated nature» in which more than ten people are accused, or five years if his case proves to be «especially difficult.» There is no possibility of granting the accused any form of bail or conditional liberty.

If the police in charge of the investigation suspect the detainee of «treason,» the situation is even more disturbing, as the case is then tried in a military court. There, the detainee can be held *incommunicado* for up to 30 days. Only the military justice system need be informed of the detention.

If the case then finally comes to trial, the identity of judges, prosecutors and in some cases even witnesses is not disclosed to the defendant. The so-called «faceless judges» (*jueces sin rostros*) sit behind a mirror and their voices are electronically altered. In Peru, pre-trial evidence and confessions are usually given significant weight in the trial, yet the policemen present at the arrest and those who interrogate the defendant cannot be called to serve as witnesses by the defence. In addition, the periods allowed for judicial examinations and for trials and appeals in both military and civilian courts (10 days / 30 days) are too short to allow for thorough investigations.

## Improvements

Under national and international pressure, some of the decrees conflicting with international human rights law contained in President Fujimori's 1992 anti-terrorism decrees were revoked by Congress in November 1993 (see *Attacks on Justice 1992-1993*).

Under the amended anti-terrorism legislation, writs of *habeas corpus* can now be filed. Lawyers are now permitted to represent more than one defendant charged with terrorism at the same time,

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although in cases of «treason» they are still limited to only one client. Also, the provision allowing an accused to be tried *in absentia* was repealed. Examining judges, who were previously prohibited from ruling that defendants be unconditionally released when there was no case, were permitted to do so as of November 1993, although such rulings are referred to a higher court for ratification or vetoing. Since the amendments, military tribunals are entitled to review prison sentences in those cases where the defendant was convicted of treason, including cases in which evidence of innocence was not taken into consideration. However, this review does not apply, if the defendants were convicted on charges of «belonging to a group which fulfils a leadership role in a terrorist organisation.»

**Ruben Bustamante Banda, Ernesto Cubas Montes:** Lawyers in Chiclayo. Both lawyers were arrested in December 1992 and charged with «crimes of terrorism» (see *Attacks on Justice 1992-1993*). Their trial was interrupted because of a dispute over whether their case falls under civilian or under military jurisdiction.

**Oscar Cieza Díaz, Absalón Ríos Caballero:** Lawyers in Chiclayo. Both were detained in mid-November 1993 and charged with «crimes of terrorism.» Their detention was based upon incriminating testimony alleging they were members of the *Asociación de Abogados Democráticos*, an organisation that has regularly taken over the defence of members of the Shining Path and is portrayed by the government as a part of the movement. By representing a number of defendants accused of «terrorism,» the testimony stated, the lawyers were following orders from the Shining Path to obstruct justice and impede the actions of the police and security forces.

Both lawyers have denied the charges against them. The police search of Mr. Ríos' office reportedly did not uncover any incriminating evidence. Both men said that they had in fact represented defendants in «terrorism» cases, but it was at the request of the Superior Court, the local Bar Association or relatives of the accused. Their testimony has been corroborated by court records and several testimonies.

After half a year of investigation, the case against Oscar Cieza Díaz was dismissed. Absalón Ríos Caballero was acquitted in August 1994.

**Victor Cubas Villanueva:** Public Prosecutor. Before the case was transferred to a military court, he headed the investigations in the *La Cantuta* case (see above). Despite pressure and threats against him, he had assembled sufficient material to identify and charge the officers involved in the killing of the professor and students. In December 1993, he declared he had been followed and received a number of death threats since October. Even though he reported these threats to the Attorney General (*Fiscal de la Nación*), he was denied appropriate protection. He reportedly stated that «the pressure came from the highest circles, from the Army Command and from governmental authorities. They could not come from anywhere else.»

**Jorge Espinoza Egoavil:** Lawyer. In August 1994, Jorge Espinoza Egoavil was arrested together with two physicians. All three were charged with «crimes of terrorism.» These charges were based on the accusations of «repentants» who claimed that the men were involved with the Shining Path. At the time of his arrest Espinoza Egoavil was President of the Bar Association (*Colegio de Abogados*) of Huánuco, Pasco and Ucayali, and Dean of the Faculty of Law and Political Sciences of the Hermilio Valdizán University of Huánuco.

According to the prosecutor, the «repentants» accused Espinoza Egoavil of participating in a murder and defending terrorists free of charge. Even though Espinoza Egoavil has publicly declared his clear opposition to Shining Path, and even though no other proof reportedly exists indicating his guilt, he was remanded to prison. However, after a trial of first instance the prosecutor called for an acquittal. The «faceless» judge agreed, but the three have had to remain in prison until the verdict is confirmed by a higher tribunal.

In the course of his work, Espinoza Egoavil had denounced 14 policemen of stealing a large amount of money, leading to their

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imprisonment. He had also had several arguments with the former police chief of the area.

The lawyer and the physicians were found not guilty after 150 days of arrest.

**Luis Antonio Galindo Cardenas:** Lawyer and former judge at the Superior Court (*Corte Superior de Justicia*) in Huánuco. Galindo Cardenas was arrested and held in custody for 31 days because a «repentant» had named him as a member of the Shining Path. This arrest led to his resignation as a judge and forced him to leave the area.

Around the 15 September 1994, Judge Galindo was informed that a «repentant» and alleged member of the Shining Path had named him as a member of the guerrilla organisation. On 14 October 1994, he went to discuss this accusation with office of the Anti-Terrorism Headquarters (*Jefatura Contra el Terrorismo, JECOTE*) and the public prosecutor. Also present at the discussion was a local military commander. After three hours of discussion, Judge Galindo was reportedly told that no charges would be brought.

On Sunday, 16 October, President Fujimori in a statement he made on television announced that the President of the Superior Court of Huánuco had been detained and had made use of the «repentance-law.» On the same day, the JECOTE commander visited Judge Galindo and asked him to come for another interview to the local military base. Once at the military installation, the judge was reportedly locked into a room without explanation. Two days later, the local military command issued a statement that both Judge Galindo and the rector of the National University «Hermilio Valdizan» had been arrested as presumed «terrorists» and had confessed. President Fujimori also announced this to the press.

Three days later, Judge Galindo's wife was informed of the arrest. She was allowed to see the judge who asked her to present his resignation as a judge until he could clear his name. The

military commander reportedly pressured him to make use of the «repentance law» and «confess» that the Superior Court's President and two other judges were in fact members of the Shining Path. Members of Congress who travelled to Huánuco were not allowed to see the judge. After 31 days in custody, the prosecution decided not to open a case against Luis Galindo. He was then released but threatened with rearrest if he brought his case to the attention of the public.

**Carlos Antonio Honores Iglesias:** Lawyer in Trujillo. On 10 November 1993, police detained Honores Iglesias at his law office and charged him with «treason.» He was taken to the Pisci Prison in nearby Chiclayo. The charges stemmed from a confession by another person accused of «terrorism» who had named Honores Iglesias as a member of the Shining Path. The police also alleged that «subversive materials» were found in his office. Honores Iglesias had represented individuals accused of «terrorism» and had won acquittals in some cases. He denies any involvement with the Shining Path.

In the meantime, the case against Honores Iglesias was transferred from the military tribunal to the Chiclayo Superior Court.

**Víctor Huamán Rojas:** Lawyer and former judge in the Huamanga province, Ayacucho department. As a lawyer, Víctor Huamán Rojas had headed investigations in important cases of human rights abuses by members of the armed forces. A member of the human rights organisation *Asociación Pro-Derechos Humanos* (APRODEH), he represents, *inter alia*, a woman who denounced a military officer for sexual harassment. He is also defending a peasant who is accused of «terrorism» because she denounced the leader of the Civil Defence Committee (*Comité de Defensa Civil*) in the town of Quinua for assassinating 25 peasants.

In a television programme aired by a station close to the government, Huamán Rojas and another former judge, **Sergio Canchari Chuchón**, were accused of being members of the *Asociación de Abogados Democráticos*. Such an accusation could

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endanger their lives, as the Government considers that organisation a part of the Shining Path's «subversive structure.»

**Agustín Pelayo Larios Verástegui:** Lawyer in Lima. Larios Verástegui has for many years been defending people accused of «terrorism» or «treason.» In an official announcement published in the official journal *El Peruano* on 3, 4 and 5 October 1994, the Special Investigating Judge of the Navy (*Juez Instructor Especial de la Marina de Guerra*) called for Larios Verástegui to appear before him because he was accused of «treason.» In addition to Larios Verástegui, Jorge Luis Mantilla Córdor was also mentioned, a law student who had conducted an internship in Larios's office.

Larios Verástegui is a registered member of the Lima Bar Association. He has never been contacted or summoned by the judge. In a letter to the human rights organisation APRODEH, he expressed his fear that this public summons would create a presumption of guilt. He stated he had no reason to fear a trial, but had never been informed of an accusation against him.

According to information provided by APRODEH, the accusations against Larios Verástegui and Mantilla Córdor were only based on the testimony of a «repentant,» who had indicated that the two were members of the *Asociación de Abogados Democráticos*.

**Miguel Olazábal Ancajima:** Lawyer in Chiclayo. Olazábal Ancajima was arrested in early December 1992 and charged with «apology for terrorism» (see *Attacks on Justice 1992-1993*.) After his case was transferred from a military court to the Superior Court in Chiclayo, Olazábal Ancajima was sentenced to 25 years in prison. His appeal to the Supreme Court has not been decided on, but the Prosecution insists that the sentence be upheld.

**Juan Ponce Moreno:** Lawyer in Huánuco. Juan Ponce Moreno defends one of the physicians accused of «terrorism» and arrested with the lawyer Jorge Espinoza Egoávil (see separate entry above.) On 22 November 1994, Juan Ponce Moreno informed the human rights organisation APRODEH that the

Ministry of Defence had sent an official letter to the Attorney General accusing him of having made illegal deals with the judge and the prosecutor to obtain the release of his client in the above-mentioned case. In the letter, Juan Ponce Moreno was reportedly also accused of membership in the *Asociación de Abogados Democráticos*.

The lawyer stated that it would have been impossible for him to make any deal whatsoever with the judge or the prosecutor, as their identity was never revealed to him.

**Various human rights lawyers in the town of Piura:** In May 1994, human rights organisations in Peru found out that the headquarters of the Anti-Terrorism Security Office (*Jefatura de Seguridad contra el Terrorismo*) in the northern town of Piura had sent a list of lawyers to the local Bar Association asking whether any of them were members of that Bar. The list contained the names of 285 lawyers and carried two seals, one declaring it «secret» and the other showing its origin: the General Directorate of Intelligence of the Ministry of the Interior (*Dirección General de Inteligencia del Ministerio del Interior*).

Among the lawyers on the list are many who work for human rights organisations or for church organisations: **Nino Alarcón Torres**, of the *Asociación Pro-Derechos Humanos* (APRODEH,) **Antonio Salazar García** of the *Centro de Estudios y Acción para la Paz* (CEAPAZ); **Víctor Álvarez Pérez** of the *Fundación EcuMénica para el Desarrollo y la Paz* (FEDEPAZ,) **Cecilia Polack Boluarte**, **Gladys Liliana Rodríguez Flores** and **Layla Magali Simón Orozco**, all of the *Comisión Episcopal de Acción Social* (CEAS,) **José Antonio Regalado Gutiérrez** of the *Concilio Nacional Evangélico del Perú* (CONEP,) **Norma Rojas Noriega** of the *Instituto de Defensa Legal* (IDL) and **Norbel Mondragón Herrera** of the *Instituto de Estudios y Desarrollo para la Paz* (IEDEP.)

**Emma Vigueras Minaya:** Lawyer. While representing a client accused of «treason», Emma Vigueras Minaya was repeatedly followed by police. On 24 July 1993, unidentified individuals forcibly tried to prevent her from filing an appeal on



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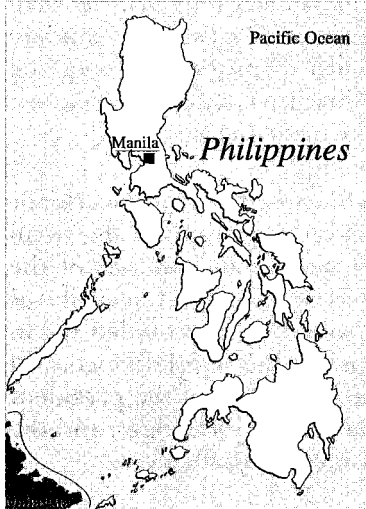
behalf of another client who had been convicted of «treason.» On 24 August 1993, a police officer interrupted a court appearance by Emma Viguera Minaya in a case related to *La Cantuta* (see above), where Emma Viguera represented the Dean of the *Enrique Guzmán y Valle* University against charges of abuse of authority. The police officer tried to stop the proceeding by threatening Emma Viguera Minaya in open court.

When this did not succeed, the officer detained a personal guard of the Dean who was also in court. The guard was released after five hours in detention, during which he heard the police officer accusing Emma Viguera of belonging to the *Asociación de Abogados Democráticos*. Viguera informed the Lima Bar association of the harassment, who in turn reportedly filed complaints with the Peruvian Ministry of the Interior, the Inter-American Commission of Human Rights of the Organization of American States and the General Secretariat of the United Nations.

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# The Philippines

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The Constitution of the Republic of the Philippines was approved by plebiscite on 26 February 1987. The legal system established is one in which human rights and the independence of the judiciary are guaranteed; however the power of the military, dominant under the Marcos administration, continues, despite the efforts of successive governments. The strength of the military is evidenced by the continuing impunity enjoyed by many security force members for human rights abuses. The military harasses lawyers whose work

impinges on its power; its actions also endanger the independence of a relatively vulnerable judiciary.

## The Court System

The lowest courts in the Philippines judicial system are called Metropolitan Trial Courts, Municipal Trial Courts or Municipal Circuit Trial Courts (MTCs). They handle small civil and criminal cases. There are also special Sharia courts to deal with personal status matters for Muslims. On the second level are the Regional Trial Courts, which deal with larger civil and criminal cases, and serve as a first level of appeal from the MTCs. The next level is the Court of Appeal, which reviews the decisions of the Regional Trial Courts and is located in Metro Manila. The Supreme Court is the final appellate level. The Court has wide jurisdiction, and is the focal point for the judiciary and legal profession in the Philippines. It can hear any case, on appeal or on original writ.

The court employs no system for deciding whether to hear cases; all cases brought before it must be heard. The Supreme Court also supervises both the administrative and regulatory functions of the court system. It can discipline lawyers and must approve disciplinary actions taken by bar associations, although a formal complaint must be filed before the Supreme Court will involve itself in a disciplinary matter. The Supreme Court's wide mandate further extends to dealing directly with disputes involving the civil service, and interpreting the constitutionality of treaties, presidential decrees and other executive ordinances.

Art. VIII of the Constitution delineates the framework for the independence of the judiciary: section 3 guarantees the fiscal autonomy of the judiciary, section 10 secures the salaries of the Supreme Court justices and the lower court judges; security of tenure to the age of 70 years or incapacitation is provided for in section 11. A certain measure of executive and legislative control over the judiciary is retained, however. The office of the president controls the timing of the release of the judiciary's budget; and the precise amount of the budget is determined by parliament.

Section 8 of the Constitution establishes a Judicial and Bar Council (JBC) to recommend suitable judicial appointees to the president. The JBC consists of seven members: the Chief Justice as *ex officio* chairperson, the Secretary of Justice and a representative of the Congress as *ex officio* members, a representative of the Integrated Bar, a professor of law, a retired Supreme Court judge and a representative of the private sector. The JBC is assisted by the Court Administrator of the Supreme Court. The Council prepares a list of three to five nominees for each vacancy. Before the president selects one person from the list, the names of the nominees are made public; members of the public may then lodge objections, which are declared valid or invalid by the JBC. The present appointment process was established to eliminate the undue influence of the executive and legislature on the selection of the judiciary. However, this has not prevented politicians from lobbying members of the JBC, and the president, for certain appointments.

The courts suffer from the related problems of inadequate resources, low judicial salaries, heavy caseloads, and long delays; these factors conspire to create a climate conducive to corruption and inadequate protection of human rights. Problems of low salaries and scarce resources relate mainly to the lower courts. Backlogs and delays effect the judicial system as a whole, including the Supreme Court, though the Regional Trial Courts are particularly affected. Some cases, especially civil disputes, have taken over 30 years to resolve. Where there are delays in criminal cases, the result is that defendants may spend long periods in detention awaiting the resolution of their case. Backlogs of cases and delays are caused in part by the bribery of judges and other court officials, who can sometimes be persuaded to postpone trials almost indefinitely. Prosecutors and military intelligence officers reportedly sometimes meet with judges in the course of a case, a practise which undermines judicial independence.

## **The Role of Lawyers**

All lawyers must join the Integrated Bar Association of the Philippines (IBP). The IBP receives its budget from the Supreme Court and is subject to its supervision. Apart from the IBP there are 23 voluntary bar associations in the Philippines, and many law-related non governmental organisations. As an official agency, the IBP's influence on the government in legal matters is considerable.

President Ramos issued Administrative Order 40 in February 1993, specifying that military or police commanders would be held responsible for disciplinary or criminal offences by their subordinates. Those security force members accused of criminal offences, and their commanders, must be immediately discharged from service and the case referred to a civilian court. Despite this attempt to curtail military impunity, investigations and prosecutions of human rights violations continue to be obstructed by the security forces.

A second group of lawyers who are at risk through the exercise of their profession are those involved in the fight against organised crime. Lawyers involved in the recently formed Presidential Anti-Crime Commission have reportedly received death threats. In late 1993, a former state prosecutor involved in cases against major criminals was the subject of an assassination attempt.

## **The Government's Response**

In its response to *Attacks on Justice*, dated 21 March 1995, the Government of the Philippines stated, «the draft report fairly presents the constitutional and statutory structure of the various lawyers of Philippine courts. It, however, significantly misses the *Sandi Ganbayan* as well as the capability of the Barangay Courts to dispense justice at the grassroots level. While the Barangay Courts under P.D. 1508 are beyond the administrative and regulatory jurisdiction of the Supreme Court since they are organizationally aligned with the Executive branch of the government, they essentially perform judicial functions since they are created to settle disputes among residents of the same municipality to prevent the rise of a suit in a regular court of law. To obviate the eventuality of making the proceedings before a Barangay Court too legalistic and adversarial, lawyers are not allowed to appear before it.»

The response also stated that lawyers can be instrumental in the delay of case resolutions because they utilize or exhaust every available legal remedy to defend or underscore their clients' causes. The government stated that the report's mention that prosecutors sometimes meet with judges in the course of a case is a «highly opinionated and sweeping statement.»

The government's response also stated that «the incidence of lawyer's involvement in crimes as victims - whether or not in relation to their profession - is no cause for alarm as the same is

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merely isolated and does not create a scenario where lawyers appear to be under siege.»

**Eugene Tan:** Human rights lawyer and former National President of the Integrated Bar of the Philippines. On 14 November 1994, at about 7:30 in the evening, Tan and his driver, Eddie Constantino, were abducted at gun point near Tan's residence in Metro Manilla. On 18 November, the bodies of both men were found in Sitio Barangay Sampaloc, Cavite, south of Metro Manila. Both bodies bore signs of torture, as well as knife and gunshot wounds. Both men had been handcuffed when shot. The disappearance of Tan and Constantino was not announced publicly until the bodies were found. No arrests have yet been made in connection with the murders.

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# Romania

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**Corneliu Turianu:** Judge. Judge Turianu, author of a number of textbooks, was a Supreme Court Justice from February to June 1990. From July 1990 to July 1994 he was a Judge at the Recourse Court in Bucharest, the highest court below the Supreme Court. In November 1991 he was named President of that court. On 14

July 1994, then-Minister of Justice, Petre Ninosu, reassigned him as a regular judge at a chamber dealing with commercial law, an area he did not have any experience in. Sources suggest, his removal might have had political motives.

