CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

ATTACKS ON JUSTICE

THE HARASSMENT AND PERSECUTION OF JUDGES AND LAWYERS

EDITORS:
MONA RISHMAWI
LYNN HASTINGS

JANUARY 1996-FEBRUARY 1997

GENEVA
SWITZERLAND

CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

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

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

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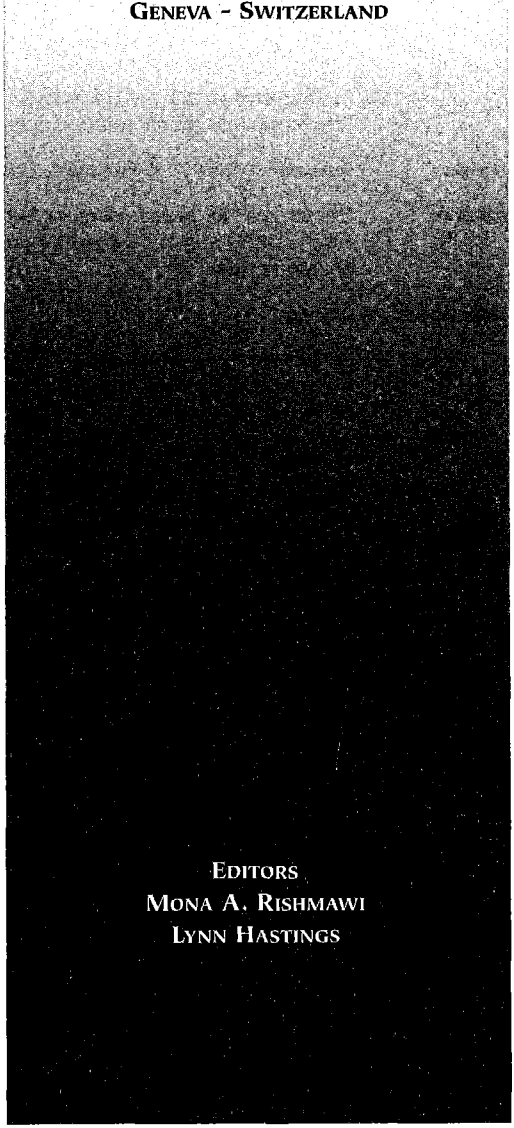

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INTRODUCTION

States which have stable institutions with adequate checks and balances command international respect. In today's world, upholding the independence of judges and lawyers plays a crucial role in bringing about political and economic stability. People's confidence in the effectiveness, ability, objectivity and impartiality of their judicial institutions reduces the dramatic prospect of conflict. Individuals will not take the law into their own hands, if they feel that justice will prevail. States that cherish, enhance and protect the independence of their judiciary and safeguard the role of defence lawyers are more likely to have peace and economic prosperity.

The independence of the judiciary is, therefore, not merely a human rights value. There are also clear political and economic consequences associated with having a judiciary that commands the respect of all sectors of society, corrects mistakes by the governmental as well as the non-governmental sector, and stands against abuses of power. A well-resourced and qualified judiciary, free from intimidation and corruption, and an active and creative legal profession can strike the right balance, advance the interests of the various sectors of society, and preserve human rights of all.

This is why the data gathered by the Centre for the Independence of Judges and Lawyers (CIJL), remains astonishing. This eighth edition of the CIJL annual report *Attacks on Justice* reveals that There are significant structural defects in the legal and judicial systems in many countries that lead to the improper administration of justice and contribute to impunity. During 1996 at least 572 jurists suffered reprisals in 49 countries for carrying out their professional duties. Of these, 26 were killed, 2 disappeared, 97 were prosecuted, arrested, detained or even tortured, 32 physically attacked, 91 verbally threatened and 324 professionally obstructed and/or sanctioned and 86 of them were anonymous. This represents a 25% increase over the number of cases we reported last year. The CIJL also received reports of an additional 349 jurists who suffered reprisals in 1996 but was unable to conclusively confirm those reports. So many countries in the world are thus far from appreciating the need to respect the independence of the judiciary and protect judges and lawyers from harassment and intimidation.

MAJOR TRENDS DURING 1996

The year 1996 witnessed several patterns that constitute a threat to the independence of the judiciary. These are the creation of special tribunals and decrees, the removal of judicial discretion in sentencing, undermining the security of tenure, pervasive corruption, the public denunciation of judges, the existence of inadequate legal frameworks and the threats and attacks against defence lawyers. Such patterns are elaborated upon below.

SPECIAL TRIBUNALS AND DECREES

Many countries create special tribunals in a manner that undermines the jurisdiction of their regular judiciary. The independence of these tribunals is not structurally guaranteed. Despite an elaborate judicial structure, the *Colombian* police and judiciary continue to lack the will and the resources to investigate and prosecute crime. In June 1996, the High Council of the Judiciary announced that 74% of all crimes go unreported and that between 97-98% of all crimes go unpunished. The Colombian Commission of Jurists continues to maintain that impunity for political crimes is virtually 100%. Colombia continues to resort to faceless judges, prosecutors and witnesses, in the so-called regional jurisdictions, formerly known as public order courts. A minor improvement is that judges can no longer base a conviction only on the testimony of an anonymous witness. The CIJL had hoped that the opening of the field office of the UN High Commissioner for Human Rights would have helped to improve the administration of justice in Colombia through the analytical reports of the situation and the technical assistance programme. The CIJL is concerned, however, that almost one year after the adoption of the Chairman's Statement on Colombia, this office has yet to begin functioning.

Peru also issued decrees which undermine the proper administration of justice and resorts to faceless judges.

As a result of international pressure, *Nigeria* amended the Civil Disturbances (Special Tribunal) Act, to remove military personnel from its Civil Disturbances Tribunal. The CIJL remains concerned, however, that the Government of Nigeria has not abrogated the decrees establishing special tribunals or those revoking normal constitutional guarantees or fundamental rights as well as the jurisdiction of the normal courts.

On 10 March 1996, the jurisdiction of the State Security Courts was reportedly extended in *Bahrain* to offences which were previously handled by the regular criminal courts, such as arson and assault on public servants. There is no presumption of innocence of those tried before these courts. They hold sessions *in camera*. They fail to investigate allegations of torture. The defendants are denied the right to counsel. Their decisions are not subject to any appeal. Hundreds of persons remain under preventive detention without court review.

The State Security Court system of *Turkey* continues to cause concern. The courts are composed of civilian and military judges. Writers, journalists, human rights activists, and lawyers are tried before these courts, commonly under Articles 8 of the Anti-Terror law and 312 of the Criminal Code. Confessions extracted under torture are admitted by these courts without adequate review of their validity. The decisions of these courts are subject to an appeal to a special department in the High Court focusing on state security matters.

The police in *Brazil* are involved in serious human rights abuses including the extra-judicial execution of street children and others, as well as

torture. The police have a separate judicial system to investigate allegations of these abuses. This overloaded and ineffective system as well as the intimidation of witnesses, prosecutors, judges and human rights monitors, contribute to the climate of impunity surrounding these horrendous acts. A study of the police courts found that only eight percent of the cases examined between 1970 and 1991 resulted in convictions.