Corneliu Turianu had reportedly been under attack from the government for past court decisions. In one case, he decided to free 38 defendants whom the Government had labelled «fascist mercenaries» for their involvement in an attack on the TV station in June 1993. He established that they were only members of the population who felt disenchanted with the «procommunist» government.

Judge Turianu had also been in charge of organising the local elections in Bucharest in February 1992 and the parliamentary and presidential elections in September and October 1992. As a result of these reportedly free and fair elections all seven mayors in Bucharest belonged to the (opposition) Democratic Convention. In September 1992, Judge Turianu 's court upheld a complaint against President Ion Iliescu who was illegally trying to participate both in the elections for President and for the Senate. Petre Ninosu, who later as Minister of Justice removed Judge Turianu, represented Ion Iliescu in the appeal of that judgement to the Supreme Court.

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# Senegal

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The Senegalese judiciary is constitutionally independent. The court system was altered in 1992 (see *Attacks on Justice 1991-1992*) by constitutional amendment, with the Supreme Court being replaced by three courts: the *Conseil Constitutionnel* (Constitutional Council), the *Conseil d'Etat*, and the *Cour de Cassation*. The *Conseil Constitutionnel* has jurisdiction, *inter alia*, to examine the constitutionality

of laws, and to resolve issues of conflicts of jurisdiction between the *Conseil d'Etat* and the *Cour de Cassation*. It is composed of five members, selected for one six-year term. The Constitutional Council has become politicised as a result of the controversies surrounding its certifying of the 1993 presidential elections and in particular the resignation of Kéba Mbaye from the presidency of the Council (see *Attacks on Justice 1992-1993*).

The assassination, on 15 May 1993, of Babacar Seye, Vice-President of the Constitutional Council (see *Attacks on Justice 1992-1993*) continued to produce repercussions. In May and June 1993, a series of arrests were made in connection with the murder. In May 1994 the *Chambre d'Accusation* in Dakar's Court of Appeal pronounced a non-suit in the case of 6 of the accused. The case of Cléodore Sene, Papa Ibrahim Diakhate, Assane Diop and Modou Ka was referred to the *Cour d'Assises*. The discharge in relation to the cases of the other defendants was upheld by the *Cour de Cassation*. In September and October 1994, the trial of the four accused of the murder took place before the *Cour d'Assises* of Dakar. The trial was attended by an ICJ observer. The court held three of the defendants guilty of conspiracy and of murder, but accorded them the benefit of extenuating circumstances. Cléodore



Sene was sentenced to 20 years imprisonment; Assane Diop and Ibrahim Diakhate were both sentenced to 18 years imprisonment. Modou Ka was acquitted.

The trial raised issues of the independence of the judiciary and the freedom of judges to give rulings; specifically, in relation to the granting of bail under the Code of Criminal Procedure. Art. 139 of the Code states that, on the written demand of the public prosecutor, an investigating judge is compelled to grant a custodial order against anyone charged with certain crimes under Art. 56 to 100 and Art. 255 of the Penal Code. The Article also provides that the request to discharge on bail a person charged under the specified sections of the Penal Code will be declared inadmissible if the public prosecutor opposes it by written demand. Thus, the investigating judge is submitted to the good will of the *parquet* both in relation to provisional remands in custody, and in relation to the granting of bail. One qualification of the power of the public prosecutor in this area did formerly exist; until 1979, the demands of the prosecutor that bail should not be granted was required to be «justified.» However, law 79-43 of 11 April 1979 abolished this safeguard.

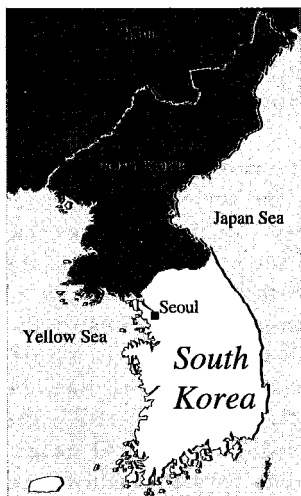
The Seye case was characterised as one of attempt on the security of the state, as well as a case of murder. There is cause for concern that the charges were characterised in this way in order to bind the investigating magistrate to refuse to grant bail to the accused. A second possible factor is that, where the case is one of attempt on the security of the state, the permitted period of preventive detention (*garde à vue*) under Art. 55.8 of the Code of Penal Procedure is doubled. The investigating magistrate in the Seye case refused bail; this decision was confirmed by the *Chambre d'Accusation*. Both courts had no choice but to make such an order, under the present law.

Art. 139 constitutes an interference of the executive with the exercise of the judicial power. There are indications that consideration is being given to the repealing of this article and that a Law Reform Commission is currently reviewing the Penal Code and the Code of Penal Procedure.

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## South Korea

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The Constitution guarantees the independence of the judiciary: Article 103 states that «judges shall rule independently according to their conscience and in conformity with the Constitution and the law.» This guarantee is reinforced by provisions regarding the appointment and dismissal of judges. The appointment of judges at all levels is the joint responsibility of the President and the National Assembly; the National Assembly may withhold its consent to any judicial appointment (Art. 104). Judges may be removed from office only through impeachment, sentence of imprisonment or other heavier

punishment and may be suspended from office or disciplined only through disciplinary action (Art. 106 (1)).

The Supreme Court, subordinate courts and military courts are provided for in the Constitution. The Supreme Court has final Appellate jurisdiction over all court martials (Art. 110). It also has the power to review the constitutionality of administrative decrees, regulations or actions. There is also a Constitutional Court, with power to review the constitutionality of laws. The court is composed of nine judges appointed by the President, three from a panel selected by the National Assembly and three from a panel selected by the Chief Justice.

Following the inauguration of President Kim Young Sam in February 1993, some reforms were instituted affecting the judiciary and the administration of justice. The government's demand, in June 1993, that judges and other government officials

disclose their financial and real estate assets led to the resignation of many judicial officials, amongst them the Supreme Court Chief Justice. In July, against the background of a call by the Korea Bar Association for the resignation of leading members of the judiciary and the replacement of «politicised» judges, the thirteen Supreme Court judges agreed to the setting up of a judicial reform committee, composed of judges, lawyers and academics. They also agreed to create a «judicial counsel» at district court level, which would ensure the greater independence of the subordinate courts.

It is questionable, however, whether the reforms instituted by the new bodies will be sufficient to remedy the serious weaknesses in the South Korean judiciary. To date, the judicial reform committee has addressed issues on the efficient operation of the courts, to the neglect of issues of the politicisation and lack of independence of the judiciary. The committee discussed the establishment of a «court police» to quell disruptions in court; however, the root causes of public discontent with the judicial process have not been addressed. Although, since July 1993, the courts gave rulings against the government in several cases, including cases of ill-treatment of detainees by the authorities, more fundamental structural reforms of the judiciary are still required.

Some areas of serious concern continue to exist. Lawyers regularly experience difficulties in gaining access to detainees (see case of Cho Yong-whan, below). This is despite Art. 12 of the Constitution, by which persons arrested or detained have the right to the prompt assistance of counsel. Art. 12(5) provides that persons arrested or detained must be informed of their right to assistance of counsel. In particular, those arrested under the emergency National Security Law (NSL) are deprived of many of the due process rights guaranteed by the Constitution. They are often not informed of their right to a lawyer, and lawyers' access to clients charged under the NSL is restricted. The NSL, which criminalises speech or acts supportive of North Korea or considered «anti-state» and which has resulted in large numbers of detentions on political grounds, (see case of Professor Cho

Kuk, below), has remained unreformed. Detentions under the NSL reportedly increased in 1994.

**Professor Cho Kuk:** Lecturer in Law at Ulsan University. On 23 June 1993 he was arrested by officers of the security division of the National Police Administration, under Art. 3 of the National Security Law. A warrant for his arrest was issued only two days later, on 25 June. Professor Cho Kuk was held in police custody until 12 July, when his case was transferred to the prosecution, where he was subject to further questioning. He is accused of belonging to the Social Science Academy, which the authorities believe to be an «anti-state» organisation, connected to the Sanomaeng (Socialist Workers' League). He has been critical of the National Security Law and is a member of the Democratic Legal Studies Association and Chairperson of the Committee for Progressive Social Reform. He was released and given a suspended sentence in December.

**Cho Yong-whan:** Lawyer, member of the organisation *Minbyun* (Lawyers for a Democratic Society); and **Batik Seung-hun:** Lawyer. Cho represented Noh Tae-hun, a human rights activist convicted in October 1993 on charges of «possession of publications benefiting the enemy», contrary to Art. 7 of the NSL. On 15 July 1993, Noh Tae-hun was arrested in the office of Cho Yong-whan and Batik Seung-hun. An investigator from the Security Division of the National Police Administration entered the office and stated that he was there to arrest Noh. Cho asked to see a copy of the arrest warrant, upon which he was shown a photocopy of the cover of the warrant. This did not, however, appear to contain the information required by the Code of Criminal Procedure. Cho requested a certified copy of the warrant. A dispute arose during which several other officers also entered the room. One of them left, saying that he would get the warrant. Shortly afterwards three or four policemen rushed into the office and attempted to drag Noh away. According to Cho and Batik Seung-hun, they remonstrated, and were insulted, threatened and physically assaulted by the police officers. Noh was forcibly removed from the room.

In July 1993 Cho Yong-Whan and Baik Seung-Hun filed a criminal complaint before the Seoul District Prosecutor, claiming that the arrest of 15 July was illegal. The District Prosecutor's office notified them, on 8 November, that they would not prosecute the officers involved in the case, as in cases such as that of Noh, arrest without a warrant was permissible. The Prosecutor's office claimed that the officers involved had read a summary to Noh of the charges against him at the time of his arrest; however Cho maintains that this did not take place. The lawyers filed a constitutional petition with the Constitution Court, which is still pending. They also filed a civil suit against the policemen involved in the arrest and against the government, seeking monetary compensation. On 23 December, the Seoul Civil District Court declared the arrest illegal and ordered the payment of compensation to the two lawyers. Noh also filed a civil suit against the government seeking military compensation for his illegal arrest and other irregularities by the police. This case is also still pending.

On 16 May 1994 Cho attempted to visit two of South Korea's longest serving political prisoners, Kim Sun-myung and Ahn Hak-sop, who have been detained for 43 and 41 years respectively. At present they are held at Taejon prison. The lawyer was denied access to the prisoners on the grounds that he did not have a «power of attorney» signed by the two prisoners. He obtained the required documents, but when the general secretary of *Minakabyop* (a human rights group) returned to the prison with the requisite forms the authorities refused to accept them. Cho filed a petition of complaint with the Ministry of Justice. In November 1994, the Ministry of Justice dismissed his petition, stating that Cho had «political purpose to use the meeting for the petition of their release, repeal of the National Security Law or release of the prisoners of conscience» and therefore he «had not proper business to meet» the prisoners. Cho filed a lawsuit against this decision which is still pending. Lawyers have been attempting since 1993 to secure the release of the prisoners through legal proceedings; it is possible that the trial of the two may be invalid under the provisions of the National Defence Law, replaced in 1960 with the Military Penal Law.

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# Sri Lanka

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Armed conflict between government forces and the Liberation Tigers of Tamil Eelem (LTTE) continued into 1994. The long-running conflict has been characterised by large scale disappearances and widespread use of torture and extra-judicial killings. There remains a serious problem of impunity for such crimes, despite the establishment of the Presidential Commission of Inquiry into Involuntary Removal of Persons and the extension, in June 1993, of its terms of reference to enable it to investigate cases more quickly. In May 1993, following the assassination of President Ranasinghe Premadasa, apparently by an LTTE suicide bomber, Prime Minister Dingiri Banda Wejetunga was installed as President. Parliament was dissolved in June and elections were held on 14 August, resulting in the victory of the Peoples Alliance, a coalition dominated by the Sri Lankan Freedom Party, led by Chandrika Bandaranaike Kumaratunga. Kumaratunga was appointed Prime Minister on 18 August. Following elections in October 1994, Kumaratunga was sworn in as President.

Under the 1978 Constitution, the office of the President of Sri Lanka carries with it extensive powers. The President is head of state, head of government, head of the cabinet of ministers, and commander-in-chief of the armed forces. President Kumaratunga has recognised the potential for abuse of this power, and has pledged to abolish the executive presidency by July 1995 and replace it with a more ceremonial office.

The present broad reach of presidential power has implications for the Rule of Law and the administration of justice. In particular, Art. 34 (1) of the Constitution allows the President to grant pardons to those convicted in the courts. The use of this power has undermined the role of the judiciary and contributed to the already prevailing climate of impunity for members of the security forces. In March 1994, a controversy arose over this issue, when the President granted a pardon to two men convicted of culpable homicide. A warrant had been granted in relation to the two to compel them to appear at court in order that the sentence of three years imprisonment could be carried out. However neither these, nor subsequent similar warrants were served by the police; the convicted persons did not appear before the court. In light of such contempt for the judicial process, the pardon granted by the President, before the convicted persons had begun to serve their sentence, was seen as particularly problematic. The extensive use of Art. 34 (1) constitutes unwarranted interference in the judicial process, contrary to Art. 2 of the UN Basic Principles on the Independence of the Judiciary.

The Sri Lankan court system is composed as follows: the Supreme Court, Appeal Court and High Court, which under the constitution are responsible for the administration of justice (Section 105) and the Family Courts, Magistrates Courts and Primary Courts, which are judicial institutions created by parliament. Judges of the Supreme Court and Court of Appeal are appointed by the President; they may be removed on the instructions of the President with the approval of a two-thirds majority of parliament. High Court judges are appointed by the President and may be removed from office by him on the advice of the Judicial Service Commission. The appointment, transfer, discipline and dismissal of all other members of the judiciary is the responsibility of the Independent Judicial Services Commission, headed by the Chief Justice.

The Constitution protects fundamental rights, including the right to equality before the law, freedom from torture, the right to a fair trial and the presumption of innocence. The Supreme Court

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of Sri Lanka has special jurisdiction in relation to the protection of such rights; by Article 126, persons whose fundamental rights have been infringed can seek redress through the Supreme Court.

One case of alleged government interference with the judiciary concerned the trial of 23 soldiers accused of murdering 35 Tamil Civilians in the village of Mailanthani in 1992. The trial was moved from the majority Tamil town of Batticaloa to the majority Sinhalese town of Polonnaruwa. Opposition MPs accused the government of moving the trial in order to make it more difficult for the mostly Tamil witnesses to attend.

Concern about the Rule of Law in Sri Lanka centres around the Prevention of Terrorism Act (PTA) and the Emergency Regulations (ER), both of which give the security forces extensive powers of arrest and detention. Under the PTA, suspects may be detained without charge for up to 18 months, while under the ER, detention may continue indefinitely without trial, where there is a detention order signed by the Defence Secretary. In such cases it is not even necessary that the suspect be brought before a court. However, under 1993 changes to the ER, the magistrate must visit centres where individuals are detained under the ER each month, and must compile and publish a list of all those so detained. In addition, it is prohibited to detain persons in secret locations, or locations unauthorised by the Defence Secretary, who must publish a list of authorised places of detention. The lack of prompt and adequate judicial review of such detention orders violates international human rights norms. Detentions under the ER and PTA reportedly declined in 1993.

**M S Premaratne:** Attorney at law. Premaratne was attacked as he was returning to Colombo from a magisterial inquiry at Suriyakande in Ratnapura District on 10 January 1994. Three mass graves, containing up to three hundred bodies, were discovered at Suriyakande; the bodies are believed to be those of the victims of the 1989 government counter-insurgency operation against the *Janatha Vimukthi Peramuna* (JVP). Premaratne was the first lawyer to report the discovery of the graves. On 10 January he was followed by a white van. When he and his driver stopped



at a roadside fruit stand, they were fired on from the van by unidentified gunmen. No one was injured in the attack. In the town of Kahawatte, near Suriyakande, a skull and crossbones were left at the post office, evidently to intimidate those involved in the investigation.

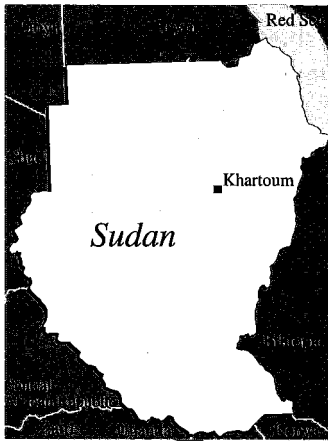
**Wijedasa Layarachchi:** Lawyer who died from torture in 1988. In a case which illustrates the problem of impunity in Sri Lanka, a police officer wanted for questioning in relation to the killing who had been absent from Sri Lanka for some time, was not required to appear in court on his return to the country in June 1993, despite a 1992 summons served on him in relation to the case. The officer was appointed to a senior position in the government service.

**Weerasena Ranahewa:** Lawyer. It is reported that Ranahewa, who had been representing an eleven year old girl allegedly raped by a former high ranking police officer, received several death threats. After he also received a threat to injure his son, he withdrew from the case, in October 1993.

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# Sudan

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During 1993, some political changes took place in Sudan. The National Salvation Revolutionary Command Council (NSRCC), in command since the 1989 *coup d'état*, declared that the Government and its policies will be based on the principles of freedom and *shura*, a principle of consultation in Islam. The NSRCC also stated that the Council shall appoint the President of the Republic, and that free elections of the President of the Republic will be held at a later stage. A Transitional National Assembly was created as the new legislative body. General Mohammed El Amin Khalifa, a supporter of the National Islamic Front (NIF) and one of the leading members of the NSRCC, was relieved from his duties in the army and appointed Chairman of this new body. The 300 members of the Council who have been appointed by the NSRCC are mainly NIF supporters.

The NSRCC appointed by decree, General Omar Hassan El Bashir as the President of the Republic. On 16 October, the NSRCC dissolved itself and transferred its powers to the Transitional National Assembly and the President of the Republic. National Assembly elections are scheduled for March 1995, and Presidential elections are to take place in 1996. The recently passed election law, however, maintains the prohibition of political parties. It also states that only the government can fund the election campaign.

The state of emergency declared in Sudan in 1989 remains in force, and the prohibition of political parties continues. (See

*Attacks on Justice 1991-1992*). During 1993-1994, human rights violations, including restriction of movement, and withdrawal of passports of suspected political opponents, continued to take place. In addition, the night curfew imposed over Khartoum since 30 June 1989 was lifted, night curfew over other areas continued.

Among the major trials of 1994 was the trial of 29 individuals accused of conspiring with a Sudanese military group outside the country to invade Sudan with the aid of a foreign power and destroy vital installations. Twelve people were arrested in April 1993 but their trial did not start until 20 December 1993. The other seventeen were tried *in absentia*. During the trial, the defendants said that the confessions they signed were extracted from them under severe torture and they showed the court torture marks on their bodies. Later in 1994, two of the lawyers representing the defendants were arrested (see below).

Two of the accused, Mr. Mubarak Gadein and Dr. Gaffar Yassin, informed the court they were secretly offered pardons if they testified against the others. Both refused.

The Court applied the new Code of Criminal Procedure of 1991 which introduced a new provision permitting for the first time trials *in absentia*. The Code allows for such trials on several grounds including if the person is accused of a crime against the state. The provision is apparently intended to try members of opposition groups who live in exile.

The Court also applied the new Penal Code of 1991 which introduced cruel, inhuman and degrading punishment such as amputation, flogging, and execution by stoning or hanging which may be accompanied by crucifixion. In April 1994, five of those tried in person were sentenced to terms of imprisonment ranging from two to seven years. Seven were acquitted.