Removal of judicial discretion in sentencing

Another serious question is judicial discretion. Some countries attempted to remove judicial discretion in sentencing, apparently following the lead of the "three-strikes law" in the United States. In Australia, the Attorney-General of the State of Victoria is advocating a "wholesale revision" of the Sentencing Act. Questions related to judicial authority and discretion were also fiercely debated this year in the United Kingdom. A bill proposed by the former Home Minister attempted to extend mandatory life sentences, currently imposed for murder, to second offences of rape or serious violence and impose mandatory minimum sentences for repeat offences involving drugs and burglary. The judges objected. Another bill proposed by the same Home Minister initially sought to permit the police to break into private premises for the purpose of bugging without judicial authority.

Security of tenure

More than 77 judges were dismissed in Ethiopia during 1996. There are reports of an additional 270 which we could not confirm. The Prime Minister claimed that the dismissals took place because the judges are corrupt and unqualified. The government did not substantiate these allegations and did not follow the removal procedures set out in Article 79(4) of the Constitution and Proclamation No. 24/1996. It is ironic that the government announced in January this year that approximately 1218 of 1800 detainees had been charged with war crimes under Colonel Mengistu's regime. With the large dismissal of the judges, it is difficult to see how these cases can be processed in a fair and efficient manner so that the rights of both the accused and victims are not jeopardised.

Although there are guarantees for the independence of the regular judiciary in Jordan, in 1996 the Minister of Justice recommended to the Judicial Council the forced retirement of 11 senior judges from the bench. The Council, unfortunately concurred.

The lack of tenure makes judges sensitive to political reaction to their judgments. Although there are constitutional guarantees in Botswana to provide for the proper selection of judges, granting them tenure and securing them against arbitrary removal, these safeguards have little impact as most judges are hired on contract. The renewal of the contract is left to the Judicial Service Commission which appears to be acting on considerations of political acceptability .

Corruption

The judiciary is legally independent in *Venezuela*. Yet, low judicial salaries, as well as backlog, and the manner in which courts are administered encourages corruption. In 1994, the World Bank started a pilot project granting a loan to Venezuela for judicial reform. The project is criticised for not tackling the root-causes of the deteriorated judiciary, such as political interference and corruption.

In *Mexico*, corruption within the police force and the judiciary prevent citizens from reporting crime and human rights violations, therefore contributing to the culture of impunity. Criminal investigations, particularly in politically sensitive cases, are not pursued and judicially ordered arrest warrants are often not enforced.

Public confidence in the judiciary is undermined in several countries, notably, *Indonesia*, *Morocco* and *Zaire* because of corruption.

Public denunciation of judges

The central role the *Italian* judiciary is playing in confronting the Mafia and combating political corruption is widely reported in the international press. In the second half of 1996, there were attempts to discredit those who conduct the anti-corruption investigations.

In several countries, including the *United States of America*, high executive political officers publicly commented negatively on the performance of the judiciary.

Inadequate legal framework

The judiciary needs an adequate legal framework to be able to preserve human rights and the Rule of Law. Although the judiciary is said to be a separate and independent power in many countries, Executive control over its functioning is often pervasive.

The CIJL is concerned over the future of *Hong Kong* after June 1997 when sovereignty was transferred to China. The newly selected parliament did not endorse 24 laws that protect human rights and civil liberties, therefore affecting the manner in which the judiciary will view these matters in the future.

In *Belarus*, the President of the Republic ignored the Constitutional Court decision which held that 11 decrees he had enacted were unconstitutional.

The judiciary in *Kenya* is widely perceived to be pro-government. In January 1996, the Chief Justice of Kenya refused to allow 34 magistrates, members of the Kenya Magistrate and Judges Association, to attend a human rights training session in Arusha.

Human rights lawyers

In several countries, lawyers are identified with the cause of their clients. The CIJL is particularly alarmed that several lawyers are arrested in *Turkey* because of statements they made during the course of their defence of their clients. In *Venezuela,* charges were brought against two human rights lawyers because they submitted a formal complaint concerning the death of a citizen at the hands of state police agents on 3 November 1996. Human rights lawyers are particularly targeted in *Mexico, Sudan, Djibouti, Pakistan, Tunisia, The Philippines, Nigeria,* and *Northern Ireland.*

Attacks against the UN Special Rapporteur on the Independence of Judges and Lawyers

It is equally disturbing that the UN Special Rapporteur on the Independence of Judges and Lawyers is himself under attack. Despite the privileges and immunities accorded to UN Special Rapporteurs under international law, a civil suit was filed in a *Malaysian* court against the UN Special Rapporteur on the Independence of Judges and Lawyers. In a certificate issued on 7 March 1997, the UN Secretary-General confirmed that Dato' Param Cumaraswamy is immune from legal process with respect to statements he made in his above-mentioned capacity. The UN Secretary-General further called upon the Government of Malaysia to respect these immunities. The CIJL added its voice to that of the UN Secretary-General and called upon the Malaysian government to respect its obligations under international law. On 28 June 1997 the Kuala Lumpur High Court dismissed his motion to strike out the defamation claim against him. Dato' Cumaraswamy appealed the decision. The CIJL sent Justice P.N. Bhagwati, the Chairman of the CIJL Advisory Board to observe the appeal procedures of 20 August 1997. The results of this appeal are not known at the time of writing.

The Methodology of the Report and the Governments' Comments

Throughout the year, the CIJL gathers information on issues related to the independence of the judiciary and legal profession around the world. The CIJL has a wide network of sources that provides it with information. Key to this process are members as well as sections and affiliates of the International Commission of Jurists and members of the CIJL Advisory Board as well as the CIJL affiliates. The ICJ network transcends the ICJ and CIJL family. We also seek the help and assistance of other international organisations as well as local human rights and legal groups and individual judges and lawyers. We are grateful to all those who contribute to this process.

The CIJL then solicits the assistance of legal researchers to verify the information and prepare chapters. The chapters are checked and verified several times within the ICJ and CIJL secretariats and by experts in the respective countries. Ensuring the quality of this report is key to its credibility. The CIJL is appreciative to all those who participate in this important process of not only gathering the information, but also in keeping the report's quality.

In April, the first draft of the report was produced. The tentative findings were presented before the UN Commission on Human Rights in Geneva. The aim was to assist the Commission in its consideration of this subject.

As in last year, the CIJL submitted the country chapters for each government for comments. The governments were given one month to respond. The CIJL committed itself to publishing the response of each government in its entirety, if it did not exceed 1000 words. Space limitations do not allow us to publish texts in excess of this limit.

Out of the 49 countries covered in the report, 21 governments responded. Many governments respected the word limitation and submitted their comments within the time framework. Some governments requested more time to prepare their answer. Reasonable requests were granted. Some government submitted lengthy responses. Although we were not strict in enforcing the 1000 words limit and we allowed responses that reached 1300 words to be published in their entirety, we had to summarise longer comments. Some governments also submitted their responses in a language other than English. The English translation of these responses were published here.

We are grateful to all the governments who reacted and responded. In many cases different ministries were involved in preparing the response, most notably the ministries of justice and foreign affairs. We are grateful to those governments that are engaged with us in a constructive dialogue to improve the independence of the judiciary and the legal profession in their countries and to reflect on our concerns over the structural as well as physical threats to this independence. Their comments enriched this publication.

We are thankful to the governments of Australia, Bahrain, Belgium, Bolivia, Canada, Croatia, Egypt, Ethiopia, Guatemala, Ireland, Japan, Jordan, Kenya, Kyrgyzstan, Myanmar (Burma), Pakistan, Peru, The Philippines, Tunisia, The United Kingdom concerning Hong Kong, and Venezuela. They all took time and effort to study and react to our concerns.

We hope that this publication will help to shed light on the status of the independence of the judiciary and legal profession throughout the world. Our aim is to help in their protection.

Mona Rishmawi
CIJL Director,
August 1997

ALBANIA

After the collapse of the Soviet Union, the Republic of Albania adopted a new interim constitution in April 1991. In 1992, the Democratic Party won a majority of seats in the parliamentary elections and its leader, Sali Berisha, was elected President.

Albania has since officially had a multi-party political system although with state-owned television, no private radio and a general climate of harassment of independent journalists and political opposition, it is effectively a one-party state. Throughout 1994, tension concerning the draft permanent constitution grew between the government and the Constitutional Court. Three judges of the Constitutional Court eventually resigned in protest to, among other things, some of the provisions of the draft constitution. The draft constitution was ultimately rejected on 6 November 1994 by referendum (see *Attacks on Justice, 1995*).

Albania remained without a permanent constitution in 1996. Nevertheless, there were several laws which provide a constitutional framework including the Law on Major Constitutional Provisions of 1991, and a series of laws passed pursuant to it such as the 1992 Law No. 7561 on the Organisation of the Judiciary, the Constitutional Court and the 1993 Law No. 7692 on Fundamental Freedoms and Human Rights and the Constitutional Laws of the Republic of Albania. These laws provide that the President of the Republic is the head of state and is elected by the parliament, the People's Assembly for a five-year term. Executive power is vested in the Council of Ministers, composed of the Chairman of the Council, nominated by the President, and the other Ministers, appointed by the President upon recommendation of the Chairman. Legislative power is vested in the unicameral People's Assembly, whose members are elected for a four-year term. The People's Assembly approves the Council of Ministers with a vote of confidence.

On 26 May 1996, the first round of the general elections for the 140 members of the People's Assembly, were held. The Organisation of Security and Co-operation in Europe (OSCE) reported that the elections were riddled with significant irregularities. The major opposition party, the Socialist Party, followed by other opposition parties, withdrew from the elections several hours before the polls closed, denouncing alleged widespread ballot rigging, intimidation and violence. On 27 May, the opposition parties called their supporters to demonstrate in Tirana's main square the next day. The Interior Minister declared the demonstration illegal and the police refused permission to hold the meeting. Nevertheless, the demonstration took place, but the security forces violently dispersed the crowd with excessive force, according to local political opposition groups, foreign journalists and international election monitors present in the square. Demonstrators were attacked and beaten and a number of them were arrested but released at the end of the day.

On 2 June, the electorate returned to the polls in nine constituencies where no candidates had won a majority in the first round. The opposition parties boycotted this second round. According to official results, the ruling Democratic Party won a decisive victory. On 8 June, President Sali Berisha agreed that new elections should be called on 16 and 17 June in those constituencies where the election commission had reported irregularities. The opposition parties boycotted those elections and demanded fresh elections throughout the country.

In an Information Report on Albania, the Council of Europe maintained that "the acts of violence and numerous irregularities in the recent general elections in Albania clearly damage the credibility of the democratic process in that country". According to the OSCE however, the legality of the newly elected Parliament could not be put into question.

Trials of Former Communists

As with many of the former communist countries, Albania has had to decide how to deal with its past, and the perpetrators of the numerous human rights violations. In September 1995, the Government brought into force the Law on Genocide and Crimes Against Humanity Committed in Albania During the Communist Rule for Political, Ideological and Religious Motives. It banned anyone who occupied a high ranking office within the regime's system from holding any local or national public office until 2002. At the end of November 1995, Parliament approved the Law on the Verification of the Moral Character of Officials and Other Persons Connected with the Defence of the Democratic State. That law regulates disclosure of the content of the communist-era files of the secret police.

On 24 May 1996, the Tirana District Court sentenced to death three former communist officials: Mr Aranit Cela, former Supreme Court Chair, Mr Rapi Mino, a former Prosecutor-General and Mr Zylyftar Ramizi, a former Interior Minister and head of the secret service police. They were found guilty of crimes against humanity and genocide and specifically of having violated the then-existing laws by jailing, executing and forcing into internal exile many persons. It was the first time that former high-ranking members of the former Communist Party had been sentenced to death since 1991. On 24 July, the Court of Appeal commuted their death sentences to significant terms of imprisonment. Since the fall of the communist regime, it is estimated that 72% of the 169 trial court judges have been replaced, under the allegations of having participated in the previous regime as high level officers.

Other trials concerning the procuration of state funds for personal use were seen by some that as trivialising the more serious crimes of the communist era. It was suspected that these charges were pursued to garner support in the upcoming elections. At the same time, persons suspected of serious crimes who had managed to maintain ties with the government were not prosecuted.

THE JUDICIARY

Article 5 of Chapter I of the Constitutional Laws provides that "the judicial power is exercised by the courts which are independent and guided solely by Law". Despite this theoretical guarantee, it was reported that in 1996, the judiciary remained thwarted by political pressure, insufficient resources, inexperience, patronage and corruption. The majority of the judges were either from the communist regime or were poorly trained with little experience. Furthermore, the whole process of judicial appointments, administration, removal and discipline remained in the hands of the executive, undermining seriously the real independence of the judiciary (see below for those procedures).

COURT STRUCTURE

The structure of the judiciary is provided for in Chapter VI of the Constitutional Laws and consists of the Court of the Cassation, the Court of Appeals, the Courts of First Instance and Military Courts. The Court of Cassation reviews all cases appealed to it on a point of law.

There is also a Constitutional Court which defends and guarantees the Constitution and the legislation. Every lower court may suspend a case and submit it to the Constitutional Court for a ruling concerning the constitutional compatibility of a law. The Constitutional Court has, *inter alia,* the power to resolve disputes of competency between the three powers and those between local authorities and the central powers. It also has the power to investigate criminal accusations made against the President of the Republic.