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## **The Legal Profession**

In 1993, the Advocates Act of 1983, which organised the Bar Association, was amended. The amendment transformed the Bar Association into an organisation regulated by labour laws, with elections subject to the Trade Union Act of 1992. This latter Act deprives the union movement of its independence and puts it under the executive control of the Minister of Labour and the Registrar of Trade Unions. As a result, the Bar is subject to the intervention of both the Registrar of the Union and the Minister of Labour.

The 1993 elections of the Bar Council turned into a mockery. On 11 March 1993, the Registrar of Trade Unions announced that the elections to the Bar Council will be held on 13 March, with nominations to be made on 12 March. If no quorum is present on 13 March, the elections will be held on 15 March regardless of the number of the quorum. The majority of Sudanese lawyers reacted by boycotting the elections.

On 15 March, the elections took place without the necessary quorum. Members and affiliates of the NIF dominated the Bar Association and the new Council. Reportedly, this new Council started to create obstacles to other members of the Bar Association, especially when they apply to renew their practising licenses.

In another limitation on the legal profession, the Chief Justice reportedly withdrew the power of attestation and notarisation from a number of lawyers, without a lawful excuse. This action has paved the way for NIF lawyers to control the profession.

## **Administration of Justice in the South**

The 12-year-old internal conflict between the government and the Sudan People's Liberation Army (SPLA) in the South of Sudan has claimed the lives of many civilians.

The SPLA has established its own legal Code known as, «Sudan Peoples Revolutionary Laws, SPLM/SPLA Punitive Provisions 1983.» It handles military offences and a number of offences of a civilian nature, in an attempt to regulate civilian life. Violations of the Code are tried in three tiers of military courts. The first is the People's General Courts Martial. It has personal jurisdiction over high-ranking officers and officials of the SPLA. It also has subject matter jurisdiction over offences requiring the death penalty and life imprisonment, and appeals therefrom. The second is the People's District Courts Martial for all civil suits. The third is the People's Summary Courts Martial for less serious offences.

These courts are not standing courts and their staff is appointed by the military on *ad hoc* basis. Moreover, the Code lacks procedural guarantees and guidelines, and gives almost absolute discretion to the military officers and others who lack legal training. Except for the People's Summary Courts Martial, the two other courts are staffed by military personnel only.

## **The Government's Response**

In its reply to this chapter on Sudan, dated 28 February 1995, the Government of Sudan blamed the persistent use of the 1989 State of Emergency on the war in the south «which is imposed on Sudan and is supported by exterior sources.» It added that the failure of Sudanese political parties to run the country by means of a «western style liberal» democracy has led the people of Sudan to opt for a democratic system based on committees.

The government denied that it has withdrawn the passports of political opponents. It stated that it has offered amnesty and the opportunity to participate in the rebuilding of the homeland to «those who carried arms against it.»

As for the case of the 12 individuals who were accused of conspiring to invade the country, the government denied that they

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were tortured. While the Court of First Instance found that torture had been committed, the Court of Criminal Appeal overturned the decision. The matter is still pending before the judiciary.

The government admits that it allows trials *in absentia*, stating that such trials are limited to cases of high treason.

The government denies that lawyers have been arrested and states that the amnesty offered to lawyers Mubarak Gadein and Gaffar Yassin was made public, in accordance with the law, and supervised by the judiciary.

The government rejected that certain punishments contained in the Penal Code of 1991 are inhuman and degrading.

**Al-Hag Al-Fihail Abdel Rahim:** Lawyer and member of the Sudan Bar Association. He was arrested in April and detained for three months.

In its response, the government stated that it could not identify this individual.

**Farouk Abu Issa:** Lawyer and Secretary General of the Arab Lawyers Union. (see *Attacks on Justice 1991-1992*) On 20 June 1993, the Vice-President of the new Bar Council reportedly asked the government to conduct trials *in absentia* for lawyers in exile. He asked that they be sentenced to death for treason, because of their opposition to the government, and because they incite other countries to intervene in Sudan.

It seems that Mr. Abu Issa was particularly targeted by these threats. This is due to his constant criticism of human rights violations and the lack of judicial independence in Sudan.

In its response, the government stated that while Mr. Abu Issa is a well known political opponent who calls for the violent overthrow of the government, there has been no action taken against him.

**Sadiq Al-Shami:** Lawyer and member of the banned Bar Association Executive Council (see *Attacks on Justice 1992-1993*). He was arrested several times for various periods. In 1994, he was detained for three months.

In its response, the government stated that Mr. Al-Shami is a political activist and a member of the dissolved Arab Socialist Ba'ath Party. He was summoned in his capacity as a politician concerning matters unrelated to his function as a lawyer. The government also denied that he has been detained since 1991.

**Sayed Ahmed El Hussein:** Lawyer, and Former Minister for Foreign Affairs and Deputy Prime Minister. He was arrested on 17 November 1993 after having participated in a symposium organised by the Omdorman National University Students Union under the theme «Peace in Sudan». He was later released and granted permission to travel abroad for medical treatment.

Since the coup of 1989, Advocate El Hussein has been arrested several times, and was on trial for serious charges which could have led to the death penalty were it not for the intervention of the international community.

The Centre for the Independence of Justice and Lawyers (CIJL) and other human rights organisations wrote to the government expressing serious fears for his life and physical safety.

The government replied that Mr. El-Hussein was accused of inciting students to use violence and was released in a political settlement.

**Ali Mohammed Hassanein and Mustafa Abdel Gadir:** Lawyers. They were both members of the defence team in the 1993 trial concerning the conspiracy to invade the Sudan mentioned above. On 2 December 1994, security officers stormed and searched both their houses, without warrant. They were asked to report to the offices of the security authorities the

following day at 8 o'clock. Having complied, they were made to stand with their hands on the wall until 11:30. They were escorted by security officers to their offices where another search took place until 2:30. All their documents and court cases files were searched. They were then taken back to the security offices where they continued to be mistreated. Around midnight, security officers started interrogating them. During the interrogation, they were subjected to verbal insults and ill-treatment. Upon their release at 6 o'clock, they were both asked to return to the security offices the following day. They were both arrested on 5 December, and were released 12 days later. The CIJL and other human rights organisations wrote to the government expressing serious fears that the harassment of both lawyers was linked to their professional activities.

Advocate Hassanein has previously been subjected to harassment by security officers. He was arrested in Khartoum from 6 June 1994 to 20 June 1994. His arrest was apparently linked to his professional activities. At the time of the arrest, he was representing the victims' families of a bomb attack, in which government involvement was alleged.

The government stated in its reply that the two lawyers were summoned for one day and questioned about acts unrelated to the legal profession. It denied that they were ill-treated.

**Kamal al Gazouly:** Lawyer and member of the Sudan Bar Association. He is also a poet and a member of the banned Sudanese Writers Union (see *Attacks on Justice 1992-1993*). He was arrested several times, the last was during 1994 for a period of three months.

In its response, the government denied that Mr. Gazouly was detained in 1994.

**Hamid Mohammed Hamid:** Lawyer and member of the political bureau of the Umma Party (see *Attacks on Justice 1992-1993*). Mr. Hamid has been arrested since 12 April 1993. The security forces searched his house and threatened to detain him in



an unspecified place of detention. No charges were brought against him.

In its response, the government stated that it could not identify this individual.

**Sidik Kadoda:** Lawyer. He was arrested in November 1993 and charged with attempting to commit adultery and with possession and consumption of alcohol, acts considered as criminal offences under *Sharia* Islamic law applied in Sudan. Mr. Kadoda was volunteering to defend college students charged with planning terrorist acts. Reportedly, during the last two years, the said students have been subjected to torture while being detained in a secret detention centre. Mr. Kadoda had asked the court to intervene to stop the torture of the students. It seems that, after his petition to the court, security police stormed his home. There, they found him in the company of a woman. They took him to the police station and detained him overnight. The following day, he was released on bail. He left the country on the same day and is now living in Egypt.

The government replied that Mr. Kadoda was arrested and charged with the consumption of alcohol and adultery in accordance to the Penal Code.

**Bushara Abdel Karim:** Lawyer and member of the Sudan Bar Association. He was arrested in April 1994 for one month, then released. Two months later, he was arrested again, and remains in detention to date.

In its response, the government stated that it could not identify this individual.

**Osman Omar El Sharif:** Lawyer and Former Minister of Justice and Attorney General. He is also a member of the Political Bureau of the Democratic Unionist Party in Sudan. He was arrested on 27 November 1993, after being charged with incitement during demonstrations that took place in the city of

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Wad Madani in the Central State. He was detained for 11 days. He was later, reportedly, transferred to Khartoum, where he was detained in a secret detention centre for some time before he was released.

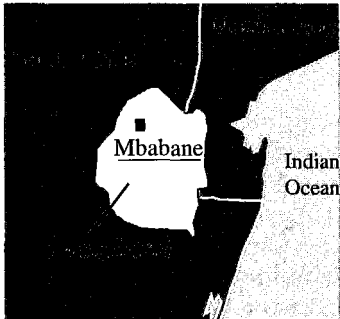
Advocate El Sharif has already been arrested twice since the coup of 1989. He was also tried in court for charges of corruption. The charges against him were not proved. Human rights organisations have expressed their fear for his life and physical integrity.

In its response, the government claimed that Mr. El Sharif no longer practices law and his arrest was due to illegal political activities.

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# Swaziland

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Swaziland is a monarchy in which executive, legislative and judicial authority alike vest ultimately in the King. The House of Assembly, the lower house of the parliament, was directly elected for the first time in October 1993; the parliament exercises only limited powers. There is a dual judicial system, the first branch of which is modelled on the western court system, the second of which applies traditional Swasi law and custom. The former branch of the court system comprises a Court of Appeals with final appellate authority, a High Court and magistrates courts. The traditional Swasi courts hear cases involving minor criminal charges and violations of Swasi custom. There is a right of appeal from these courts to the High Court and the Court of Appeal. The judiciary enjoys a substantial degree of independence; however, problems do exist in relation to the court system. Many judges are recruited from outside the country: a June 1993 agreement with South Africa provided for the secondment of judges from the South African bench and the legal training of Swasi judges in South Africa. The operation of the courts, in particular the High Court, is hampered by a shortage of staff and long delays; these delays were exacerbated in 1993 by the judges' strike described below.

**M. Dlamini, S. Mabusa, D. Magagula, S. Maphalala, L. Maziya, S. Mngomezulu, K. Nkambule, D. Tshabala, P. Vilakati, R. Zondi:** Magistrates of the Swasi courts. In 1993, the magistrates came into conflict with the authorities over the setting up of a Special Committee to police the Judiciary Service Commission (JSC). The Special Committee has authority to order the discharge of judges whom they consider have failed to

perform their duties satisfactorily. In a statement the magistrates stated that «this special committee has as its main object the purging of judicial officers who do not perform their duties to the satisfaction of the special committee, and certain magistrates ... have already been targeted for removal from office.» They described the establishment of the committee as unconstitutional and clandestine and said that their ability to discharge their duty of the administration of justice had been seriously compromised.

Members of the Committee reportedly included the Minister for Justice, the Attorney General, the Commissioner of Police, the Chairman of the Civil Service Board, the Principal Secretary in the Ministry of Justice and the Acting Director of Public Prosecutions. Since the Chairman of the Civil Service board is also a member of the JSC and the Principal Secretary of the Ministry for Justice is also the secretary to the JSC, the independence of the JSC also appears to be compromised by the setting up of the committee.

On 2 August 1993, in response to the establishment of the Special Committee, and in protest at what they perceived to be a violation of their independence, the ten magistrates went on strike. They were charged with misconduct justifying dismissal and were suspended on half pay. Disciplinary proceedings were brought against them; however, a compromise solution was reached by which the magistrates returned to work and a substantial fine was imposed upon them by the Chief Justice.

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# Syria

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The executive power in the Syrian Arab Republic is held by the President who is also the supreme commander of the armed forces. He is elected for a seven-year term through a national referendum. According to Syria's Constitution, the President must be a Muslim of Arab Syrian origin and must be over 40 years of age. In March 1992, President Hafez Assad started his fourth term in office.

The 250-member People's Assembly is elected every four years and is dominated by the Ba'ath Party. It has the constitutional power to initiate legislation. In reality, however, its function has been restricted to reviewing legislation proposed by the executive authority.

## The Judiciary and the State of Emergency

Art. 131 of the Syrian Constitution states that the judiciary is independent. The provision adds that «The President of the Republic shall guarantee this independence with the assistance of the Higher Council of the Judiciary». According to Art. 132, the President presides over the Higher Council of the Judiciary. The judicial system in Syria is composed of civil and criminal courts; religious courts; military courts; and State Security courts. The latter tries cases involving national security offences.

The Supreme Constitutional Court is composed of five members, all of whom are appointed by a Presidential Decree. The judges are not permitted to combine their membership with a

ministerial post or membership in the People's Assembly. The judges serve four-year terms that are renewable and they can only be dismissed for reasons provided for by law.

Due to the prevailing state of emergency first declared in 1963, normal legal procedures are often suspended. This is a clear violation of the International Covenant on Civil and Political Rights (ICCPR) ratified by Syria. Art. 4 of this Covenant allows derogation of its obligations only «to the extent strictly required by the exigencies of the situation.» Administrative detention authorised under Syria's emergency law grants broad powers to security forces to carry out preventive arrests without the oversight of the judicial branch. Under the State of Emergency Law, the Emergency Law Governor, who is appointed by the President of the Republic, is given control over all internal and external security forces. The Emergency Law Governor has the power to issue martial law ordinances in writing, personally, or through subordinates. He can also order in writing the preventive detention of anyone accused of endangering public security and order.

## **The State Security and Military Courts**

The State Security Courts, established by Decree N° 47 of 1968, have jurisdiction over «any case referred to them by the Emergency Law Governor» (Art. 5 of Decree 47). The State Security Courts replace military courts previously established by Decree N° 6 of January 1965, while retaining the latter's jurisdiction over specified offences and crimes.

State Security Courts are composed of a president and a number of judges appointed by the President of the Republic. Judges are not required to have legal training.

According to Decree N° 47, State Security Courts are not confined to observe the usual measures prescribed in the

legislation, whether in the proceedings of investigation, prosecution or trial. Moreover, trials are held *in camera* and proceedings may be summary. Also, there is no right to appeal the decisions of State Security Courts.

During 1994, trials of 500 political prisoners accused of memberships or links with unauthorised political parties and organisations continued before the State Security Court. Reportedly, defendants have limited access to lawyers and sentences rendered are not subject to appeal before other courts. Additionally, the President of the Court have frequently refused to hear defence witnesses in many cases. Moreover, allegations concerning the extraction of confessions through torture went, reportedly, uninvestigated.

The Court has already pronounced judgements on at least 300 defendants. Of them, 118 were sentenced to 6 years in prison, 29 defendants to 8 years, 31 defendants to 10 years, 36 defendants to 12 years, 5 defendants to 14 years, and more than 60 were sentenced to 15 years. The verdicts affirm the arbitrary nature of the trials. For example, members of a certain political party were sentenced to 15 years whereas the leaders of the same party were sentenced to half of the verdict.

Among the sentences pronounced are those of Dr. Ahmed Fayez Al- Fawaz, Vice-Secretary General of the Communist Party, 15 years; the unionist leader Omar Kashash, 15 years; jurists Hanna Nader, 14 years, and Abdullah Qabarah, 12 years; Dr. Mohammed Ganem, 15 years; Mr. Adnan Abu Janab, 15 years, pharmacist Nicholas Al- Zahr, 14 years; and student leader Farhan Nairbiyeh, 15 years.

Additionally, in 1993, the State Security Court sentenced four human rights activists who are members of the Committee for the Defence of Democratic Freedoms and Human Rights in Syria on charges of belonging to an «illegal» organisation. These are Ahmed Hesso, Najib Ata Layqa, Ibrahim Habib, and Jihad Khazem.

Furthermore, upon their release, prisoners were transferred to an interrogation room where they were asked to sign an attestation condemning their political parties and promising never to practice politics in the future except to support the political line of the country's President. Reportedly, some prisoners who were acquitted by the Court were kept in supplementary detention for more than eight months because they refused to sign such an attestation. Among those cases are prisoners who are members of the Arab Socialist Union Party (see case below).

## **The Legal Profession**

The 1981 Advocacy Act provides for government control over the Syrian Bar Association. According to Article 3 of the Law Regulating the Legal Profession, the purpose of the Syrian Bar Association is to «work towards Arab Unity and to realise its aims by the principles of the Ba'ath party.» The Ba'ath party must be notified in advance of Bar meetings and government officials must be allowed to attend them. Article 73 of the Law Regulating the Legal Profession forbids lawyers to represent foreign clients without permission from the Minister of the Interior. The government may dissolve the Bar any time this association is deemed to have deviated from its objectives. «Deviation» is not further defined by law. The Prime Minister can call for elections to the Bar Association within 15 days of its dissolution or appoint a temporary bar council. The law does not define the word «temporary.»

Contrary to Art. 23 of the United Nations Basic Principles on the Role of Lawyers, which stresses that lawyers in particular «shall have the right to take part in public discussion of matters concerning the law,» Syrian lawyers are not allowed to engage in public discussion of the Rule of Law or the functioning of the judiciary. The freedom of association, which is called for in Art. 24 of the Basic Principles, is violated by the fact that Syrian lawyers must receive permission from the Ba'ath party before joining any international jurist organisation. Moreover, lawyers



have in some cases been prohibited from leaving the country. Also, many lawyers who have been detained without charge or trial, have remained in detention for many years now. Moreover, four lawyers who were held in detention for political reasons and released in 1994, **Mohammed Daqqa, Ibrahim Hakim, Walid Mouteiran** and **Darwish Al- Roumi** were not allowed to return to their legal practice.

**Naif Al-Hamoui:** Lawyer (see *Attacks on Justice 1991-1992 and 1992-1993*). On 16 January 1991, he was arrested along with 50 other lawyers after he signed a leaflet protesting Syria's involvement in the Gulf War. He is still in detention.

**Yousef Al-Said:** Lawyer (see *Attacks on Justice 1991-1992 and 1992-1993*). He has been detained since 1982 without charge or trial.

**Riad Al-Turk:** Lawyer and First Secretary of the Political Bureau of the Banned Communist Party (see *Attacks on Justice 1990-1991 and 1991-1992 and 1992-1993*). Mr. Al-Turk has been detained since 28 October 1980 without charge or trial. Reportedly, he is in solitary confinement in the Military Interrogation Section. It is also reported that he is in bad health.

**Ahmad Ayash:** Lawyer (see *Attacks on Justice 1991-1992 and 1992-1993*). He has been detained since 1982 without charge or trial.

**Najib Dadam:** Lawyer (see *Attacks on Justice 1991-1992 and 1992-1993*). Dadam has been detained since May 1993 without charge or trial.

**Abdel Karim Hamoud:** Lawyer (see *Attacks on Justice 1991-1992 and 1992-1993*). Hamoud has been detained since 7 October 1987 without charge or trial.

**Philippe Khalaf:** Lawyer (see *Attacks on Justice 1991-1992 and 1992-1993*). Mr. Khalaf has been detained since 1981 without charge or trial.

**Afif Mizher:** Lawyer and member of the Committees for the Defence of Human Rights and Democratic Freedoms in Syria (see *Attacks on Justice 1991-1992* and *1992-1993*). On 18 December 1991, Mizher was arrested. In a trial observed by the CIJL, he was tried with 16 others before the State Security Court for membership of the Committees for the Defence of Human Rights and Democratic Freedoms in Syria. On 17 March 1992, he was sentenced to nine years imprisonment.

**Walid Mouteiran:** Lawyer (see *Attacks on Justice 1991-1992* and *1992-1993*). Mr. Mouteiran was arrested in January 1991. On 20 February 1994, he was indicted with belonging to an «illegal» organisation, the Arab Socialist Union Party. He was kept in detention by an administrative order after he refused to sign an attestation declaring that he condemns his political past, and promising to refrain from any future political activities. He was released in October 1994.