In June 1992, the "Law on the Organisation of Justice and Some Amendments to the Criminal and Civil Procedural Codes" (Law on the Organisation of Justice) joined the six Appellate Courts sitting in different districts together into one single court in Tirana. The Appellate Court, composed of 22 judges, decides appeals based on both fact and law and, if so requested by the parties, may conduct a *de novo* review of the proceeding, based on the trial transcripts. Cases are heard by three-judge panels.

At the lowest level are District Courts which are first instance courts and enjoy general jurisdiction. Since the adoption of the new Civil Procedure Code on 29 March 1996, District Courts consist of three divisions: family, administrative and commercial. District Courts are composed of a chairman, a vice-chairman, judges and assistant judges. Assistant judges hold a university law degree or are studying in order to obtain such a degree. Civil cases are heard by panels of three judges, whereas, according to the Albanian Criminal Code, criminal cases are tried by a number of judges determined by the category of the offence. Appeals to the Court of Appeal must be presented either by the defendant or by the prosecutor, within 15 days from the date of the District Court decision.

Military Courts now only try cases where military crimes and offences have been committed, and not simply those cases involving military personnel.

Appointment of Judges

According to the Constitutional Laws, a Court of Cassation judge, as with all judges, must hold Albanian Citizenship, "enjoy full rights and be ethical" and "be distinguished by his/her professional capabilities and with no less than seven years of experience in legal institution or as lecturer at the Faculty of Law". The President and Vice-President of the Court of Cassation are elected by the People's Assembly on the proposal of the President of the Republic. The remaining nine judges are elected by the People's Assembly. All the members of the Court of Cassation are elected for a renewable term of seven years, an obvious threat to their security and therefore independence.

Members of the Constitutional Court are elected from among "lawyers noted for their capabilities, who have been working no less than ten years in juridical activity or as lecturers at the Faculty of Law, and who have a high moral reputation". Five of the nine judges of the Constitutional Court are elected by the People's Assembly, the remaining four are selected by the President of the Republic. The members of the Constitutional Court elect their Chair through a secret ballot for three years. The Chair is eligible for re-election. Judges are to be elected to 12 year, non-renewable terms. Although the terms are not renewable, the appointments to the Constitutional Court are controlled by the government, again, interfering with the independence of judges, and in particular, those who are eligible for appointment to the Constitutional Court.

Article 17 of Chapter VI of the Constitutional Laws, permits people with "Albanian citizenship with a law degree, who enjoy full rights and are ethical" to work as judges or prosecutors. Judges and assistant judges of both the District and Appellate Courts are appointed by the High Council of Justice, also established by Chapter VI of the Constitutional Laws. Its members are the President of the Republic as Chair, the President of the Court of Cassation, the Minister of Justice, the Attorney-General and nine jurists elected for a five-year term by an electoral college composed of the judges of the Court of Cassation and the Attorney-General's office sitting together. The Supreme Council enjoys the power to nominate, replace and take disciplinary measures against the judges of the District Courts and Courts of Appeal and against prosecutors. Its composition is evidently influenced by the executive and it is reported that "since its formation [it] has failed to uphold the independence of the judiciary, [and] on the contrary, evidence suggests that the Council has been a principal instrument of the judiciary's subordination to the executive".

Until the establishment of the College of Magistrates in November 1995 (see below), no uniform formal training program for judges was in force.

It was reported that some judges had only six months training while others had no experience at all and held judicial office after only one year of education.

Discipline Procedures

In order to guarantee the independence of the judiciary, all judges have judicial immunity. Judges of the Court of First Instance and the Courts of Appeals specifically are given "immunity and cannot be removed from their office during their term." "Their immunity can be withdrawn and they can be removed from office only by the competent body, in cases and consistent with the procedures provided for in law. Cassation and Constitutional Court Judges, in addition, "can not be arrested, detained or punished for action connected with the fulfilment of their duties as members of the [two Courts]".

Judges of the Court of Cassation can by removed from their office by a decision of the People's Assembly on the grounds of serious criminal acts or mental disability.

The "function" of a Judge of the Constitutional Court is terminated when the judge fails to exercise his or her duty for unjustified reasons for more than six months; resigns; is appointed to another position which is not compatible with the function of a judge; or when his or her term ends." The Constitutional Laws do not specify who enjoys the power of dismissing Constitutional Courts Judges.

Under Article 19 of the Law on the Organisation of Justice, all judges, save for those of Court of Cassation and the Constitutional Court, may be removed from office by a decision of the High Council of the Judiciary, for any of the following reasons:

- committing a penal offence;
- becoming medical incapable;
- failure to pass a periodic professional exam;
- serious violation of discipline; or
- compromising their moral image.

In the event such a violation occurs, the High Council of Justice may sanction judges or assistance judges. Sanctions include admonition, admonition with a warning of removal, suspension for a maximum of six months, transfer and removal. Suspension, transfer and removal may only be taken on the request of the Minister of Justice. Article 10 of the Law on the Organisation of Justice permits the Minister of Justice in "special cases" to assign a judge of a district or military court to another district or military court. This clearly leaves judges vulnerable to be transferred without their consent.

Judges subjected to disciplinary measures have no right to appear before the Council itself although they can appeal the Council's decision to the Court of Cassation. According to the High Council of Justice Statute, the Council enjoys extensive disciplinary authority over district and appellate judges, and no adequate limitation on the use of this broad power has been provided by the People's Assembly.

In 1996, judges undergoing disciplinary proceedings were not always notified in advance of the proceedings against them and often were not given the opportunity to defend themselves. It was reported that the High Council of Justice dismissed 17 judges in 1996. They were charged with falsifying documents, delaying procedures, giving light sentences and taking bribes.

Resources

The law provides that the judiciary shall administrate its own budget, but that budget is to be adopted by the People's Assembly on a recommendation from the Council of Ministers. While the salaries of judges are higher than those of other public servants, given the country's desperate financial condition, they are still quite low. It was reported that in early 1996, a district court judge earned between $80 and $125 each month. As an example of the poor conditions, when asked by an American judge visiting the Albanian courts what resources American judges could send to Albanian judges, an Albanian judge asked for light bulbs to be sent. Low salaries, of course, tend to favour the spread of corruption and bribery. Despite foreign aid given to assist in developing legislation, providing office equipment, computerisation and renovations, many courtrooms were still lacking updated versions of codes and the majority of laws at the end of 1996.

The College of Magistrates

In November 1995, by Council of Ministers Decision N° 624, the "College of Magistrates was created. The College is to provide post-graduate training to the employees of the institutions of justice under the Ministry of Justice." On 31 June 1996, the People's Assembly passed the required legislation, which provided that the "professional training programme includes the mandatory initial training of the candidates for magistrates, and also the program for the continuing education of magistrates." The initial training consists of a three year programme of study and a pre-professional internship, after which the candidates are appointed by the High Council of Justice according to the number vacancies. Many lawyers claimed that despite this extra training, loyalty to the Democratic Party continued to be the best determinant of a judicial appointment.