**Aktham Nouaisseh:** Lawyer and member of the Committees for the Defence of Human Rights and Democratic Freedoms in Syria (see *Attacks on Justice 1991-1992* and *1992-1993*). In a trial observed by the CIJL, he was tried with 16 others before the State Security Court for membership in the Committees for the Defence of Human Rights and Democratic Freedoms in Syria. On 17 March 1992, he was sentenced to nine years in prison with hard labour. He suffers from severe eye problems. He was once admitted to the Tal Hospital for eye treatment but was returned to prison before the end of his treatment. He is, reportedly, now blind in one eye and requires urgent medical attention.

**Abdallah Qabara:** Lawyer (see *Attacks on Justice 1991-1992* and *1992-1993*). He was arrested on 14 April 1987 and accused of membership in the Communist Party Political Bureau. He was sentenced to 15 years imprisonment. He is reportedly being held in Aleppo prison, and suffers from problems with his eyes.

**Ahmed Shahin:** Lawyer (see *Attacks on Justice 1991-1992* and *1992-1993*). Mr. Shahin has been detained since October 1980 without charge or trial.

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**Daoud Shihadeh:** Lawyer (see *Attacks on Justice 1991-1992* and *1992-1993*). Mr. Shihadeh has been detained since January 1991 without charge or trial.

**Shakour Tabban:** Lawyer and member of the Arab Socialist Union Party (see *Attacks on Justice 1991-1992* and *1992-1993*). He was arrested in January 1991. In November 1992, he died in custody, allegedly due to maltreatment by the security authorities.

**Nash'at Tu'ma:** Lawyer (see *Attacks on Justice 1991-1992* and *1992-1993*). On 25 February 1989, Mr. Tu'ma was arrested. He was sentenced to 6 years imprisonment.

**Mahmoud Younes:** Lawyer (see *Attacks on Justice 1991-1992* and *1992-1993*). Mr. Younes has been detained since 15 December 1987 without charge or trial.

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# Thailand

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Under the 1991 Constitution, the Thai legislature is composed of a House of Representatives, which is directly elected, and a Senate, the members of which are appointed by the King. The government is headed by a Prime Minister, who must be a member of the National Assembly. The Constitution provides for equality before the law (Section 25), the presumption of innocence (section 29), and legal aid for those charged with criminal offences (Section 31).

## The Judiciary

The courts are divided into three levels: courts of first instance, Courts of Appeal, and the Supreme Court. In the courts of first instance, misdemeanour trials are heard by a single judge, while more serious cases are heard by a panel of two or more judges. At appellate level, cases are heard by a panel of judges. Trials are normally in public but may be held *in camera* in certain cases, such as those which involve the Royal Family or questions of national security. In accordance with Section 194 of the Constitution, military courts have been established; these courts have a wide jurisdiction. They try cases involving military personnel. The military courts also try cases involving threats to the Royal Family, threats to international relations or national security, cases brought under the Anti-Communist Act, and cases relating to criminal association. There is no right of appeal from decisions of the military courts, in contravention of international fair trial standards.

Section 190 of the Constitution provides that «Judges are independent in the trial and adjudication of cases in accordance with the law.» The courts are staffed by career judges, who enter the career on graduation from law school. Promotions and assignments are controlled by the Judicial Commission, which makes recommendations on these matters to the King. The Commission is composed of 12 persons, including the President of the Supreme Court, the President of the Court of Appeals, the Vice President of the Supreme Court and the Permanent Secretary of the Ministry of Justice. The remaining members are four active judges and four retired judges, elected by their peers. The Judicial Commission has become controversial, as a result of a divisive power struggle within the Commission during 1991 and 1992, over the appointment of a new Supreme Court Chief Justice and the dismissal of eleven judges. Rival factions vied for control of the Commission, and its decisions as to appointments and dismissals were repeatedly reversed. The conflict also involved government attempts to exert greater control over the Judicial Commission; on two occasions the government refused to refer the recommendations of the Commission to the King (see case of Pravit Khambharat, below). It also attempted to alter the composition of the Commission so as to make it more sympathetic to the government. In September 1992 the government attempted to dissolve the Judicial Commission by decree, replacing it with a new committee subject to greater executive control (see *Attacks on Justice 1992-1993*). After general elections the following month, however, the decree was overturned by the new government.

The 1992 dispute between the judiciary and the government continues to be a source of tension and controversy; in a case at present before the courts, Judge Chamnarn Rawinnpong, chief of the Chun Buri provincial court, is suing Wichian Wattanakhun, Minister of Justice in the Anand government of 1992, for libel. The alleged libel concerns remarks by the former minister to the effect that the Judicial Commission was plagued by attempts to bolster self-interests; the minister also allegedly criticised the system of election to the Commission.

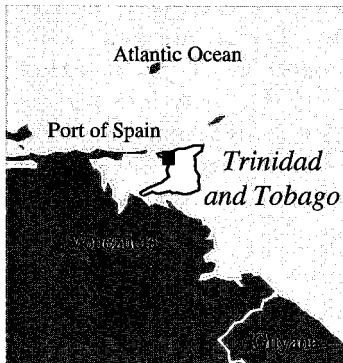
In another case arising out of the events of 1992, a former judge of the Supreme Court, Pravit Khanbharat, is bringing a

private prosecution against the former Thai Prime Minister and several members of his government. The defendants are charged with malfeasance of public office. Mr. Pravit is claiming that the former government denied him appointment as Chief Justice of Region One Court of Appeals in June 1991, despite a resolution of the Judicial Commission nominating him to the post. The resolution of the Commission recommending the appointment of Pravit was opposed by the then President of the Commission, who attempted to block the resolution. When this attempt failed, the Chairman, along with three other members of the Commission, walked out on the meeting. Despite this protest, the resolution was adopted by the remainder of the Commission. The resolution should, according to the usual procedures, have then been forwarded by the Prime Minister and the Minister of Justice to the King. Shortly after the Commission had adopted the resolution, however, Mr Anand was appointed Prime Minister, upon which he refused to forward the resolution to the King. At issue in the present case is whether the Prime Minister had an unconditional obligation, or a discretion, to forward the resolution of the Judicial Commission to the King. The first hearings of the case took place in August 1993; a CIJL observer was present at further hearings of the case in March and April 1994. In the course of the legal argument, it has been claimed by the defence that the plaintiff has no standing in the case, as the alleged injury caused by the plaintiff's actions was to the state, rather than to the plaintiff. The court, however, in November 1993, refused to rule on this point at the present stage in the case, saying that a ruling on the issue would be issued concurrently with the verdict in the malfeasance case.

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# Trinidad and Tobago

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The Republic of Trinidad and Tobago, a member of the British Commonwealth of Nations, is headed by a President who is elected by an electoral college. Legislative power is vested in a bicameral Parliament. Tobago, the smaller of the two main constituent islands, has enjoyed internal self-government since 1987.

Relations between the executive and the judiciary in Trinidad and Tobago have been strained, especially on the issue of the death penalty. In one of the longest *de facto* moratoria in the Caribbean, no execution of a death penalty had been carried out since 1979. A tense social climate due to harsh structural adjustment measures and rising crime rates, however, caused the government to call for the resumption of executions. In a first clash between the executive and the legal profession, the National Security Minister attacked lawyers for intervening in death penalty cases in August 1993 (see case below).

The tensions came to a climax on 14 July 1994. On that day, Glen Ashby, a convicted murderer and long-term prisoner, was hanged. At the very time of the hanging, Ashby's case was being considered by the Judicial Committee of the Privy Council in London, which serves as the final court of appeals for Trinidad. Ashby had been on death row for six days short of five years. In November 1993 the Privy Council ruled in a similar case from Jamaica that any death sentence which was applied more than five years after sentencing constituted «cruel and unusual punishment» and should be commuted to life imprisonment. Less than five hours before the hanging, Ashby's lawyers and the Privy Council received a written assurance by the Attorney General

that the execution would not be carried out until all applications for a stay had been exhausted. The decision of the Privy Council to grant a stay reached Trinidad by fax only minutes after Ashby's death.

The UN Human Rights Committee on 7 July 1994 had agreed to consider a petition by Ashby. It had not reached a decision, though, by the time he was hanged. On 27 July it thus strongly criticised the execution and said that it would pursue Ashby's case posthumously. The local Bar Association called the execution «the most serious breach of the process of law» yet in the country.

## **The Government's Response**

In its response of 28 March 1995, the Government of Trinidad and Tobago stated that «there was no written communication whatsoever for the Attorney General, or his lawyers before the Privy Council, concerning a stay of execution of the death sentence on Mr. Ashby.» The Government went on to explain its position that when Mr. Ashby was executed the warrant of execution was still valid because the conservatory order was not issued until after he died.

**Reginald Armour, Gregory Dalzin, Christopher Hamel-Smith, Douglas Mendez:** Lawyers. Reginald Armour, the secretary of the Trinidad and Tobago Law Association, as well as the three other lawyers received anonymous threatening phone calls as a result of their efforts to stop the execution of two clients in August 1993. The clients, Michael Bullock and Irving Phillip, were convicted of murder and sentenced to death by hanging. Bullock had been on death row since 1983, Phillip since 1988. In an attempt to prevent the executions from being carried out, the lawyers filed constitutional motions before the High Court, calling the long time the two had spent on death row a «cruel and unusual punishment.»



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On 21 August, two days before the lawyers were due to file the motions, National Security Minister Russell Huggins made an inflammatory appeal to party activists to protest the lawyers' actions. «In this country,» he said, «certain persons are overly concerned with protecting the rights of the criminal ... So on Monday, when they file their motions to stop the hangings, you must get up and let your voices be heard.» He added that the lawyers were frustrating the functioning of the executive branch at a time of increasing murders and shortly after the killing of the island's Police Commissioner.

In spite of the number of obscene and threatening phone calls the lawyers received after the minister's speech, they went ahead with their motions. They were granted a stay of executions on 23 August. After the Privy Council's decision that five years was the maximum time a prisoner should spend on death row (see above), the Trinidadian Government commuted the sentences of Michael Bullock and Irving Phillip, as well as those of about 50 more prisoners.

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# Tunisia

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In recent years, the Tunisian Government has made efforts to internationally publicise its commitment to human rights. Internally, several governmental bodies were created to deal with human rights concerns. These include the Higher Committee for Human Rights and Basic Freedoms, the Commission of Inquiry on Human Rights Violations, particularly on prolonged *incommunicado* detention and torture, the Principal Presidential Advisor on Human Rights, and human rights units in a number of ministries. However, Tunisia still suffers from serious and systematic human rights violations in breach of its obligations under both international and internal rules.

The Tunisian Constitution states that international treaties ratified in accordance with the law prevail over domestic law. For treaties to be domestically enforced, however, they must be published in the Official Gazette. The Tunisian Government has in some cases delayed the publication of international treaties in the Official Gazette. For example, the Government ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1968 but they were only published in 1993. Also, the Government ratified the African Charter on Human and Peoples' Rights in 1982, but has yet to publish it. This has delayed the possibility of invoking such treaties before the Tunisian Courts.

## Legal Developments During 1993-1994

In November 1993, both the Tunisian Penal Code, and the Code of Penal Procedure were amended, apparently in order to facilitate the Government's fight against the opposition. Among the amendments to the Penal Code is the introduction of a broad definition of «terrorist offences.» The amendment defines terrorism as any crime committed against persons or property, done within the context of an individual or group's plan to terrify people. The definition also includes incitement to hatred or racial or religious fanaticism, regardless of the means used. The Code, therefore, does not require that violence be used for the crime of terrorism to be committed. In other words, the Code incriminates the non-violent expression of opinions. Moreover, the sentences of these crimes cannot run concurrently, but must be consecutive. Furthermore, amendments of the Code of Penal Procedure allow the prosecution of persons for having committed «terrorist offences» in other countries, even if these acts are not recognised as crimes under the law of the country where they were committed.

The amendments of the Code of Penal Procedure reduced the period of preventive detention to six months. This period can be renewed once for a period of three months for misdemeanours, and twice for a period of four months for major crimes. This long detention remains, however, inconsistent with international standards, such as the right to trial within a reasonable time or the right to be released.

The period of *garde à vue* detention is four days, renewable, twice, to a maximum of ten days. There is a concern that, in several cases, *garde à vue* detention has been illegally prolonged. The police records regarding the date of detention are often inaccurate. What worsens the matter is that the accused has a right to be represented by a lawyer only before judicial institutions. There is no right for legal representation before the police.

Many suspects accused of belonging to the illegal Islamist organization *al-Nahda*, or to the left-wing opposition, mainly

members of the *Parti communiste des ouvriers de Tunisie*, or their sympathisers were arrested during 1994. Many detainees were held in *garde à vue* detention. In some reported cases, the date of detention was falsified to conceal illegally prolonged detention. Additionally, several detainees reported that they were tortured or ill-treated in the Ministry of Interior, police stations or secret detention centres. Torture methods include beatings, suspension for long periods in difficult positions, often accompanied by beatings; semi-suffocation in dirty water or bleach; and sexual abuse.

The International Commission of Jurists (ICJ) has been concerned with the case of Mr. Hamma Hammami. Mr. Hammami is the spokesperson of the *Parti communiste des ouvriers de Tunisie* and the editor of *al-Badil* newspaper. In November 1992, he was sentenced in the town of Ghabis, *in absentia*, to four years and nine months imprisonment for forming an illegal organization and distributing illegal material. On 14 February 1994, he was arrested in Susah. A new case was brought against him linked to his arrest in Susah.

Mr. Hammami was accused of several offences. The first was possessing a forged identity card and defying the orders of the authority. The police records claim that he refused to stop and present his identity card to them although they identified themselves as police officers. They claimed that Mr. Hammami was carrying a false identity card. Mr. Hammami, however, denied the accusation stating that he presented his real identity card to the police. The picture on the false identity card matched a picture that is in the possession of the Ministry of Interior from a previous arrest.

The second charge involves assaulting two police officers. Two officers out of three present during the arrest claimed that Mr. Hammami assaulted them. They submitted a complaint against him, where some medical reports were attached. However, upon checking the file, it was found that the medical reports were dated after the complaint was submitted. This means that they were later obtained and added to the file.

During his trial, which was attended by the director of the Centre of the Independence of Judges and Lawyers, Mr. Hammami testified he was severely beaten and sexually abused by his interrogators. The Court, however, neglected investigating these allegations. He was sentenced to a total of 9 years. He appealed the two decisions, but the Court of Appeal upheld the holding of the lower courts.

Also, Dr. Mouncif Marzouki, the former President of the Tunisian League for Human Rights, was arrested on 24 March 1994, and judicial proceedings were brought against him. Apparently, his arrest was due to remarks he made on the human rights situation in Tunisia. The ICJ intervened on his behalf with the President of the Republic to state that each and every person in Tunisia has the right to express his/her opinion freely. The ICJ asked that Dr. Marzouki be released, and that the judicial proceedings against him be stopped. On 13 July 1994, Dr. Marzouki was released on bail.

## **The Judiciary**

According to the Constitution, the judiciary in Tunisia is independent, and exercises its functions according to the law. Nonetheless, it suffers from many structural and functional deficiencies. The High Council of the Judiciary supervises the nomination, promotion, transfer and discipline of judges. However, most members of the Council are appointed rather than elected. Moreover, judges may be transferred without their consent. Also, the law provides that the age of retirement of judges can be extended by an executive order, issued yearly, for a period not exceeding five years.

In Tunisia, administrative courts are separate from regular civil and criminal courts. There is no appeal of the decisions of such court and deliberations are in secret. The President of the Republic appoints the Chief Judge of the Court. The Chief Judge may come from outside the judiciary. Also, the Prime Minister

presides over the High Administrative Judicial Council, and the Prime Minister supervises the Administrative Courts. Also, there is no entity to determine the conflict of jurisdiction between administrative courts and civil or criminal courts.

## The Government's Response

On 6 March 1995, the Permanent Mission of Tunisia to the United Nations in Geneva responded to *Attacks on Justice*. The Government objected to the inclusion of the cases of Mr. Hamma Hammami and Mr. Mouncif Marzouki in the report (see above).<sup>3</sup> The government objected to the CIJL's use of the term «systematic» to describe abuses of human rights in Tunisia. It also noted that it had no evidence that the police falsify arrest records. Referring to the arrest of sympathisers of *al-Nabad* or the *Parti communiste des ouvriers*, it stated that Tunisian law does not contain provisions to punish sympathisers of banned groups and that such sympathisers are not tried.

Concerning the transfer of judges without their consent, the government stated that this action is taken within the framework of the High Council of the Judiciary and in accordance to need.

**Abdel Rahman El-Hani:** Lawyer. He was arrested on 15 February 1994, and accused of «setting up an unauthorised association and spreading false information.» Just before his arrest, he had announced his candidacy for the presidency of the Republic. He was kept in custody for 72 days pending trial. On 23 April, he was released on bail. He was later sentenced to eight months suspended imprisonment.

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3 Although these persons are not jurists, and are therefore not listed as individual cases, they have been included in the chapter because their trials shed light on the administration of justice in Tunisia.

**Bashir Sai'd Sid:** Human rights lawyer. His passport was withdrawn December 1992, preventing him from going abroad. Reportedly, his professional activities are also targeted by the Government, through the harassment of his clients.

**Najib Hosni:** Human rights lawyer. He was arrested on 15 June 1994, on the charge that he falsified a land deal. Hosni had defended many political prisoners in Tunisia, and had apparently made statements in court criticising the situation of human rights in the country. Reportedly, during the year prior to his arrest, he was subjected to harassment by the authorities. Also, his wife and children could not obtain passports. After his arrest, the authorities allowed his lawyers to visit him. Since 12 August, such visits were denied. He remains in detention without trial. His long pre-trial detention is unjustifiable. Human rights organization have expressed their fear that Mr Hosni is being detained solely on the basis of his human rights activities.

In its response, the government claimed that from the time of his arrest on 15 June 1994 until 10 January 1995, Mr. Hosni was visited by 43 lawyers on 170 occasions. It added that he has yet to be tried because of on-going preliminary proceedings.

**Ahmed Souab, Al Hadi El Iari, Al Hadi El Qdairi, Al Mounji Qassam, Al Mounsif Bou Zrarah, Al Taher Shamam, Annan Ben Hamoudeh, Ghazi Al Jraibi, Hala Ben Milad, Hatem El Dashrawi, Jamal Bazar Pasha, Kamal Hamdi, Majidha Ben Gharbiyah, Majidah El Oubaidi, Mohammed El Askari, Mohammed Sharif, Mohammed Othman Moussa, Najat Ben Saleh, Noura El Soudani, Roudah Sasi, Shadia El Safi, Tarek Brahem, Wajdi Ben Ahmed, Wasilah El Tlaili, Zakia El Majri:** Judges. Between 14-24 November 1994, the International Commission of Jurists (ICJ) and the CIJL organized a Seminar entitled *Judicial Independence and Functions in Tunisia*. The Seminar was organized in collaboration with the Arab Institute for Human Rights and several governmental and non-governmental Tunisian institutions. After the Seminar ended, the participant judges were subjected to pressure from the Ministry of Justice to withdraw their support for a document

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entitled *Summary of the Activities of the Course*, issued at the end of the Seminar.

The judges had been requested to report individually to the *Centre d'Etudes Juridiques et Judiciaires* at the Ministry of Justice, and direct pressure was exercised on them to sign a letter withdrawing their support of the document. A new document was added to the letter which significantly altered the original document.

The distortion of the original text is apparent from the first line. The heading of the original document is the *Seminar on Judicial Functions and Independence in Tunisia*, the title of the Seminar.

The heading of the altered document is the *Republic of Tunisia, the Ministry of Justice and the (Ministry's) Centre d'Etudes Juridiques et Judiciaires*. This title leaves little doubt as to who is its author.

Under the first sub-heading, *Judicial Independence and Human Rights*, the original document spells out 2 and 1/2 pages of concerns of judges about judicial independence in Tunisia. Among participants' concerns was the structure and composition of the High Council of the Judiciary, and the non-existence in the legislation of the principle that judges cannot be transferred without their consent, nor of its exceptions.

Under the same sub-heading, the altered document omits such concerns and generally praises the independence of the judiciary in Tunisia. Specifically praising the advances made by the President of the Republic, the document heralds the provision of automobiles and modern equipment to senior judges. It should be noted that all of the participants were young judges and that these privileges do not concern them.

Under the third sub-heading, *Criminal Law*, the original document highlighted the need to control police records concerning the date and time of arrest. Without proper control of



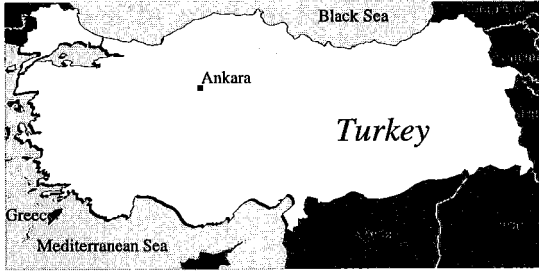
these records, there is the potential for abuse. The original document further proposed that the prosecutor's office be given the power to check such police records and that lawyers attend the first interrogation of an accused in police custody. These concerns and suggestions were omitted from the second document.

Under the fourth sub-heading, *Constitutional and Administrative Law*, the original document contained a three-page examination of the advantages and problems of the administrative court system in Tunisia. The altered document reduced the discussion to two short paragraphs, containing two sentences praising the President of the Republic.

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# Turkey

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Turkey is a secular Republic with a multiparty parliament that elects the president. The unicameral legislature (Turkish Grand National Assembly/*Türkiye Büyük Millet Meclisi*)

is elected every 5 years. It in turn elects the President for a single, non-renewable term of seven years. From amongst the members of the National Assembly the President appoints a Council of Ministers headed by a Prime Minister. The President enjoys certain veto powers in relation to the legislature.

Turkey's judicial system is composed of general law courts with the Constitutional Court (*Anayasa Mahkemesi*) at its apex, State Security Courts (*Devlet Güvenlik Mahkemesi*) and military courts. Most cases are heard by general law courts, which include the civil, administrative and criminal courts. Appeals are heard either by the High Court of Appeals (*Yargıtay*), with the exception of some questions of administrative law, which are reviewed by the Council of State (*Danıştay*). The Constitutional Court examines the constitutionality of laws, decrees, and parliamentary procedures, although it cannot review measures regulating areas under state of emergency. Military courts, with their own appeals system, hear cases regarding infractions of military law.

In the organisation of the judiciary, the Supreme Council of Judges and Public Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu*) plays a decisive role. It was founded by law no. 1461 of 1981, pursuant to Art. 159 of the Turkish Constitution, and consists of seven members. The Minister of Justice, who presides

the Council, and the Under-Secretary to the Ministry of Justice are members *ex officio*. Three judges from the High Court of Appeals, as well as two judges from the Council of State are appointed by the President to complete the panel. The Supreme Council nominates all judges and prosecutors, decides on local jurisdiction, and exercises disciplinary power. It also has the power to remove judges and prosecutors from office. The decisions of the Supreme Council are definitive and always taken secretly.

## State of Emergency

Turkish reality is overshadowed by an internal conflict in the predominantly Kurdish south-eastern parts of the country. In 1984 the Kurdish Workers Party (*Partiya Karkeren Kurdistan*, PKK), which is fighting for Kurdish autonomy, launched a guerrilla campaign. Over the years, fighting between the government and the PKK has grown more and more intense. Independent observers report a growing number of breaches of international humanitarian law by both sides, such as the killing of large numbers of civilians. The Government, through the decision to «evacuate» villages in the region, has reportedly destroyed a large number of villages. Apparently, all or most of the «evacuated» houses are later torn down or burnt. A State of Emergency declared in 1987 in the ten south-eastern provinces is still in force. Under the state of emergency rules, the State of Emergency Region Governor (the so-called «super-governor») and the regular provincial governors exercise exceptional powers, including censorship of the press. The super-governor also has the power to expel people from the area whose activities he deems adverse to public order and order authorities to search residences or the premises of political parties, businesses, associations and other organisations.

In the fight against the PKK, special courts were introduced to deal with guerrilla related crimes. The bench in these State Security Courts consists of a president and two judges, one of

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whom is a military judge. Each is appointed to a four-year term. The civilian judges are appointed by the Supreme Council (see above), while the military officer, who must be a jurist, is nominated by the Minister of Defence according to the Military Judges Act. Their verdicts may be appealed on questions of law to a department of the High Court of Appeals specialising in crimes against state security. Because the fight against the PKK has come to dominate all other aspects of public life in the south-east, the State Security Courts have come to occupy a central position in the judicial system of the region, and plans exist to dramatically increase their number. The fact that a military officer on active duty, thus under disciplinary control of the Minister of Defence, is a part of the three-judge panel, gives the executive great influence in these courts, endangering the principle of an independent judiciary.

Even more preoccupying, however, is the criminal law the State Security Courts apply. In most of the cases before them, the defendants are accused of breaches of the 1991 Anti-Terror Law (*Terrörle Mücadele Yasası*). Its definition of «terrorism» is too wide to meet international standards. It includes, for instance, using «any method of pressure» to «weaken the authority of the State.» According to Article 6 of the law, «any method of pressure» includes writing and reporting ideas. According to Article 8,

«written and oral propaganda and assemblies, meetings and demonstrations aimed at damaging the indivisible unity of the State of the Turkish Republic with its territory and nation are forbidden, *regardless of method, intention and ideas behind them.* Those conducting such activity are to be punished by a sentence of between two and five years' imprisonment and a fine ...» (unofficial translation, emphasis added)

This was one of the laws used to start proceedings against eight Kurdish members of Parliament, who in December 1994 were condemned to prison terms between 3.5 and 15 years mainly because of speeches they gave in Parliament. In practice, the sole mention of a Kurdish identity can be interpreted as «damaging the

indivisible unity of the State» (see some of the cases below). The Anti-Terror Law is thus increasingly used to criminalise non-violent political opinion.

## **Torture / Criminal Procedure**

Even though Turkey is a party to both the European Convention for the Prevention of Torture and the UN Convention Against Torture, police regularly torture suspects in custody. On 18 November 1993, the UN Committee against Torture condemned the government of Turkey for «systematic» torture. A similar statement had been issued a year before by the European Committee for the Prevention of Torture.

The 1992 amendment to the Criminal Trials Procedure Law (*Ceza Muhakemeleri Usul Kanunu*) has not fulfilled the hopes it raised. Under the amendment, access to legal counsel has been improved for detainees and confessions obtained under duress are banned (see *Attacks on Justice 1992-1993*). The reform, however, has failed to help improve the situation in regard to the use of torture in police stations, as it allows for long periods of police detentions. Only for those detainees charged with common, individual crimes, the detention period is 24 hours. Those detained for group delinquency may be held without charge for 4 days, subject to a 4-day extension. In cases under the jurisdiction of State Security Courts, which were not affected by the reform, a defendant can be kept in police custody for 48 hours. If accused of crimes that are regarded as being of a «collective, political or conspiratorial» nature, which in practice are the majority of cases, the defendant may be detained for up to 15 days in most of the country and up to 30 days in the provinces under the state of emergency.

Another factor that facilitates the use of torture is the almost complete impunity which public officials enjoy. Under the decree that established the office of the «super-governor» in the state of emergency areas, judicial review of the constitutionality of any act

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of the administration in the fields of emergency issues was explicitly excluded. Many legal experts hold this to be unconstitutional, as Art. 125 of the Turkish Constitution only allows a derogation of the right to seek temporary injunctions.

It is also difficult, if not impossible, to sue public officials in their personal capacities for unlawful administrative action. The Law on the Trial of Public Officials (*Memurun Mubakemat Yasası*) states that the preliminary investigation into such alleged offences is done by the administration itself, which then decides whether «prosecution is necessary.» Normally, such a decision can be reviewed by the courts. As mentioned, however, judicial review in the state of emergency areas is not possible. That means that it is in the power of the administration itself to judge whether a public official has committed a crime or not.

Although the Constitution specifies the right of every detainee to request speedy arraignment and trial, judges have ordered a significant number of persons detained for long periods of time. While many such cases involve persons accused of violent crimes, it is not uncommon for those accused of non-violent political crimes to be kept in custody until the conclusions of their trials.

## **Attacks on Lawyers**

In its fight against the PKK, the Turkish Government has increasingly started attacking those within the Turkish society who fight for the Kurds' human and political rights. The case that caught most international attention was the dissolution of the pro-Kurdish People's Labour Party (*Halkın Emek Partisi*, HEP) and its successor, the Democracy Party (*Demokrasi Partisi*, DEP) by the Constitutional Court and the subsequent arrest and trial of six Kurdish members of Parliament, which has been mentioned above. Attacks and harassment have, however, also been directed at journalists of pro-Kurdish newspapers and human rights lawyers.

Among the latter, lawyers who take up the defence of people before the State Security Courts in the area of Diyarbakir seem to be a special target for the Turkish authorities. In a mass arrest, 16 lawyers were detained during a period of three weeks in November and December 1993 and charged under the Anti-Terror Law. These allegations were mainly based on information provided by one prisoner turned police informer. In February 1994 the last eight of them were released, but their trial continues. All 16 lawyers report to have been tortured while in custody (see below).

The way these lawyers were arrested looks like it was intended to dissuade lawyers from taking up cases of defendants under the Anti-Terror Law. It also seems to have been in contravention of Turkish law: Art. 58/1 of the Lawyers' Law (*Avukatlık Yasası*, Law N° 1136) states that the investigation of any crime committed by a lawyer in the course of his or her professional duties may only be conducted on the authority of the Ministry of Justice. Circular 46, issued by the Ministry of Justice on 27 June 1970 and another Circular of 27 March 1971 state that, because of issues of professional confidence, investigation of crimes committed during their activities as lawyers, and also personal crimes, should not be left to the police, but should be carried out by the Public Prosecutor and assistants. In this case, however, the lawyers were arrested by the gendarmerie (*Jandarma*), a militarised police force under the authority of the Interior Minister.

As can be seen by this and many more cases listed below, the security forces, especially in the south-east, have consistently identified the defence lawyers with the causes of their clients in cases where they represent people accused of assisting the PKK. This runs counter to Principle 18 of the United Nations Basic Principles on the Role of Lawyers which expressly forbids such identification.

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## Harassment of Human Rights Groups

Many of the lawyers listed below are active in the Turkish Human Rights Association (*Insan Haklari Dernegi*, IHD), the largest organisation of its kind in Turkey with branches throughout the country. The Turkish government actively tried to silence the internationally respected organisation. Even though the IHD has repeatedly condemned human rights violations by all sides in the conflict, the Government has accused it of complicity with the PKK. In his response to the declaration regarding Turkey, which the ICJ's Centre for the Independence of Judges and Lawyers submitted to the UN Sub-Commission on Human Rights in August 1993, the Turkish delegate called the Turkish groups organisations «lacking any relation with the area of human rights, but with an organic relationship with the drug-dealing PKK terrorist group.» In that context, he accused the ICJ and other NGOs of «consciously or unconsciously supporting terrorism» because of their reports of human rights violations by the Turkish government.

As a result of the constant harassment, the last of which was the order to close down the Diyarbakir branch for 30 days on 28 December 1994, only 20 of the 54 IHD branches could work properly at the end of December 1994. None of the 13 branches in the south-east is working at full strength.

Among the measures that caught most of the attention of the ICJ and the CIJL were lawsuits against the IHD and its sister organisation, the Human Rights Foundation of Turkey (*Insan Haklari Vakfi*, HRFT), founded by IHD members with the aim of working for the rehabilitation of torture victims.

One such lawsuit had been initiated against the Istanbul branch of the IHD in October 1993 because of a meeting where peaceful solutions to the problems in the Kurdish regions were discussed. It ended with an acquittal three months later.

Another suit was initiated in October 1994 by the Prosecution Office of the Ankara State Security Court, this time



against the Human Right Foundation's chairman, Yavuz Önen, and Fevzi Argun, a member of its Administration Board. They were accused of «separatist propaganda» for statements made in a booklet on torture and deaths in detention places between 1980 and 1994. In these statements they refer to a «Kurdish people», which was seen by the prosecution as «damaging the indivisible unity of the state» under Art. 8/1 of the Anti-Terror Law (see above). At the same time, lawyers Akin Birdal, Hüsnü Öndül, Sedat Aslantas and Erol Anar, leading members of the IHD, were tried for similar comments in a book entitled «*A Profile of Burned Villages.*» The ICJ sent an observer to both these trials which took place on 19 December 1994 in Ankara. To its great delight, it was informed on 11 January 1995 that all cases had ended in acquittal.

**Sabahattin Acar, Arif Altunkalem, Mesut Bestas, Meral Danis Bestas (f), Baki Demirhan, Nevzat Kaya, Hüsnüye Ölmez (f), Sinasi Tur:** Lawyers. During the week of 15 November 1993 these eight lawyers from Diyarbakir were arrested by the gendarmerie. They were taken to the Department for Anti-Terrorism (*Terörle Mücadele Subeleri*) and the Training Centre of the Gendarmerie's Intelligence Organisation (*Jandarma Istibbarat Teskilati Eğitim Merkezi*) for interrogation.

On 23 November 1993, members of the Anti-Terror-Branch arrested three more lawyers: **Vedat Erten, Tahir Elci, and Niyazi Cem.** In the week of 2 December, another five lawyers were arrested: **Gazanfer Abbasioglu, Fuat Hayri Demir, Mehmet Selim Kurbanoglu, Arzu Sahin (f)** and her husband **Imam Sahin.** In the beginning no one, not even the President of the Diyarbakir Bar, was granted access to the detained lawyers.

Between the 11 and 15 December 1993, Sabahattin Acar, Mesut Bestas, Tahir Elci, Vedat Erten, Selim Kurbanoglu, Hüsnüye Ölmez, Arzu Sahin and Imam Sahin were remanded to prison, the rest were released. At the first hearing of the case in Diyarbakir State Security Court on 17 February 1994, the eight were also released. Several international organisations sent observers to the trial.

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The main charges brought against the lawyers were membership in the PKK and smuggling notes between prisoners and the organisation. Also, many were charged with «belittling the Turkish State» by faxing information to human rights associations in Europe.

In bringing the charges, the prosecution relied heavily on information supplied by a former representative of the prison inmates turned police informer. The only other sources cited in the indictments were searches of the lawyers' homes and workplaces and statements signed by some of them while in police detention. In order to make them sign the statements, the lawyers reported having been severely tortured. After their release they said they had been hosed down with icy water under high pressure for long periods at a time, hung up by the wrists, beaten, and subjected to mock executions. They also said that they were blindfolded for days and that they had not been able to read the statements before signing them.

**Mehmet Bicen, Ferudun Celik, Zafer Gür and Sinan Tankrilu:** Lawyers in Diyarbakir. In early 1994, these four lawyers were charged with the same crimes as their 16 colleagues mentioned above. On 17 February 1994, their trial was opened in Diyarbakir. The case was unified with the case of the others.

**Mahmut Akkurt:** Lawyer and former president of the Balikesir branch of the Turkish Human Rights Association's (IHD). On 31 October 1994, Mahmut Akkar was arrested by police for a speech he had made two years prior when he was still president of the local IHD branch. In early December 1994, he was convicted by a State Security Court under Art. 312 of the Turkish Penal Code for «praising a crime» and sentenced to 14 months imprisonment. According to information provided by Amnesty International, Mahmut Akkurt never advocated violence. He is now serving his sentence in Kepsut prison, Balikesir province.

**Tonguc Aslan, Hüseyin Aygöl, Fuat Erdogan, Mercan Güclü (f), Eren Keskin (f), Ali Riza Dizdar:** Lawyers in

Istanbul. On 28 September 1994 at around 4:30 p.m., three persons were killed during a police raid on the «Arzum» café in Istanbul. The three killed were the lawyer Fuat Erdogan (see separate entry below), Elmas Yalcin (f) and Ismet Erdogan. Two days later, on 30 September 1994, the Istanbul branch of the Turkish Human Rights Association (IHD) investigated the incident. As they were releasing their findings to the press, the police intervened and detained the six lawyers and two journalists.

Of the lawyers named, five were released the same day around 11 p.m. Hüseyin Aygül, however, was held for two days and reportedly beaten; he was released on Sunday, 2 October 1994. According to a report by the lawyer Mercan Güclü, all the detainees were insulted and abused in custody. She also stated the police alleged that lawyers who took up political cases were themselves members of illegal armed organisations.

Reports of the incidents in the café vary greatly. Istanbul Police Chief Necdet Menzir issued a statement saying the police had entered the café to check identity cards. When they were fired upon, they used their weapons, killing the three people who, according to the police, were members of the illegal armed guerrilla organisation *Devrimci Sol* (Revolutionary Left). According to the IHD delegation's report, however, there were no signs of a clash in the café. There were not more than three bullet holes in the wall opposite the entrance. According to their findings, the place was far too small for a clash as described by the police. Witnesses also told the delegation there had not been a call for surrender or anything similar before the police started to shoot.

**Sedat Aslantas:** Lawyer, member of the IHD, Deputy General Chairman and president of its Diyarbakir branch until October 1994. Sedat Aslantas is currently serving a three year sentence for «propaganda against the indivisible unity of the state.»

On 12 May 1994, four plainclothes policemen entered his office, arrested him and took him to the Anti-Terror Branch of the

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Ankara Police Headquarters. On or around 17 May 1994, Mr. Aslantas was transferred from police custody to Ankara Central Closed Prison and later to Diyarbakir E-Type Prison, before he was released on bail on 8 June.

At that time, two warrants were issued for Mr. Aslantas' arrest: one in connection with the mass arrest of lawyers in Diyarbakir in November 1993 (see above); the other in connection with a press statement issued on 27 May 1993 by the «Democratic Platform,» a group of leading members or representatives of trade unions, associations and publications in Diyarbakir.

The current imprisonment stems from a trial where Sedat Aslantas was accused under Article 8 of the Anti-Terror Law because of a speech he had made in the General Meeting of the IHD in 1992. On 1 December 1994, he was sentenced to 3 years imprisonment and a heavy fine. On 5 December, he was arrested when he went to Ankara Court Hall to represent a client in an unrelated matter.

Sedat Aslantas had also been prosecuted in connection with the Book *A Profile from the Burned Villages* (see below case of Hüsni Öndül, et al.). Like his co-defendants, however, he was acquitted in that case.

Sedat Aslantas has worked closely with Western human rights groups in preparing the submission of complaints to the European Commission of Human Rights in Strasbourg.

**Kemal Bilgic:** Lawyer and member of the Izmir branch of the Turkish Human Rights Association (IHD). On 22 September 1992, Bilgic and four other members of the IHD staged a non-violent demonstration in front of Buca Prison, near Izmir, concerning the ill-treatment of prisoners there. Because of that they were sentenced to 18 months imprisonment for breach of the Law on Assemblies and Demonstrations by Izmir Criminal Court No. 5 on 27 May 1994. The four other IHD members, Derviş Altun, Naile Erogluer, Haluk Dirik and Ismail Hakkı Türkaslan

had been detained and interrogated at Izmir Police Headquarters for 22 days in September and October 1992.