An additional training, not exceeding one month per year, is required for those judges and prosecutors who have less than five years of experience and did not attend the College. The mandatory participation is much needed as many judges in Albania do not possess adequate legal training. Moreover,

the College organises improvement courses for judges and prosecutors, in collaboration with the Ministry of Justice, the Court of Cassation and the General Prosecutor's Office. It is reported that at the end of 1996, the Board of Directors of the College had been appointed and the first courses were scheduled to begin in October 1997.

CASES

Zef Brozi {former Chief Judge of the Court of Cassation}: On 14 February 1996, the Constitutional Court ruled that the dismissal of Justice Brozi by Parliament in September 1995 was legal, on the grounds that the former Chief Justice had committed serious criminal offences. Despite the fact that Justice Brozi was never charged with a criminal offence, the Constitutional Court found he had acted unreasonably in the execution of certain decisions and those actions were sufficient to constitute a criminal offence. The Special Rapporteur on the Independence of Judges and Lawyers, in his report to the UN Commission on Human Rights in the beginning of 1997 noted that "...suspending the execution of certain decisions would appear to fall within the normal duties of an appellate court and certainly cannot be considered a criminal offence".

It was widely believed that in reality, Justice Brozi's removal was more likely a result of his opposition to the proposed constitution in November 1994 and an effort to subordinate the Constitutional Court to the Executive. There were even rumours that the vote by Parliament to remove him had been falsified. Justice Brozi left Albania in 1996 (for further information on Mr Brozi's case, see also *Attacks on Justice 1995*).

ARGENTINA

The Federal Republic of Argentina is comprised of 23 provinces, the Federal District and the National Territory of Tierra del Fuego. The thoroughly revised Constitution, which entered into force in 1994, vests executive power in the President, elected for a four year term with the possibility of re-election for one consecutive term. A Vice-President is elected by the people at the same time as the President. The President appoints the Cabinet (*Gabinete*), the chief of which is politically responsible to Congress. Federal legislative power lies with the bicameral National Congress, composed of a 257 member Chamber of Deputies, representing the nation, and a Senate, consisting of representatives from the provinces and the city of Buenos Aires.

Presidential elections held in 1994 were won by Carlos Saúl Menem, of the Justicialist Party (*Partido Justicialista-PJ "Peronist"*), who remained in power in 1996. The President's party held a majority in the Senate and in 1996, President Menem's brother was the provisional President of the Senate.

IMPUNITY

Argentina is still suffering the consequences of the period of military rule (1976-1983), during which several thousand people were abducted and disappeared at the hands of the police and security forces. The National Committee on the Disappearance of Persons (*Comisión Nacional sobre la Desaparición de Personas*, CONADEP), appointed in 1983 by the first civilian government after the end of the military rule, documented 8,960 cases of disappearances, although the actual number of disappeared is believed to be much higher. Investigations into the human rights violations and convictions of members of the junta and security forces were, however, halted by the 1986 Full Stop Law (*Ley de Punto Final*), which set deadlines for the courts to investigate the crimes. The 1987 Law of Due Obedience (*Ley de Obedencia Debida*) also obliged judges to accept the defence of "due obedience" on behalf of all officers below the rank of colonel, and conclude all cases against them. The Presidential Pardons of 1989 and 1990 further hindered any convictions.

The above mentioned laws effectively excluded the possibility of taking any criminal action against the perpetrators of human rights violations during the military rule. In 1995, the United Nations Human Rights Committee expressed that,

> ...the Full Stop and Due Obedience Laws deny effective remedy to the victims of human rights violations during the period of authoritarian rule in violation of articles 2 (2,3) and 9 (5) of the International Covenant on Civil and Political Rights ... The Committee expresses concern that pardons and general amnesties may promote an atmosphere of impunity for

perpetrators of human rights violations belonging to the security forces.

In 1996, revelations of extra judicial killings by former military officers who were serving under the military Governments triggered a national debate over the accounting for the those disappeared. The Government and the armed forces claimed that they did not have any more information than what was revealed by CONADEP in 1984.

Argentine law thus allows no means of bringing those responsible for the violations to justice. Cases involving foreign nationals however, were investigated in 1996. Investigations into the case of Dagmar Hagelin, a young Swedish woman who disappeared in 1977, were reopened by a Federal Chamber, but only for the limited purpose of determining her fate.

Due to the failure of Argentina to investigate extra-judicial killings, both the Italian and Spanish Governments commenced their own investigations and proceedings against Argentine military and police officers. Requests for assistance by a Spanish judge investigating charges against 97 military and police officers were refused by the Argentine Government. In Italy, 89 military and police officers, including former Presidents Videla and Galtieri, have been accused of involvement in enforced disappearances. In 1996, instances of extra judicial killings and abuses of detainees continued, reportedly, at the hands of the provincial police.

The Judiciary

The main concerns for the Argentine judiciary continued to be political influence and inefficiency in the administration of justice, although the Constitution establishes that the President may not exercise any judicial functions, involve himself in pending cases or re-open cases that have been closed. An example of the Government trying to interfere with a judgment is the case of Judge Julio García Martínez (see below).

The court structure on the federal level comprises a Supreme Court of Justice, which is divided into lower chambers of appeal (*Cámaras de Apelaciones*) and courts of first instance. Each province has its own Supreme Court and lower courts organised in the same manner.

Appointment Procedures

Prior to 1994, judges were elected directly by the President, with the consent of the Senate. The 1994 Constitution provided for a Council of the Judiciary (*Consejo de la Magistratura*), which is mandated to achieve a balance between the political organs, judges of all levels, lawyers and academics. Its composition is to be determined by law. After a public examination process, the Council is to compile a list of nominees from which the

President, with the consent of the Senate, should appoint judges to the lower courts. Supreme Court judges, however, will continue to be elected directly by the President, on approval of two-thirds of the members of the Senate.

In 1995 however, the Government froze the negotiations on the creation of the Council of the Judiciary and in 1996, there was still no law regulating the Council of the Judiciary, nor had the composition of the Council been established. A proposal which was presented before the Chamber of Deputies in 1996 was opposed by members of the judiciary, since it reportedly grossly favoured the political sector. In March 1997, the Chamber of Deputies approved of most of the proposal elaborated by the Senate, but since it introduced changes as to the composition of the Council, the proposal was returned to the Senate for review.

A transitory paragraph to the 1994 Constitution established that when 300 days had elapsed from the entry into force of the Constitution, inferior court judges (all judges except Supreme Court judges) could only be appointed according to the procedure established in the new Constitution, i.e. through the Council of the Judiciary. Therefore, since August 1995, no new judges have been appointed, a situation that will remain until the Council is eventually created.

The delay in creating the Council of the Judiciary and efforts by the Government to retain control over the appointment process through its composition, undermined any potential that existed to strengthen the independence of the judiciary. Furthermore it should be kept in mind that despite the eventual creation of the Council of the Judiciary, the election of judges to the country's highest judicial body, the Supreme Court, remains in the hands of the Executive, as does the final choice of lower court judges.