**Hakki Bingöl, Ahmet Bozkurt Caglar, Faik Candan, Aysenur Demirakle, Cemal Emir, Meryem Erdal, Ercan Kanar, Eren Keskin, Ahmet Kirimli, Cabbar Leygara, Mustafa Olcayto, Hüsnü Ölmöz, Hüsnü Öndül, Sedat Özevin, Nusret Öztürk, Hüseyin Türhalli, Ertugrul Usanmaz, Fevzi Veznedaroglu, Celal Vural, Edip Yildiz, Ali Yildirim, Sevtap Yukus:** Lawyers. These 22 lawyers face prosecution under Article 8 of the Anti-Terror-Law because they sent a petition to the United Nations in April 1992, in which they complained about the killing of more than a hundred civilians by security forces during peaceful celebrations of the Kurdish New Year (*Newroz*) in 1992. If convicted, they would face two to five years imprisonment and disbarment. As of December 1994, no date for a trial had been set. Several of the lawyers are also involved in other cases (see separate entries).

**Abdullah Cager, Nimetullah Gündüz, Mahmut Sakar:** Lawyers and members of the Board of the IHD's Diyarbakir branch. On 16 and 17 December 1994, the three lawyers were arrested and subsequently taken to Diyarbakir Prison. As of the end of December 1994, they were in custody, pending trial, at Diyarbakir E-Type Prison. They are charged under Article 8 of the Anti-Terror Law for «separatist propaganda.» Their trial is scheduled to start at Diyarbakir State Security Court on 13 February 1995. The three lawyers have acted on behalf of over 100 Kurdish applicants who have brought complaints of human rights abuses before the European Commission of Human Rights.

**Yilmaz Camlibel:** Former Judge at the Ankara State Security Court. Mr. Camlibel had publicly criticised Ankara SSC's Chief Prosecutor Nusret Demiral, who had demanded issue of an arrest warrant against Islamic fundamentalist Cemalettin Kaplan in Germany. He said that «to create a crime suitable for the defendant is unacceptable.» After Nusret Demiral lodged a complaint against the judge with the Minister of Justice, Yilmaz Camlibel was removed from his duty by the High Commission of

Judges and Prosecutors and transferred to Alfyon Court. After strong protests from within the judiciary, the transfer was revoked.

**Faik Candan:** Lawyer, member of the Ankara Bar and former Ankara chairman of the pro-Kurdish People's Labour Party (HEP), which was closed down in 1993 by the Constitutional Court. On 2 December 1994, Faik Candan disappeared in Ankara after leaving his law office to go to the bank. When his relatives started to get worried, they contacted the Anti-Terror Department (*Terörle Mücadele Subesi*) of Ankara Police, where they were reportedly told by an official that Mr. Candan was a dangerous man who had contact with an outlawed terrorist organisation. The official then warned them not to ask for him anymore. The relatives had the impression that this answer implied that Mr. Candan was being held by that department at that moment.

On 9 December 1994, the CIJL brought these facts to the attention of the Turkish Government and asked them to ascertain whether Mr. Candan was being held by the Turkish authorities. No response was received. On 14 December, his corpse was found near a military base in the town of Bala, about 40 km outside the capital. His body bore gunshot wounds.

**Ali Demir, Eyüp Duman, Necati Güven, Gıyasettin Kaya, Saniye Songül (f), Mahmut Tuncer Caferoğlu:** Lawyers. These lawyers were arrested on charges of helping and harbouring PKK militants: Ali Demir was detained on 17 August 1994 in Erzincan. Mahmut Tuncer Caferoğlu and Gıyasettin Kaya were detained on 16 August 1994 in Erzincan. Eyüp Duman, Chairman of the Agri Bar Association was detained on 17 August in Datca district (Mugla province) while he was on vacation. Necati Güven, was detained on 16 August 1994 in Erzurum, and Saniye Songül was arrested on the same day in Ankara.

On 29 August, Necati Güven and Tuncer Caferoğlu were officially charged by the Erzincan State Security Court and remanded to prison. The rest were released.

On or around 16 November 1994, the Erzincan SSC Prosecution Office issued the indictments, accusing the aforementioned, plus the lawyers **Bahattin Eryilmaz, Mehmet Emin Adiyaman** and **Abdürrahim Firat**, who had also been briefly detained in the summer, of helping and harbouring the PKK and having acted as a courier for the organisation. Sentences of no less than three years were sought for the accused. Besides this, Erzurum Chief Public Prosecutor Salim Atici and prosecutors Ömer Kilicaslan and Mithat Özcan, who were responsible for the prison, were removed from their duties by the Minister of Justice in connection with the trial.

**Murat Demir, Ahmet Düzgün:** Lawyers. At 2 pm on 27 September 1994, the two lawyers Murat Demir and Ahmet Düzgün Yüksel were detained at the Ankara branch of the People's Law Office (*Halkın Hukuk Burosü*) together with Fatma Yamam and Gülkan Yagiz, who were visiting the office. Only after interventions by several international organisations, among them Amnesty International and the CIJL, did the Turkish authorities admit that the four were held at the Anti-Terror Branch of Ankara Police Headquarters. On 10 October 1994, Murat Demir was formally arrested and charged with being a member of *Devrimci Sol*. He was then committed to Ankara Central Closed Prison. The other three detainees were released.

Reportedly, all except Ahmet Düzgün Yüksel were tortured. Murat Demir reported having been tortured during the first three days, including being stripped naked and having his testicles squeezed. The doctor from the State Forensic Medicine Institute who examined him at the end of the detention period referred him to the hospital, where he was taken from the prison for examination. Fatma Yaman and Gülcan Yavuz were allegedly tortured for two days by electric shocks and hanging by the wrists. The two were said to have shown clear traces of torture.

At the time the police raid on the People's Law Office took place, the lawyers were preparing to submit a file of information concerning their client Dursun Karatas to the French Embassy in Ankara. Mr. Karatas is alleged to be a founding member of

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*Devrimci Sol*. He had been arrested in France on 9 September 1994 in the company of the lawyer Zerrin Sari, an associate of the People's Law Office. On the very day the raid took place, the Turkish government applied for the extradition of Dursun Karatas.

Before this latest arrest, Murat Demir had been subject to harassment on several occasions. In June 1991 he was detained for 14 days and interrogated under torture at Ankara Police Headquarters. On 4 December 1992, the UN Working Group on Arbitrary Detention passed a resolution stating that the detention of Murat Demir had been «arbitrary, being in contravention of articles 9, 10 and 20 of the Universal Declaration of Human Rights» (see *Attacks on Justice 1991-1992, 1992-1993*). In April 1993 a detainee who asked to speak to a lawyer of the People's Law Bureau was reportedly told by police «Your lawyer is dead - or if not, we will kill your lawyer.»

On 16 September 1993, Murat Demir was reportedly attacked by a policeman in the lobby of Kayseri State Security Court. According to other lawyers who witnessed the attack, a plainclothes policeman appeared after the affray and told Murat Demir: «You are a traitor and I am the state - I will hang you or cut your throat and nobody can do anything about it.» The lawyers complained to the State Security Court judges and prosecutors who told them that they were not competent to intervene. In another incident on 12 October 1993, the house Murat Demir shares with another lawyer, *Zeki Rüzgar*, was ransacked by police on the pretext of theft in the same quarter. As a result of that raid, *Zeki Rüzgar* was taken to the Security Directorate and kept in detention for some time.

**Yusuf Ekinci:** Lawyer in Ankara. Yusuf Ekinci, the younger brother of Tank Ziya Ekinci, a Kurdish activist of long standing, reportedly disappeared on 22 February 1994. On 25 February his body was found in the Gölbasi district of Ankara. He had been shot 7 times.



**Sevket Epozdemir:** Lawyer and representative of the IHD in the town of Tatvan in the eastern province of Bitlis. On 25 November 1993, Sevket Epozdemir was kidnapped by unknown persons after returning home from work. The following day his body was found in a snowdrift by the roadside approximately 20 kilometres from the town of Bitlis. The autopsy report from the Bitlis hospital indicated that Sevket Epozdemir had been tortured and then killed by a single gunshot in the head. Even though an investigation was started by the Prosecutor's Office in Tatvan, no trace of the murderers was found.

**Fuat Erdogan, Ulutan Gün, Ümran Gün, Fethiye Peksen, Zerrin Sari and Bedii Yarayici:** Lawyers in Istanbul. In November 1992, these six lawyers - formerly all associated with the People's Legal Aid Bureau (*Halkin Hukuk Bürosu*) - were indicted in connection with their representation of persons accused of membership in the illegal armed organisation Devrimci Sol. The indictments alleged that the six «acted as couriers between members of an organisation in prison and a person high up in the organisation outside.» Peksen and Yarayici had been arrested previously and subjected to mistreatment because of their work on behalf of members of this group (see *Attacks on Justice 1991-1992 and 1992-1993*). The trials began in early 1993, but were soon adjourned till mid-September 1993. As of December 1994, they are still pending.

In the meantime, however, Fethiye Peksen was arrested in connection with a raid of an alleged «safe house» of *Devrimci Sol* (see separate entry below) and sentenced to three years and nine months imprisonment. Fuat Erdogan was killed in an alleged extrajudicial execution in Istanbul on 28 September 1994. Ulutan Gün was sentenced to ten months imprisonment by Istanbul No. 2 Criminal Court on 29 September 1993 for «insulting the justice system» (Art. 159 of the Turkish Penal Code) in an article published in the periodical *Mücadele* (Struggle). The chief editor of the periodical was also found guilty on the same charge and sentenced to imprisonment.

**Zeynep Firat (f):** Lawyer and member of the People's Legal Aid Bureau in Istanbul. On 16 December 1994, Zeynep Firat and

a client of hers, Ms. Münevver Kuv, were arrested in two different districts of Istanbul. Münevver Kuv had previously been imprisoned in Bayrampasa, Istanbul, between 1990 and 1994 charged with membership of *Devrimci Sol*. Zeynep Firat later stated she had been taken by policemen to an unknown place where she says she was tortured by being hung up by her arms with her wrists tied behind her back. Later, she was brought to the Anti-Terror Branch of Istanbul Police Headquarters. There she said that she was told to stop defending political cases, and that the police wanted her to work for them. They reportedly threatened that she would be killed if she did not give up her work. The police initially denied holding her, but following an intervention from the Istanbul Bar Association, her detention at Istanbul Police Headquarters was confirmed.

Even though her lawyer, who could briefly see her while she was in custody, confirmed that she had problems moving her left arm because of the torture, a doctor at the State Forensic Medicine Institute reportedly recorded this as «subjective pain» only. On 3 January 1995, Zeynep Firat was released, but her client remained in custody.

**Ercan Kanar, Ali Riza Dizdar:** Lawyers in Istanbul. Ercan Kanar, Vice-President of the IHD and president of its Istanbul branch, and Mr. Dizdar, President of the Progressive Lawyers' Association, were prosecuted under Art. 8 of the Anti-Terror Law as a result of a petition they had signed. In the petition they alleged the death of lawyer Metin Can and medical doctor Hasan Kaya in February 1993 had been extra-judicial executions by the security forces (see *Attacks on Justice 1992-1993*). Both were, however, acquitted of these charges.

Separate charges were then brought against Ali Riza Dizdar under the Law on Associations for signing the petition on behalf of the Progressive Lawyers' Association without receiving official permission. Under the Law on Associations, the authorities must grant permission for a public document to be signed in the name of an association, even if the association itself has already given permission to do so.

Ercan Kanar is being tried in two more cases. In one he has been indicted of «insulting the state» because he had said publicly in 1992 that the Turkish authorities were «immoral» and «terrorist» for their conduct on human rights. In this case, the prosecution has demanded a ten-year prison sentence. In another case he faces charges of disseminating separatist propaganda in connection with an article published in the fifth issue of the bulletin of IHD's Istanbul branch. An acquittal in that case was overturned by the Court of Appeals. The prosecution is demanding a prison sentence from one to three years and a heavy fine. In addition to the law suits brought against him, Ercan Kanar also reported receiving telephone death threats.

**Yildiz Kolucik:** Lawyer and member of the IHD in Malatya. She regularly works as a defence counsel before the Malatya State Security Court and has on several occasions brought allegations of torture to the attention of the relevant authorities. For that, she received death threats in 1993 and 1994. On 15 June 1994, 10 men in plain clothes, thought to be members of the Anti-Terror Branch, surrounded the building in which her office is situated. As claimed in the weeks before the incident, detainees had been coerced to sign statements incriminating the lawyer; giving her reason to fear her life was in acute danger. Only after immediate interventions by several international organisations, including the CIJL, did the men disappear.

In a note the CIJL received in September 1994, the Second Secretary of the Permanent Mission of Turkey to the UN in Geneva maintained that Yildiz Kolucik had never been subject to any police investigation. Instead, he wrote, she might have been disturbed by measures taken by law enforcement officials to prevent thefts on salary payment days at the crowded building. According to the letter, an investigation prompted by Yildiz Kolucik's complaint with the Malatya Prosecutor's Office was underway. As of December 1994, the results of that investigation had not been made known to the CIJL.

In an earlier incident on the night of 7 October 1993, Yildiz Kolucik had been attacked by an unknown person who had

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entered her house. She was slightly wounded after being hit over the head with a gun. She later said the attacker had seized her bracelets, but she did not think that the incident was a theft. No results of a police investigation have been made public so far.

**Hüsni Öndül:** Lawyer and Secretary General of the Turkish Human Rights Association (IHD). Hüsni Öndül was sentenced to six months' imprisonment for publishing an article in the IHD's July 1993 newsletter which described the alleged extra-judicial execution of four people and the sexual assault against a detainee in south-east Turkey. The sentence has been appealed. Hüsni Öndül had been harassed and charged with «belonging to an illegal organisation» before, but was acquitted (see *Attacks on Justice 1990-1991, 1991-1992*).

In another case, Öndül, as well as the lawyer **Sedat Aslantas** (see above), Erol Anar, now member of the IHD's Executive Board, and Akin Birdal, General Chairman of the IHD, faced charges in connection with a book *A Profile from the Burned Villages (Yakılan Köylerde Bir Kesit)* which was published in April 1994. Their trial took place on 19 December 1994. The CIJL sent an observer to the trial. They were acquitted on 11 January 1995.

**Ahmet Zeki Okcuoglu, Selim Okcuoglu:** Lawyers and publishers, the latter being owner of Doz Publishing House. In different trials, both lawyers were convicted of «spreading separatist propaganda» and sentenced to 20 months imprisonment because of having referred to a part of Turkey as «Kurdistan.» As a consequence of that sentence, they will be barred from practising as lawyers in the future.

Together with two prominent journalists they are currently imprisoned in Gemlik Closed Prison in Bursa province. According to a letter the four sent to the Istanbul Branch of the Human Rights Association in August 1994, the administration of the prison incited the other inmates against them. They thus feared that their lives were in danger.

**Fethiye Peksen (f):** Lawyer in Istanbul. On 17 September

1993, police raided a house in the Üsküdar district. It was suspected that the house was a «safe house» of the illegal armed organisation *Devrimci Sol*. During the raid, a 27-year old woman was killed and 18 people, among them Fethiye Peksen, were arrested. They were all taken to the Anti-Terror Branch of Istanbul Police Headquarters. Fethiye Peksen was subsequently sentenced to three years and nine months in prison, a sentence which was later upheld by the Supreme Court.

**Medet Serhat:** Lawyer in Istanbul. At around 1 am on 12 November 1994, Medet Serhat and his wife were returning home from a wedding. As they approached their house, a car drew up, blocking their way. Two assailants reportedly jumped out of the car, broke the windscreen of their car, shot the driver dead and then fired at Medet Serhat, killing him instantly. Mrs. Serhat was badly wounded when she threw herself over her husband to try and protect him.

Medet Serhat had been detained by the military leaders after the 1980 coup because of his political activities. A group of British lawyers who had met with him a couple of weeks before his death reported he told them that his telephone had been tapped and that he was being followed. He also told them he had received several death threats. They thus raised the possibility of an involvement of the Turkish security forces. Other sources, however, pointed to a possible connection with the Mafia. As of December 1994, no result of an official investigation was known to the CIJL.

**Yavuz Yilmaz:** Lawyer and member of the Progressive Lawyer's Association. On 29 April 1994, eight men in plain clothes entered his office and introduced themselves as members of the «political police» in Elazig, eastern Turkey. They then took Yilmaz to the Police Headquarters in Istanbul, where he was apparently held for one or two days before being transferred to the Police Headquarters in Elazig. When his lawyer and his family tried to find out about him, the authorities first denied that he was being held. Only after appeals by international organisations, among them Amnesty International, the International Bar Association and the CIJL, was it acknowledged

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that Mr. Yilmaz' arrest had been registered in the records of the Prosecutor's Office at Istanbul State Security Court, and that he had been transferred to Elazig for interrogation. After passing almost two weeks *in incommunicado* detention, Yavuz Yilmaz was presented to a judge on or around 23 May 1994 and formally remanded into custody. Later, however, he was acquitted and released.

Mr. Yilmaz has long been politically active. He practised as a lawyer in Karakocan until he was summoned to the Police Headquarters and told he should leave town or he would be killed. He had been President of the local branch of HEP (People's Labour Party) from the party's foundation until its closure in 1993. He then became a member of its successor, the DEP (Democracy Party), which in June 1994 was also outlawed by a decision of the Supreme Court.

In a previous incident in August 1991, Yavuz Yilmaz had been detained for 68 days and had reportedly been seriously tortured, before the State Security Court in Erzincan ordered his release.

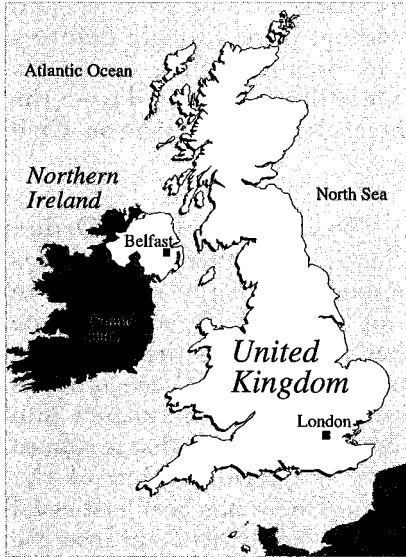
**Fevzi Veznedaroglu:** Human rights lawyer and former chairman of the Diyarbakir branch of the Turkish Human Rights Association (IHD). As in the year before (see *Attacks on Justice 1992-1993*), Fevzi Veznedaroglu received death threats.

Turkish government officials, basing their claims on a «confession» by a woman who was arrested and detained during action against alleged terrorists, reportedly blamed the threats on the PKK. They alleged that the threats were part of a plot by the PKK to assassinate Veznedaroglu and attribute the murder to the government. The woman later informed the IHD, though, that the security forces had forced her to fabricate the confession.

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# United Kingdom and Northern Ireland

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The constitutional doctrine of the United Kingdom is based on the supremacy of Parliament. There is thus no Constitutional Bill of Rights, a situation which poses particular problems in Northern Ireland, where the comprehensive emergency legislation has significantly eroded individual liberty. Two main pieces of legislation achieve this effect: the Emergency Provisions Act (EPA) of 1991 and the 1989 Prevention of Terrorism Act (PTA). The EPA was first enacted in 1973 and the PTA in 1974. The cease-fire which presently holds in Northern

Ireland has not as yet resulted in any modification of either act; they are due for renewal in March and June 1995 but there has been no indication from the government that they will be allowed to lapse. Many cases under the EPA are still pending and it is unlikely that this backlog will be cleared before the above dates; this factor is likely to increase the Government's reluctance to abandon the acts.