Disciplinary Procedures

According to the Constitution, judges of the Supreme Court and inferior court judges remain in their positions during good behaviour. They can be removed on the basis of having performed their functions wrongly or having committed a crime. The Council of the Judiciary is supposed to open the proceedings and formulate the accusations, which are to be formally presented by the Chamber of Deputies before the Senate (*juicio político*), which decides the case. Regarding inferior court judges, their eventual removal shall, according to the Constitution, be decided by a jury composed of representatives from the legislature, the judiciary and lawyers associations.

Until the Council of the Judiciary is created, the Chamber of Deputies will present the accusations in the removal procedure (*juicio político*) if the investigation conducted by the special Commission (*Comisión de Juicio Político*) establishes that there are grounds for formal accusations. The Senate will then decide whether or not the judge shall be removed. Taking into consideration that neither the Constitution nor any legislation determines what is meant by performing the functions wrongly or which

crimes allow for a judge's removal, the *juicio político* procedure is highly controversial, since it is left in the hands of the Parliament to decide the criteria which allow for possible arbitrary removals. In 1996, alleged corruption and accusations of incompetence constituted the basis of several cases of removal of judges. It is reported that judges who were to be subjected to a *juicio político* chose to resign beforehand, a signal that the judges preferred self-censure.

Resources

The Council of the Judiciary is further to be charged with the resources of the judiciary as assigned by law to the administration of justice. The Constitution establishes that judges will receive a salary according to the law as compensation for their work, which cannot be reduced while remaining in their post. In 1996, the budget of the judiciary was set at 334,000 pesos which was three per cent less than in 1995.

The judiciary is overburdened with cases, in civil as well as criminal matters. Reportedly, of the approximately 250,000 criminal cases, less than four per cent were decided within the year. This inevitably led to lengthy pre-trial detentions. Lack of human resources is one reason for the backlog, and it was recognised in 1996 that 335 new judicial positions were needed to reduce the backlog. However, considering the reduced budget assigned to the judiciary, it will be difficult to create new judicial positions. Also, as long as the Council of the Judiciary does not exist, no new judges can be appointed. In the meantime, with many judges resigning, taking leave of absence or being subjected to the removal procedure, several courts found themselves without judges and the case load continued to build.

Inefficiency and complicated and time consuming procedures, including trials based on written documentation, are other reasons behind the backlog. In 1992, some federal and provincial courts began introducing oral trials. However, the practice of submitting documentation to the judges before the oral trial began continued, thus potentially biasing the judges before they heard any oral testimony. In January 1997, the legislature in the province of Buenos Aires passed a new Code on Criminal Procedure, which introduced oral hearings in all criminal cases.

A Gallup poll conducted in 1996 found that 96 percent of the population considered that corruption in the country was either high or very high. This was true for many sectors of the society, including the judiciary.

Cases

Julio García Martínez (Judge in labour matters): Judge García Martínez declared unconstitutional three presidential decrees that were issued in December 1996. The decrees were said to violate constitutional

rights pertaining to employment rights. In January 1997, the President authorised the Government to denounce Judge García Martínez and the initiation of an investigation under the removal procedure (*juicio político*). The Chamber of Deputies was to decide whether the removal procedure would be applicable in the case. The Executive further wanted to ask for an order declaring the decision of Judge García null and void.

Dr. Federico Alfredo Hubert {Lawyer}: Dr. Hubert is the lawyer for the family of Diego Laguens, who died in police custody in 1994. In the first half of 1996, Dr. Hubert received telephone death threats.

The trial of those accused of killing Diego Rodríguez Laguens was scheduled to begin on 31 October 1995 in the city of Jujuy but was adjourned until March 1996. Despite attempts, allegedly by the Jujuy police, to hamper police and judicial investigations, three policemen were sentenced on 31 May 1996 to 16 years in prison for the killing and another six policemen were each given a two-year suspended sentence. The family of the victim, who was their son, received compensation amounting to US$ 100,000. After sentencing, and after the members of the court had retired, Dr. Hubert reportedly said "as a father I ask myself what is the price of a son's life - $100,000, is that the price of a judge's son?" The remarks were published in the media and the court ordered Dr. Hubert detained for five days for contempt. On 11 June 1996, the Court suspended the disciplinary sentence against Dr. Hubert, for lack of an appropriate place to hold him. The case was left pending at the end of 1996.

Pablo Lanusse {Prosecutor}: Mr. Lanusse suffered threats and violence reportedly due to his involvement in the investigations of a case concerning alleged fraudulent activities in gold exportation, which purportedly also involved companies associated with the former President's family. The threats continued even after Mr. Lanusse and his family were placed under police surveillance. Because of the continued threats and attacks, Mr. Lanusse asked to be transferred from the case. The Minister of Justice, transferred Mr. Lanusse in December 1996, from the federal prosecutor's office to the prosecutor's office in the capital.

Horacio Schillizzi Moreno {Lawyer}: Dr. Schillizzi received a sanction of three days detention by the Federal Court of Appeal in civil matters of the Federal Capital (*Sala F de la Cámara Nacional de Apelaciones en lo Civil de la Capital Federal*), before which he had challenged a decision. The sanction was imposed on Dr. Schillizzi because of alleged lack of professional ethics, however, no details of his lack of profession ethics were given.

The sanction had not yet been enforced at the end of 1996 and Dr. Schillizzi had lodged a petition with the Inter-American Commission for Human Rights, denouncing Argentina for violating the right to personal integrity, the right to personal liberty, the right of judicial guarantees and the right of equality before the law, as contained in the American Convention on Human Rights.

Daniel Stragá {Lawyer working for the Co-ordination against Police and Institutional Repression (*Coordinadora contra la Represión Policial e Institucional*}: On 14 February 1997, Mr. Stragá received a message from an anonymous caller stating that there would be an attempt on his life. Mr. Stragá represents several families of victims of police brutality, including cases of extra-judicial killings.

In his capacity as both lawyer and journalist, Mr. Stragá has received death threats in the past. A complaint concerning the threat was filed before a judge of the Federal Court N° 5 (*Juzgado Federal N° 5*) and reportedly an investigation was initiated.

AUSTRALIA

Australia is an independent nation with a federal system of government. In accordance with Article 61 of the Constitution of the Commonwealth of Australia, the head of state is the British Monarch, represented in Australia by the Australian Governor-General. The Monarch does not play a day to day role in Australian government. 'The Crown' acts on the advice of its Ministers who are members of, and responsible to, the Parliament. Convention dictates that, following a general election, the Governor-General appoints as Prime Minister the parliamentary leader of the party or coalition of parties which has a majority of seats in the lower house of the bi-cameral federal parliament. The bi-cameral federal parliament is composed of a 76 member Senate and a 147 member House of Representatives.

The federal Constitution confers the legislative, executive and judicial powers of the federal government on three different bodies: the Parliament, the Commonwealth Executive and the Federal Judicature, respectively. Each state, the Australian Capital Territory, and the Northern Territory has its own legislature, government and constitutions or constituting documents.

In March 1996 and after 13 years in power, the Australian Labour Party, led by Prime Minister Paul Keating, was defeated and replaced by the Liberal-National Party coalition Government led by Liberal leader John Howard.

JUDICIARY

STRUCTURE OF THE COURTS

At the federal level, judicial power is vested in the High Court of Australia, and in such other federal courts as the Federal Parliament may create (Article 71 of the Federal Constitution). Justices of the High Court of Australia and federal judges are appointed until the age of 70 years by the Governor-General in Council (defined in the Constitution as referring to the Governor-General acting with the advice of the Federal Executive Council"). Article 72 of the Constitution provides that judges of the High Court and other federal courts shall not be removed "except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session...on the ground of proved misbehaviour or incapacity".

At the state level, courts are established by charter and by acts of the state parliaments. State judges are appointed by the State Government.

There is no Judicial Service Commission or Council with which the Governor-General or the Governor of a State must consult. In practice, State governments and parliaments in Australia have traditionally respected the strong convention of judicial independence and tenure and appointments are

usually made following consultation with the Chief Justice or presiding judge, even though it is not a constitutional requirement. However, for the continuation of their office, most state judges are dependent on the State legislature as a matter of law (see section on Constitutional guarantees of judicial tenure in Queensland, below).

Conflict of interest in contempt proceedings- Victoria

The credibility of the Solicitor-General and the Attorney-General of Victoria came into question when it became known that they held shares in a company that was subject to contempt proceedings in which they were both involved. In the 1995 edition of *Attacks on Justice,* the CIJL reported that a number of commercial companies had brought an application before the Supreme Court of Victoria to find the Broken Hill Proprietary Company Limited (BHP) in contempt of court. The application was commenced after the Government of Papua New Guinea agreed with BHP to prohibit compensation proceedings against BHP in a foreign court for any claim arising out of environmental damage in the OK Redi and Fly River areas of Papua New Guinea (see *Attacks on Justice,* 1995 under the chapter on Papua New Guinea). Pursuant to the agreement, the Government of Papua New Guinea enacted the Compensation (Prohibition of Foreign Legal Proceedings) Act, 1995, allegedly drafted by or with the assistance of BHP. Section 5 of the Act imposed a "fine not exceeding K10,000 (approximately $US 7,250) or imprisonment for a term not exceeding five years, or both" in the event a "person" pursues compensation proceedings in a foreign court. The legislation also declared the Act "relates to a matter of national interest," thereby circumventing the provisions of the Constitution. The legislation effectively removed the matter from the proper jurisdiction of the courts.

As much of the litigation against BHP would have been brought in an Australian court, several potential plaintiffs brought an application requesting the Supreme Court of Victoria to find BHP in contempt of court. On 19 September 1995. Justice Cummins held that BHP was in contempt of court. BHP and the Attorney-General as intervenor appealed the decision. The full Supreme Court of Victoria held that under recent changes to the contempt laws unique to Victoria, and subject to the limited exception set out in the legislation, only the Attorney-General could bring contempt proceedings. The plaintiffs application to find BHP in contempt was therefore dismissed.

Subsequent to the finding of the Supreme Court, the Solicitor-General of Victoria, Douglas Graham, considered if the Government should pursue contempt proceedings against BHP. In the beginning of 1996, the Solicitor-General advised the Attorney-General of Victoria, Jan Wade, that there were insufficient grounds to proceed with contempt. In March 1996, the Attorney-General announced that she would not proceed with contempt proceedings. In October 1996, it was reported that at the time of the decision, the Solicitor-General was a director of several companies which

held shares worth approximately $AUS 900,000 in BHP and the Attorney-General held shares worth approximately $AUS 12,000 in BHP.

Despite opposition calls for the resignations of both the Attorney-General and the Solicitor General, both remained in their positions. When asked to comment, the Solicitor- General initially said it was "a private matter" and in fact, the Victorian Government's Code of Conduct which requires ministers and senior public servants to declare any conflict of interest and stand down in any decision-making process where they may be compromised does not apply to the Solicitor General.

Later, the Solicitor General informed the press that the companies had not purchased any shares from the time of the appeal decision to the time he rendered his recommendation not to pursue the contempt proceedings. The Attorney-General asserted that she did not know of the Solicitor-General's holding until October 1996 and that she had disclosed her own holdings on the Register of Members' Interests in 1988.

A review of the Solicitor-General's advice was never conducted because the plaintiffs in the contempt case settled their pending cases with BHP in the summer of 1996. However, at the end of 1996, Mr. Graham's conduct was the subject of a complaint to the Bar Council and was being considered by the Ethics Committee of the Victorian Bar. As this report was going to print, the CIJL learnt that the Ethics Committee dismissed the compaint against the the Solicitor-General.

Independence of administrative tribunals

In recent years, concerns were raised over the increased use of administrative tribunals in Australia. Although most administrative tribunals have traditionally been concerned with review of government action, many have been established which consider disputes between private parties and complaints by individuals or groups that are often subjected to discrimination by individuals, corporations or government agents. In this context, the impartiality and independence of administrative tribunals has become increasingly important. However, concerns have been expressed by, among others, the legal community concerning the failure of the various governments of Australia to provide that very independence to tribunal members.

In November 1996 for example, the Federal Minister of Immigration commenced a review of the refugee and migrant appeal system, reportedly because of court delays, prolonged periods of detention for refugees and the performance of some of the 230 tribunal members. It was not known how the performance of the tribunal members will be assessed or what will happen if they "fail". It was reported that the positions on the Immigration Review Tribunal and the Refugees Review Tribunal were being filled with the incumbents uncertain as to the renewal of their terms.

Some State governments have also not provided administrative tribunals with an appropriate degree of judicial independence. The 1992 abolition of the Accident Compensation Tribunal of Victoria serves as an example. In that case, 11 of its judges were not provided with continued tenure. Nine of the judges brought an action claiming re-instatement or, alternatively, compensation. After almost 4 years of legal proceedings, the Government made an offer of settlement which the judges accepted in November 1996. Although the amount of the settlement was undisclosed, the judges had originally been offered compensatory packages ranging from $AUS 126,000 to $AUS 225,000. The judges had claimed that in making their positions redundant, the Government had "purported to abrogate an integral and fundamental element of the system of government ... namely the independence and security of the judiciary" (see *Attacks on Justice, 1993-94* and *1995).*

These and other incidents, together with the proliferation of administrative tribunals and the perceived erosion of the jurisdiction of some state courts, led to the call for assurances that the independence and impartiality of the tribunals will be guaranteed. The Attorney-General for Victoria, the Hon. Jan Wade, responded to these concerns in October 1996, when she introduced a discussion paper entitled "Tribunals in the Department of Justice: A Principled Approach." Its stated purpose is to address the "perceived deficiencies in the structure and operation of department of justice tribunals", including the inappropriate transfer of jurisdiction from courts to tribunals, the lack of independence of tribunal members from the Executive Government and the inappropriate exclusion of judicial review of tribunal decisions.