## The Emergency Legislation

The EPA establishes the 'Diplock Courts', where trials of those charged with certain scheduled offences related to political

violence are presided over by a single judge in the absence of a jury. The Act grants the security forces extensive powers to stop, question and search individuals, to search residences, and to examine and seize documents, without prior judicial approval. The PTA allows for orders excluding citizens from travelling to different parts of the UK to be made against those suspected of terrorist involvement; such orders are made without trial or judicial review. The Act also allows suspects to be detained and interrogated for up to seven days without being brought before a court. This has been found to be in violation of the European Convention on Human Rights but the UK has derogated from the Convention, as well as from the International Covenant on Civil and Political Rights, in this respect.

The 1988 Criminal Evidence (Northern Ireland) Order, which greatly limited the right to silence in Northern Ireland, has had a negative effect on the independence of the judiciary in criminal trials. Under the order, an adverse inference may be drawn from a suspect's silence either during police interrogation or at trial. Where defendants refuse to testify at trial, the judge is required to inform them that the court may take their silence into account in determining their guilt or otherwise and that a refusal to answer questions may be taken as corroboration of the evidence given against them. This requirement has been criticised as importing the traditional functions of the prosecution into the judicial office.

The role accorded to defence lawyers under the emergency legislation has been severely restricted. Such restrictions present a serious problem in a jurisdiction where there are persistent allegations of ill-treatment in detention, where prosecutions for offences related to political violence rely heavily on confessions obtained during interrogation, and where the right to silence, as noted above, has been substantially restricted.

The EPA guarantees, in Section 45(1), the right to private consultation with a solicitor. However the Act allows detainees to be held and interrogated for 48 hours without access to a solicitor,



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and further 48 hour periods during which access is denied may be authorised by the Secretary of State (Section 45 (6) EPA).

The rationale for this denial of access is that the investigation may be impeded by the solicitor, wittingly or unwittingly, passing messages or information between the suspect and «terrorist» organisations. The giving of such an order tends to impute «terrorist» sympathies to the defending solicitor. Such imputations are groundless; it would appear that no solicitor has ever been either charged with an offence, or subject to any disciplinary action in relation to the transfer of information in such circumstances. Solicitors seeking judicial review of orders under Section 45 have established a practice of filing «undertakings» with the RUC (Royal Ulster Constabulary), by which they undertake not to communicate to anyone the details of the consultation with their client. Reliable accounts suggest that in recent months solicitors have been allowed more frequent access to their clients.

Where solicitors are granted access to detainees, police officers may be present at interviews, a practice which is in breach of Art. 8 of the UN Basic Principles on the Role of Lawyers. Section 45 of the EPA allows a police officer of the rank of Assistant Chief Constable or above to direct that a detained person may only consult a solicitor in the sight and hearing of a police officer of the rank of Inspector or above.

In September 1994 the European Commission on Human Rights ruled, in the case of *Murray v UK*, that the refusal to allow suspects access to a solicitor, in conjunction with the limitations on the right to silence, was in breach of Art. 6 of the European Convention on Human Rights, which guarantees the right to fair trial. Despite this ruling, a Northern Ireland court held in the 'Ballymurphy Seven' case later that month that confessions obtained in the circumstances condemned by the Commission in *Murray* were admissible. *Murray v UK* is now pending before the European Court of Human Rights.

## The Harassment of Defence Lawyers

In addition to the legal restrictions imposed upon them, defence solicitors must work in a climate of great hostility from the RUC. Although, with the cease-fire, the number of those arrested under the emergency legislation has diminished, the harassment experienced by defence solicitors in such cases has not abated. Lawyers who regularly represent paramilitary suspects are labelled by the police as sympathetic to the terrorist cause, and detained persons who request these solicitors are in many instances warned against them by the RUC, and told that engaging such a solicitor would prejudice their case. Such comments obviously interfere with the right to a solicitor of choice. They also breach Article 18 of the UN Basic Principles on the Role of Lawyers, which provides that «lawyers shall not be identified with their clients or their client's causes as a result of discharging their functions.» In the course of the interrogation of a detainee, the RUC regularly issue threats against the detainee's defending solicitor.

In this regard the unresolved case of the murder of defence solicitor **Patrick Finucane** is a continuing source of worry and fear to defence solicitors; threats to individual solicitors by members of the RUC are often accompanied by reminders of the fate of Patrick Finucane. Finucane was gunned down in 1989 at his home in North Belfast, in the presence of his wife and three children. The attack occurred only weeks after a then Under Secretary of State at the Home Department had made a speech in Parliament stating that «there are in Northern Ireland a number of solicitors who are unduly sympathetic to the cause of the IRA.» There was evidence of official collusion in Finucane's killing: it has been reported that police check points which had been in place near Finucane's home were removed shortly before the murder. There were also claims by the jailed police informer Brian Nelson that he provided the killers with information on Finucane shortly before the attack and that his security force handlers were aware that Finucane's life was in danger. Such suspicions of complicity have yet to be laid to rest; the RUC investigation was widely regarded as unsatisfactory and no arrests were ever made

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in relation to the killing. Following further revelations by Brian Nelson in the course of a television programme in June 1993, the Director of Public Prosecutions nominated John Stevens to enquire into Finucane's case. Stevens' conclusions have now been presented to the DPP; however they have not as yet been made public.

In recent months many cases of the intimidation of defence solicitors by the police have been reported. Intimidation most frequently occurs when solicitors visit clients in police custody; solicitors are reportedly particularly likely to be harassed when they visit detainees in the Holding Centres established under the emergency legislation. In all, **forty two solicitors** regularly experience threats or harassment by the police in the course of their professional duties. To ensure the continuing safety of these lawyers, their names have been withheld.

The plight of defence solicitors is compounded by the lack of effective avenues of complaint. The government has refused to set up a judicial enquiry into the harassment of defence solicitors; the Standing Advisory Commission on Human Rights has called on solicitors to register complaints with the Independent Commission for Police Complaints (ICPC). However few solicitors have chosen to file complaints to the ICPC; all complaints which it receives must be forwarded to the Chief Constable of the RUC, which limits its impartiality and therefore its efficacy.

### **The Reports of the Independent Commissioner for the Holding Centres**

The Independent Commissioner for the Holding Centres submitted his first annual report in January 1994. The report contained proposals which could have far-reaching consequences for defence solicitors in Northern Ireland. The Commissioner's role is to report upon conditions in the 'Holding Centres', detention centres for those held for interrogation under the PTA, and, in the words of his report, to «reassure the public that the police have nothing to hide» in relation to the centres.

While the report concludes that allegations of ill-treatment of detainees in the Detention Centres are unfounded, it identifies a problem in relation to delays in the access of detainees to their lawyers. On the basis of a «small study» carried out by the Commissioner at Castlereagh detention centre in July to September 1993, the report draws the conclusion that there are unacceptable delays in the arrival of defence solicitors to visit clients at the Holding Centres. The report has been sharply criticised by the Northern Ireland Law Society and by human rights groups in Northern Ireland. It has been pointed out that, firstly, the report was carried out in the holiday period when fewer solicitors are available than is usual; secondly, that there have been no complaints from detainees about the relatively short delays in the arrival of their solicitors; and thirdly, that the problem of delays in solicitors' arrival is an inevitable outcome of the system of centralised holding centres, which requires lawyers from all over Northern Ireland to travel long distances to advise detained clients.

The report's solution to this perceived inadequacy is to do away with the present system of private defence solicitors, and to replace it with a Legal Advice Unit (LAU) at each holding centre. In a second report, dated November 1994, the Commissioner reaffirms his commitment to the establishment of LAUs. In order to ensure their independence, the centres would be administered by the law society. Once such units had been established, the report envisages that it would be «unnecessary to permit additional access to a solicitor in private practice.» It concedes that such access might be permitted, where the suspect pays for the private solicitor himself.

It is envisaged that, were the LAUs to be established, the provisions of Section 45 of the EPA which allow for the deferral of access to a solicitor (see above) could be done away with. The report concluded that «it is hard to imagine any reasonable ground for a police officer believing that anything untoward would result from a consultation with a lawyer employed ... at the Holding Centre.» This statement would seem to imply that, in

contrast, private defence solicitors are not to be trusted, an implication which can only lead to further erosion in Northern Ireland of Article 18 of the UN Basic Principles on the Role of Lawyers. The Commissioner's proposal as a whole appears to cast a slur on the integrity of defence solicitors; there must be suspicions that the purpose behind the scheme is in fact to create a body of more compliant solicitors whose presence would be less objectionable to the RUC.

The establishment of a system of LAUs would deny detainees under the emergency legislation access to their solicitor of choice. The denial of this right is justified in the report by making two distinctions: between detention in the course of the mainstream criminal process and detention under emergency legislation without charge or trial, and between the right to legal advice and the right to legal assistance. It is argued that the right to the counsel of one's choice (the right to legal assistance) refers only to the criminal process, while persons detained without charge enjoy a right only to legal advice, which involves no criterion of independence or choice.

This is a dubious analysis. The UN Basic Principles on the Role of Lawyers clearly do not envisage that those detained without charge should be subject to such an exception: Article 1 of the Principles reads: «all persons are entitled to call on the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.» The Commissioner relies on a restrictive reading of this provision; however, when read in conjunction with Art. 8, it is clear that Art. 1 refers to «all arrested or detained persons». Furthermore, Art. 5 clearly construes the right to counsel of one's choice broadly: it provides that «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».

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# United States of America

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## Limiting Judicial Discretion in Sentencing

The increasing use of mandatory sentencing in the United States has received much attention. The Comprehensive Crime Control Act of 1984 established the US Sentencing Commission to develop sentencing guidelines for federal judges. While the resulting 1990 Federal Sentencing Guidelines Manual aimed for «honesty, uniformity and proportionality», many have criticised its reliance on mandatory minimum sentences as a limitation on traditional judicial discretion. Judges have long relied on a large measure of discretion when sentencing offenders. In an attempt to apply legislation to individual circumstances, to individuate, judges have maintained that independence in sentencing is a basic principle of criminal law.

In November 1994, a crime bill, supported by President Bill Clinton, was passed by the Congress; the bill provides for mandatory minimum sentences for many crimes and for mandatory life sentences for individuals with three felony convictions. The so-called «three strikes, you're out» approach to sentencing has been the object of controversy.

Federal judges have expressed their disavowal. Supreme Court of the United States Justice Kennedy stated: «I am in agreement with most judges in the federal system that mandatory minimums are an imprudent, unwise and often unjust mechanism for sentencing.» In one white-collar criminal case, Federal District Judge H. Greene complained that he was forced to give a sentence more lenient than he wished because of sentencing

guidelines. Judge Greene stated: «It is fundamentally contrary to the precepts of the way the administration of justice is supposed to work in this country for one of the parties to make the sentencing determination. And that is what happens when you have mandatory minimum sentences.»

There have been similar occurrences in many of the federal states. In California and New York, for example, some judges have rejected, or avoided, state law providing for mandatory sentencing. In California, Judge Lawrence Antolini refused to apply mandatory sentencing in a case involving non-violent drug possession. According to sentencing requirements, the defendant should have received eight to sixteen years for possession of eight grams of marijuana, a sentence the judge considered cruel and unusual punishment and «insane». Judge Antolini stated that this type of sentencing turns judges into «robots» by taking away their discretion. The California State Attorney General has stated that he plans to challenge Judge Antolini's ruling in the Supreme Court of the state.

Reportedly, other judges have found other methods to avoid the problem. Reportedly, some judges have reduced felony charges to misdemeanour charges in order to circumvent the issue. Others, senior judges who are allowed to decline assignments due to age, have opted out of hearing cases of drug possession because they object to mandatory minimum sentences.

## **Pressure on Criminal Defence Attorneys**

As reported in the last edition of *Attacks on Justice 1992-1993*, the issue of government inquiries into fees paid to defence counsel remains problematic. One form these inquiries have taken is Internal Revenue Service (IRS) audits. IRS Form 8300 requires lawyers to identify the sources of their declared income. Although this form is required from many professions, many lawyers have refused to supply their clients' names. They feel that to do otherwise would violate the attorney-client privilege.

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Lawyers throughout the country are being sued by the Justice Department to divulge the identify of their clients as required by Form 8300. According to Andrew Good, the lawyer of Judge Nancy Gertner (see case below), «this is all part of the IRS and Justice Department's strategy: they have picked a high profile lawyer in each jurisdiction to go after ... they are looking to create precedent by bringing actions against lawyers such as Bob Ritchie in Tennessee and Oscar Goodman in Nevada, both former National Association for Defence Lawyers (NACDL) presidents, Judge Gertner in Boston, Joel Hirschorn in Miami and Jerry Lefcourt in New York .... These are all very, very prominent people.» Reportedly, the IRS is suing 90 lawyers nation-wide, out of the 956 who have refused to reveal the names of clients on Form 8300.

In response, the National Association of Criminal Defence Lawyers (NACDL) has set up a special task force to fight what they perceive to be systematic harassment and intimidation of lawyers. Lawyers have taken these cases on behalf of the NACDL, stating that these suits attack the attorney client-privilege and undermine the right to counsel.

### **California Commission of Judicial Performance**

The State of California passed a law in 1994 that many fear will seriously undermine the independence of the judiciary. The law changed the composition of the Commission on Judicial Performance, the council that disciplines judges. Previously the commission was composed of five judges, two lawyers and two members of the public.

The new law has increased the size of the Commission to eleven, eight of whom are appointed by politicians. The eight appointees are not subject to any review or confirmation, and are directly accountable to those who gave them the job: four are appointed by the governor, two by the speaker of the assembly, and two by the Senate Committee on Rules. The Commission now



has the power to write its own rules and has jurisdiction over all California judges, including the Supreme Court. Under the new rules judges can be suspended without a hearing, and there is no body designated to oversee the Commission.

**Nancy Gertner:** US District Court Judge. Judge Gertner was a prominent trial lawyer in Boston, Massachusetts before she was appointed to the federal bench in 1994. In 1991 and 1992, she, along with lawyer Jody Newman, received large cash payments from a client. The two attorneys filled out the appropriate tax forms reporting the income and paying the tax, but did not disclose the name of the client.

The US Justice Department sued her in 1994, seeking to discover the name of the client. In refusing to supply the client's name, Judge Gertner stated «the information requested violates the attorney-client privilege, conflicts with broader ethical obligations of an attorney ... and violates the First, Fifth, and Sixth Amendment rights of attorneys and clients». The Massachusetts Bar Association Committee on Professional Ethics made an advisory opinion that supported her position.

In *U.S. v. Gertner*, decided 11 January 1995, the District Court held that the information requested was privileged. Judge Morton A. Brody stated that there is no legitimate reason for the government to need the client's name as it had no relation to tax liability.

**Gerald Lefcourt:** lawyer and former vice-president of the National Association of Criminal Defence Lawyers (NACDL). Gerald Lefcourt was forced to pay a \$25,000 fine for refusing to disclose the name of a client to the IRS. He is the first lawyer in the country to sue the IRS challenging Form 8300. He believes that «the IRS is trying to coerce lawyers, by harsh penalties, to buckle under and give up their clients». His suit has not yet been heard.

**Marianne Espinosa Murphy:** New Jersey State Judge. In 1993, the Governor of New Jersey re-appointed for life tenure

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Judge Murphy, a Hispanic woman with seven years on the bench. Senator John Dorsey opposed Judge Murphy's re-appointment to the bench. Senator Dorsey exercised his «senatorial courtesy» to single-handedly block the appointment. «Senatorial courtesy» is an unwritten tradition that dates back to 1844 allowing a state senator to override gubernatorial judicial appointments. Such «courtesy» does not require a hearing or disclosed reasons.

Many of Judge Murphy's bipartisan supporters contended that it was a problem with her style that led to the Senator's opposition and that the independence of the New Jersey judiciary is threatened by the tradition. The Governor of New Jersey brought suit, and in *State of New Jersey v. Senator John Dorsey*, the New Jersey Superior Court held that the issue was non-justiciable. The State Supreme Court affirmed on 23 December 1993.

The conflict was temporarily resolved when the 206th New Jersey Legislature on 12 January 1994, decided to suspend the privilege of senatorial courtesy, because as the President of the Senate stated, it threatened the independence of the judiciary. It is unclear whether this is a final resolution of the issue, because this year's legislature has not yet decided whether it will continue the suspension or not.

**Robert Ritchie:** lawyer and former president of the NACDL. Robert Ritchie has been sued to reveal the name of a client he withheld from tax documents. Unlike the decision taken in *U.S. v. Gertner*, the Federal District Court in Tennessee in *U.S. v. Ritchie* «reluctantly» ruled that the client information was not privileged and that the IRS and Justice Department's actions were constitutional. The judge found, however, that the IRS only wanted the name of the client and was not concerned with Mr. Ritchie's tax liability.

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# Venezuela

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Venezuela is a federal, multi-party democracy with a presidential system of government. With 36 years of civilian rule, it is the country with the longest uninterrupted democratic tradition in Latin America. This tradition helped the country cope with the charges of corruption and misuse of public funds brought

against President Carlos Andrés Pérez in March 1993. In May 1993, Pérez was impeached and later removed from office. On 18 May 1994, the Supreme Court (*Corte Suprema de Justicia*) issued an arrest warrant against Pérez and two former ministers. On 26 July, he was released from prison and put under house arrest. His trial started in late November 1994.

A transitional government under interim President Ramón José Velásquez led the country from the removal of Pérez to elections in December 1993. On 2 February 1994, newly elected President Rafael Caldera Rodríguez took office amid a worsening economic situation and high social tensions. During that time, the danger of a military *coup d'état* seemed imminent.

To cope with the crisis, the new President resorted to emergency measures. Having already been granted exceptional powers in economic areas, President Caldera on 27 June suspended six constitutional guarantees: the protection from unauthorised arrest and detention, the inviolability of the home, the freedom of movement inside and outside the country, the right to engage in any legal economic activity, the right to own property and the control of expropriation by the state. After putting up some resistance, Congress accepted the suspension. It was still in force at the end of December 1994.

As part of the new President's answer to the rising level of violence, he initiated a «plan for the pacification of the country.» As a part of that plan, all participants in the 1992 coup attempt against then-President Pérez were released, easing some of the friction. Police brutality, however, has not diminished. According to PROVEA (*Programa Venezolano de Educación-Acción en Derechos Humanos*), a leading Venezuelan human rights organisation, the violence used by the security forces remains a major problem. One factor that facilitates this brutality is the long time the police are allowed to hold a detainee in custody. Up to eight days can pass before an accused must be presented to a judge. Also, a number of extra-judicial executions, some forced disappearances, and thousands of arbitrary detentions and warrantless searches have been reported.

## The Judiciary

According to the Constitution, the Judiciary is independent from all other branches of government. The Supreme Court (*Corte Suprema de Justicia*), whose 15 members are elected by Congress for nine years, has the power to judge the constitutionality of all laws and of all acts of government. The Council of the Judiciary (*Consejo de la Judicatura*), is composed of five judges: three judges named by the Supreme Court, one named by the Congress and one by the President. Its primary powers are to nominate and discipline judges and to administer the court system.

In practice, however, independent observers agree that the judiciary is subject to strong pressure from political and economic groups, and is highly politicised. In the prosecution of those apparently responsible for the crash of one of the biggest banks in the country, *Banco Latino*, which started Venezuela's latest major financial crisis, procedural questions delayed the process until the bank's former leaders had had time to leave the country. In another illustrative incident of May 1994, the new Minister of Defence presented the list of candidates for the Military Court (*Corte Marcial*) to the Supreme Court, indicating that he wanted the first five candidates to be named judges and the rest substitute judges (*suplentes*), even though the Supreme Court has the sole right to nominate the judges.

The political influence on the judiciary becomes most obvious in cases involving the armed forces. All of these cases have to be heard before military courts, which tend to «close ranks» with the accused rather than prosecute them. In August 1994, an Ad-Hoc Military Court (*Corte Marcial Ad-Hoc*) decided to acquit in last instance the 19 police and military officers involved in the massacre of *El Amparo*, where 14 fishermen were killed in October 1988 in what appeared to be extra-judicial executions. The court accepted the Government's explanation that it had been an encounter with rebels. This prompted the Inter-American Commission of Human Rights to take the case to the Inter-American Court of Human Rights in San José, Costa Rica. Furthermore, other cases of massacres, like the killing of dozens of prison inmates in the *Retén de Katia* prison in November 1992, as well as killings of indigenous groups have not been followed up either. In many of these cases, civilian and military courts could not agree on jurisdiction.

In addition, it is very hard for the poor and especially the indigenous population to resort to judicial remedies. The impunity enjoyed by the wealthy and powerful, as well as the influence of the «judicial tribes» («tribús judiciales»), i.e., judges and prosecutors affiliated to either one of the major political parties, has led the general population to distrust the judiciary to resolve problems. Also, journalists reported that some courts charged fees for legal services that were supposed to be free, or accorded temporary release orders over holidays only in exchange for payment. The fear is that the new Law on Judicial Fees (*Ley de Aranceles Judiciales*) will worsen this inequality, as a large part of the population will not be able to pay the sums required to make use of the judiciary. This in turn may lead to an even stronger rise in the level of violence in the country, as people decide to «take justice into their own hands.»

Even though the budget for the judiciary was increased significantly for 1994, this has not yet resulted in any notable improvement in the administration of justice. The same can be said of an agreement over the modernisation of the judiciary (*Convenio sobre Modernización del Poder Judicial*), signed by Venezuela in December 1993 as part of a deal with the World Bank.

According to statistics compiled by PROVEA, only one new tribunal had been created as of September 1994, although the Council of the Judiciary had reportedly estimated that 62 criminal courts of first instance (*tribunales de primera instancia en lo penal*), 103 courts of first instance in other areas and 103 superior courts needed to be created to overcome the existing backlog.

There were some reports of attacks against lawyers, mostly in cases involving defendants who had participated in the 1992 coup attempt against then President Carlos Andrés Pérez. After condemning the arrest of lawyers Freddy Gutiérrez and Lino Martínez (see below), the Bar Association (*Colegio de Abogados*) in June 1994 issued another statement condemning the practice of arresting and intimidating lawyers, which indicates that there may be considerably more cases than the ones listed below.

**Freddy Enrique Gutiérrez Trejo, Lino Martínez:** Lawyers in Caracas. In November 1993, the two lawyers and another human rights activist with the name of Josefina Guzmán were arrested and interrogated by the Military Intelligence Directorate (*Dirección de Inteligencia Militar*). They were accused of hiding weapons and helping military officers who had participated in the 1992 coup attempt. This reportedly provoked a strong response from the Bar Association of the Federal District (*Colegio de Abogados del Distrito Federal*) which called «the criminalisation of the professional activity ... a direct attack on the right to a defence.»

Even though both lawyers were released shortly after their arrest, investigation into the cases continued. In the meantime, Freddy Gutiérrez was elected to Parliament, so formal proceedings could only start against him if his parliamentary immunity was lifted. The Supreme Court of Justice requested such a decision, but Congress on 25 January 1995 decided against it. Reportedly, Congress stated that since those responsible for the *coup* attempt have been released, it made little sense to proceed with charges against those accused of helping them.

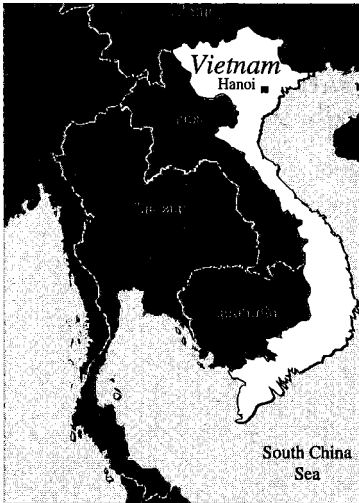
**Luz Ortiz: Lawyer.** On 5 August 1994, Luz Ortiz and Soraya El Achkar, both staff members of the Caracas-based human rights organization Network of Support for Justice and Peace (*Red de Apoyo por la Justicia y la Paz*) received death threats in an anonymous telephone call to their office. The threats were the latest in a series that had started in mid-May, after their participation in a radio program in which they accused the police of carrying out torture and extra-judicial executions. On 15 July 1994, these threats were reported to the Public Prosecution and to the Ministry of the Interior. On 8 August, the new threats were reported to the police and protection and an exhaustive investigation were requested.

**José Rafael Ramírez Hermoso: Lawyer and journalist.** On 13 March 1994, José Ramírez Hermoso accompanied twenty peasant families and the peasant leader Francisco Antonio Avila in an attempt to carry out a court injunction which gave them the right to use certain pieces of land (*amparo agrario*) in the area of Los Niveros I, Barinas state. In a dispute with the owner of that land, a military officer, both the lawyer and the peasant leader were killed by the landowner. The Commission on Agriculture and Agrarian Policy (*Comisión de Agricultura y Política Agraria*) of the House of Representatives started an investigation into the incident as well as into the general situation of the peasants in the area. However, as of December 1994, no results of the investigation have been made known.

**Tarek William Saab: Lawyer and member of the Human Rights Committee of the *Movimiento al Socialismo*.** On 11 October 1993, Tarek Saab was arrested by officials of the Military Intelligence Directorate while enquiring about the physical state of a detained client of his, Juan Barreto, professor at the Los Andes University. According to Tarek Saab, he was led to the offices of the secret service and interrogated for more than one hour. His name was registered and he was told that the military was keeping a file on him. Tarek Saab's arrest was one of many such detentions of leftist activists during the transition period under President Ramón J. Velasquez.

# Vietnam

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The Constitution of 1992 provides for the independence of the judiciary. Article 130 states that «during trials, judges and people's jurors are independent and subject only to law». Despite this guarantee, however, the judicial system is subjected to the will of the Vietnamese Communist Party (VCP). The court system includes local people's courts, military tribunals and the Supreme People's Court. Art. 135 of the Constitution states that the presiding judge of the Supreme People's Court shall be responsible and accountable to the National Assembly, and that

presiding judges of local people's courts shall be responsible and accountable to the people's councils. All judges are appointed from amongst candidates selected by the ruling VCP.

The prolonged detention of political prisoners without trial is a continued cause of concern. Although Art. 71 of the Criminal Procedure Code provides that temporary detention may not exceed 12 months for the purpose of the investigation of serious crimes, that article allows prisoners to be held indefinitely without charge or trial at the discretion of the Chief Procurator «when necessary, for crimes of particular danger to national security».

**Doan Thanh Liem:** Lawyer and specialist in constitutional law, former legal councillor for the South Vietnamese Senate, and former judge for the Saigon Municipal Court (see *Attacks on Justice 1991-1992*). Doan Thanh Liem was arrested in April 1990. He was tried on 14 May in Ho Chi Minh City and sentenced to



12 years imprisonment for «counter-revolutionary propaganda,» an offence under Article 82 of the Criminal Code. The apparent reasons for his conviction were his writings on constitutional and legal reform and his work in drafting contracts for an American businessman. The trial was preceded by articles in the official Vietnamese press accusing Doan Thanh Liem of being part of a «spy-ring.» There have been some reports that Doan Thanh Liem has been released, but his family states he remains in detention. He is reportedly in poor health, suffering from a serious pulmonary condition. He was reportedly sent to hospital in Ho Chi Minh City during 1994.

## Yugoslavia and Kosovo

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Kosovo is ruled by the Republic of Serbia, but about 90% of its population are ethnic Albanians. Tensions between the Belgrade-backed minority of Serbs and Montenegrins and the ethnic majority have been growing ever since Serbia, in early 1990, suspended and destroyed most of the institutions of what was then its constituent Autonomous Province of Kosovo. In July 1993, Belgrade authorities, over Montenegrin objections, expelled an observer mission by the Conference on Security and Cooperation in Europe (CSCE). Since then, the tensions between the groups have reportedly increased dramatically.

The establishment of absolute Serbian domination over Kosovo in 1990 and 1991 led to a strong movement within the ethnic Albanians that first demanded full republic status for the province and later full independence. In that context, a Serbian act came into effect in June 1991 which led to the dissolution of the Kosovo court system. Almost all ethnic Albanian judges were dismissed and replaced by Serbian and Montenegrin judges. The official language of court proceedings became Serbian (see *Attacks on Justice 1990-1991, 1991-1992*). Since then, massive human rights violations, especially against non-Serbs, have gone unpunished.

**Sokol Dobruna, Fatlik Lila:** Ethnic Albanian lawyers. According to information received from the Lawyers Committee for Human Rights, a Serbian-appointed court upheld prison sentences against the two lawyers in mid-November 1993.

In July 1990, Kosovo's legislature and government were dissolved by the Serbian regime. In response, a group of ethnic Albanians secretly adopted a Constitution which designated Kosovo a republic within the Yugoslav Federation. In early 1992, the Constitution was amended, declaring Kosovo an independent state. Both Fatlik Lila and Sokol Dobruna were involved in the drafting of the document. Together with lawyer Mikel Marku, who was beaten to death in November 1991 (see below), they were all prominent in the efforts to create a new independent Bar Association in Kosovo.

Sokol Dobruna and Fatlik Lila were arrested in December 1991, along with 19 other ethnic Albanians. They were charged with «association for the purpose of carrying out hostile activity» and «undermining the territorial integrity of Yugoslavia». After a trial during which many of their procedural rights had allegedly been violated, the two were sentenced in December 1992 to six and five years in prison, respectively.

**Mikel Marku:** Elderly lawyer. Ethnic Albanian lawyer Mikel Marku was beaten unconscious by police at police headquarters in Pec in October 1991. Despite the pleadings of his two nephews who were with him, he was refused medical aid until the next morning when he was taken to a hospital in a coma caused by head injuries. He remained in a coma until his death on 11 November 1991 (see *Attacks on Justice 1991-1992*).

On 6 January 1992, in the absence of any action by the authorities against those responsible for his death, Marku's family initiated criminal proceedings against two named police officers and several other unknown police officers on charges of homicide. According to press reports, the District Public Prosecutor of Pec refused the family's request to start proceedings on the grounds that the lawyer had died from natural causes. In January 1994, the district court of Pec issued a decision approving the prosecutor's decision. In February, Mikel Marku's family appealed from this decision. The CIJL has not learnt about the result of that appeal.

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# Zaire

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Zaire is undergoing extremely difficult times. President Mobutu Sese Seko, who seized power in a military coup in 1965, still dominates the country through his system of overlapping and competing security forces. The «transition to democracy» he had announced in April 1990 has not made much headway. A Sovereign National Conference (CNS) set up in 1991 was suspended by Mobutu in

December 1992, although it refused to recognise this decision. A second national assembly with Mobutu supporters was installed and subsequently «elected» its own government. For a time, almost all government authority broke down. Public unrest that broke out over a monetary reform undertaken by Mobutu but not recognised by Etienne Thisekedi, the Prime Minister designated by the CNS, led to several hundred casualties in January 1993.

In October 1993, negotiations between the two sides led to the signing of an agreement. Based on that agreement, President Mobutu on 9 April 1994 promulgated the Transitional Constitution (*Acte Constitutionnel de la Transition*), which is now generally regarded as the valid Constitution. The transitional Parliament it foresees (*Haut Conseil de la République-Parlement de Transition*, HCR-PT) is composed of members elected by the Sovereign National Conference and the members of the last national assembly which had been elected in 1987. One of the main tasks of the HCR-PT will be the organisation of elections in July 1995. Other clauses of the Transitional Constitution determine the impunity of the President for all acts except treason

or intentional breach of the Constitution and state that the President will remain in office until a successor is elected.

On 14 June 1994, the HCR-PT elected Kengo wa Dondo, a leader of the moderate opposition, as the transition Prime Minister. Kengo wa Dondo has since tried to calm down some of the ethnic conflicts which have ravaged especially in the north of the country. This was not made easier by the huge influx of refugees from neighbouring Rwanda and Burundi. He also ordered the payment of salaries to public officials, some of whom had not been paid in more than one year. However, without control over the security apparatus the Prime Minister's influence is limited.

## The Judiciary

Like the rest of the country, the judiciary in Zaïre is in a desolate state. Art. 95 and 97 of the Transitional Constitution establishes that judges are independent in the exercise of their work. This is a change from the Constitution of the Second Republic, which regarded the judiciary as part of the single-party state apparatus. The reality, however, is quite different.

Judges earn no more than the equivalent of US\$ 20 per month. During much of 1993 and 1994, they did not receive any salary at all. Under these circumstances, the system of courts of the peace, first instance courts (*Tribunaux de Grande Instance*), courts of appeal and a Supreme Court can hardly function. Due to the low salaries, corruption is pervasive.

Apart from the desperate financial situation of the judges, intimidation and threats from the various security forces make an effective judiciary impossible. The relationship between the judiciary and the executive is best illustrated by one incident which took place in Kasavubu on 9 January 1994. According to the United Nations' Special Rapporteur on Zaire, a military

officer expelled all members of the local Court of the Peace from the courthouse to use the rooms for himself. The judges then had to move to neighbouring Assossa and work in a bar.

The malfunctioning and lack of action by the judiciary has grave consequences. The impunity enjoyed by human rights violators and common criminals alike led to growing public outrage. In many areas vigilante groups have organised and people have taken justice into their own hands. In the town of Goma, for example, two military officers caught stealing were reportedly lynched and burnt alive in August 1994.

Under these circumstances, it is surprising that the Supreme Court has shown a certain independence on some occasions. One of these cases was its insistence in 1992 that a constitutional norm passed by the Sovereign National Conference was valid, and not the 1967 constitutional norm supported by the President. On another occasion, on 16 August 1993, the Supreme Court declared null and void then *de facto* Prime Minister Faustin Biriwanda's arbitrary decision to remove and transfer judges.

President Mobutu, however, did not allow this «provocation» without a response: Since the Constitutional decision in 1992, the house of Supreme Court President Balanda Mikuin Leliel has been attacked three times by the DSP, resulting in the death of one of his neighbours. Some judges reportedly had to change their residences. Ever since 1992, the Supreme Court building has been without electricity. The judges have had to work in almost unbearable heat, and they can only work during the day, as there is no light in the courtrooms.

**Bernard Bokaa Bakombe:** Lawyer in Boende, Equateur region. Bokaa Bakombe is legal counsel to the Catholic Diocese of Bokungu-Ikela. Clergy and employees of the diocese have on various occasions been harassed by members of the military stationed in the area. In one of the first such incidences, a local military commander reportedly ordered his men to beat up the lawyer on 9 June 1993. According to Bokaa Bakombe, his life was saved only because of the intervention of a priest. After the

intervention, the commander returned the shoes and valuables he had taken from the lawyer. This and a number of similar cases were reported to the military prosecutors, but no one was ever brought to justice.

**Ngowolo Bokika, Gilbert Tundwagu:** Judges. Ngowolo Bokika is a judge at the *Tribunal de Grande Instance* of Kalamu, Kinshasa. During 1994, he received threats and was pressured not to acquit journalists Felix Kabwizi and Milenge Kitungano. The two had published an article in the daily *La Référence Plus* which was critical of Bembe Anzuluni, Vice President of the transitional Parliament and an influential member of President Mobutu's Popular Movement of the Revolution (*Mouvement Populaire de la Révolution*, MPR). Anzuluni had initiated proceedings against the two journalists for defamation. In first instance, these accusations were struck down by the court of the peace (*Tribunal de Paix*) of Kasa-vubu. After that acquittal, Anzuluni reportedly asked the Minister of Justice and the president of the court of the peace to remove the responsible judge, Gilbert Tundwagu, for «intellectual incompetence». This request was not met.

**Katalamuka Byabuze:** Judge in Kinshasa. Katalamuka Byabuze was suspended from office for ordering the arrest of a Lebanese diamond merchant with the name of Kamel for contempt of court. Mr. Kamel, who seems to be working for a government official had to appear before the judge on 10 June 1994. During the hearing, Mr. Kamel told the judge that he had to leave because his absence from his office would make him lose a lot of money. He then reportedly said that he had no reason to appear before «small inspectors» and that Byabuze was nothing but a «simple idiot». After Mr. Kamel threw all of the judge's files on the floor, the latter issued an arrest order against him for contempt of court.

One day later, the judge was summoned to the office of a High Judge at the Prosecutor General's Office (*Haut Magistrat du Parquet Général*), where he was informed that an investigation was opened against him on charges of «arbitrary arrest». On 17 June, another investigation was started against the judge by the

administration. He was notified that he was suspended from office for an undetermined period of time.

**Judge Mukubi:** Judge and President of the *Tribunal de Grande Instance* of Gombe, Kinshasa. According to the Government, Judge Mukubi was caught red-handed when trying to extort a bribe from a man who was a party in a case before him. However, a couple of days later, however, the Court of Appeals (*Cour d'Appel*) acquitted him of these charges. According to AZADHO, it was found that the entire accusation was set up to discredit and intimidate the judge, and to influence the way he would handle the case in question.

**Mbuy Mbiye:** Lawyer in Kinshasa and Vice President (*Doyen*) of the Kinshasa Bar Association. According to reports by AZADHO, Mbuy Mbiye has been harassed by the President of the Bar Association throughout 1994. He was accused of disobedience by the President (*Bâtonnier*) of the Bar, but acquitted by the Bar's disciplinary tribunal (*Conseil de l'Ordre*) on 17 May 1994. Without any hearing, his office was then closed and sealed on 24 August 1994. Still without any hearing, the seals were removed on 15 September. According to the lawyer, who has been engaged in efforts to renew the leadership of the Bar, the Attorney General has sided with the *Bâtonnier* to prevent him from pleading in court.

**Jean-Claude Muyambu, Pascal Nsenga:** Lawyers in Lubumbashi, Shaba province. Both Jean-Claude Muyambu and Pascal Nsenga have reportedly been threatened by the Vice-Governor of the province of Shaba, Kapapa Mukandu Bantu, and by other officials of the provincial government. They were warned that they would be arrested lest they give up their representation of a man who was trying to sue the government. The government is dominated by members of the President Mobutu's party MPR. The two lawyers also reported receiving constant threats because of their work for the local Centre for Human Rights and Humanitarian Law (*Centre des Droits de l'Homme et du Droit Humanitaire*).



**Live Rive Paluku:** Lawyer and representative of AZADHO in Goma. Live Rive Paluku, who is in charge of AZADHO's free legal aid service, was arrested on 25 January 1994 by the Special Presidential Division (DSP). The DSP is the most infamous of Zaire's security forces and has been stationed in the province of Northern Kivu since 1993. According to AZADHO, the reason for the arrest lies in Paluku's representation of a local who was having a boundary dispute with a regional dignitary of the regime. The lawyer and his client, who was also arrested, were reportedly held in a small room which had been used as a toilet but which was now converted into a prison cell.

**Matadi Wamba:** Lawyer registered with the Supreme Court in Kinshasa. On 9 October 1994, Matadi Wamba was attacked by 6 armed men on the street in front of the Saint Luc de Binza Ma-Campagne Church. Some sources suggest that the attack was connected to Matadi Wamba's professional activities, but no further information was available.

# Centre for the Independence of Judges and Lawyers

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*Attacks on Justice*, the sixth annual report of the Centre for the Independence of Judges and Lawyers (CIJL), analyses existing legal structures and the prevailing human rights situations in 58 countries of the world and catalogues the cases of judges and lawyers who are harassed and persecuted. This report describes the cases of 572 jurists who have suffered reprisals for carrying out their professional functions. Of these, 72 were killed, 3 were "disappeared", 28 were attacked, 119 received threats of violence, 24 were tortured, 177 were detained, and 149 were professionally sanctioned or obstructed.



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