In the discussion paper, the Attorney-General proposed that two new bodies should be established: the Victorian Civil and Administrative Tribunal (VCAT) and the Victorian Tribunal Council. The Council would consist of the President of the VCAT, a Supreme Court judge, the Deputy President of a Division of the VCAT, nominated by the Attorney-General, an ordinary member of a Division of the VCAT whose Deputy President is not appointed to the Council, three nominees of the Attorney-General and the Legal Ombudsman.

The Council would advertise for and consider all applications and then submit a list of persons suitable for appointment to the Attorney-General. After consultation with the Cabinet, the Attorney-General would put forward a list of potential members to the Governor in Council. There would be three categories of members: judicial members, who would serve for 5-7 years, senior members as full-time members until age 65 and "ordinary members" who would be appointed for five year terms, but could apply for re- appointment.

Judicial members of tribunals could be removed only by the Governor in Council upon address of both Houses of Parliament. Senior and ordinary members could be removed directly by the Governor in Council on the rather broad-based grounds of incapacity, neglect of duties of office, insol-

vency, rudeness to litigants, bias against a litigant or a class of litigants, or failing to perform a reasonable workload. Any removal of a non-judicial member would have to be recommended by a committee comprising of the Supreme Court judge on the Council and two other members of the Council. The Discussion Paper does not address the remedies available to tribunal members if the tribunal is abolished.

The Victorian Section of the Australian Section of the International Commission of Jurists prepared a report concerning the discussion paper. Although the Victorian Section has acknowledged that there may be some benefits from the establishment of the VCAT, it believes those benefits will only be realised if the discretionary and administrative independence of the VCAT is assured. The Victorian Section believes that due to the unwillingness of the Victorian Government to fund a complete judiciary, a "second rung of administrative and other tribunals and review mechanisms" has been developed which have "inferior status to the courts and whose very existence, proliferation, and short-term appointees may have diminished the status of and respect for independent courts and the legal profession."

Among its recommendations, the Victorian Section recommended that all existing tribunal members serve their full terms, VCAT members should be afforded the same guarantees of tenure as members of the judiciary and the government should reconsider the inappropriate exclusion of judicial review of tribunal decisions. The Victorian Section also noted that the proposed management of the VCAT by the Department of Justice, including the budget, is "entirely at odds with the preservation and maintenance of the tribunal's independence and creates confusion as to the tribunal's independence". The Victorian Section recommended that the control of the VCAT be vested in the Supreme Court and that the Chief Justice should be responsible for its administration.

Interference with judicial discretion in sentencing -Victoria

In a radio interview given in February 1996, the Attorney-General accused the judiciary of ignoring legislation which had given them greater powers to impose longer jail terms. In March 1996, she made a pre-election proposal to ask Victorians their attitude toward sentencing. While there is some support for stiffer sentencing in Victoria, others claimed that the proposed survey was yet another attempt by the Attorney-General to erode the separation of powers by interfering with judicial discretion in sentencing.

In August 1996, Ms. Wade made good on her pre-election promise and published a survey in the reported tabloid the *Herald Sun*, shortly after it had reported that a third of all offenders convicted by the County and Supreme Courts received suspended sentences. On publication of the survey, the Attorney-General stated "[I]f the community does not have confidence in the criminal justice system, then members of the community may not report

offences, or may not be prepared to give evidence in court or be prepared to sit on juries".

Approximately 40,000 people, or 1% of the population responded and 3083 randomly chosen responses were tabulated. The Chief Justice of the Supreme Court of Victoria, Justice John Harber Phillips reportedly said in an interview reported in *The Age* on 28 August 1996, that it is the judges who are uniquely situated to have full knowledge of a case. He noted that although a judge must consider the effect the crime had on a victim, the judge must also consider other factors such as the offender's background and other mitigating factors. Other judges expressed the same sentiment.

After the survey was conducted, the Attorney-General announced that she intended to implement a "wholesale revision" of the Sentencing Act in the 1997 autumn session of Parliament. She did add that "I am not going to just pick up the answers to this and translate them into legislation". The Attorney-General also indicated she would take into account the views of the legal profession and the findings of an inquiry by the Victorian Community Council Against Violence.

Constitutional guarantees of judicial tenure - Queensland

In the 1995 edition of *Attacks on Justice*, the CIJL reported that a Parliamentary Committee was still considering a 1993 report by the Electoral and Administrative Review Commission in 1993 which included a recommendation that the Queensland Constitution be amended to provide the same "constitutional guarantees of tenure allowed judges of the Supreme Court for judges of the District Court, any courts of equivalent or higher status, and any courts created in substitution for the District Court". The Commission also recommended that before a judge can be removed, there must be a finding of "misconduct or incapacity ... by an independent tribunal consisting of at least three current or retired judges".

On 1 May 1996, the District Courts Legislation Amendment Bill 1996 was introduced by the new Coalition Government and provided some constitutional guarantees of tenure to Queensland judges. The Act was asserted to on 18 September 1996. Section 15 of the Act provides that "[t]he Governor may remove a judge for incapacity or misbehaviour on the address of the Legislative Assembly". The Act also amended section 28 of the Criminal Justice Act, 1989 which now provides that the Legislative Assembly cannot rely solely on a report from the Criminal Justice Commission, to remove a *Supreme Court* judge from office. Instead, it must appoint a tribunal of serving or retired Judges to inquire into the matter dealt with in the Commission's report in relation to the Judge. While the Act goes some way to improving judicial security of tenure in Queensland, it does so only for Supreme Court judges; presumably, District Court judges can still be dismissed directly by the Governor on the address of the Legislative Assembly.

High Court decisions confirming the independence of the judiciary

In September 1996, the High Court of Australia rendered its decision in *Wilson et al v. Minister for Aboriginal and Torres Strait Islander Affairs and another.* The case directly concerned the separation of judicial and non-judicial powers, which is required at the federal level. The plaintiffs had sought a declaration that the nomination and acceptance of a judge of the Federal Court of Australia to prepare a report under the Aboriginal and Torres Strait Heritage Protection Act, 1984 (the Heritage Protection Act) was incompatible with her commission as a judge.

The High Court of Australia held that the report to be submitted under the Heritage Protection Act was to be "no more than a condition precedent to the exercise of the minister's power, ... performed as an integral part of the process of the minister's exercise of power". The performance of such a function by a judge placed "the judge firmly in the echelons of administration, liable to removal by the minister before the report is made and ... in a position equivalent to that of a ministerial adviser".

Accordingly, the majority of the court determined that the function of reporting under the Heritage Protection Act was one which the Government could not properly give to a judge because it was incompatible with her holding of judicial office.

In a second case, *Kable v. Director of Public Prosecutions* (NSW) (1996) 138 ALR 577, the High Court considered State legislation which empowered a Judge of the State Supreme Court to order the detention of a person for reasons other than for a breach of its laws, if *inter alia* he was 'more likely than not to commit a serious act of violence'. The High Court held that the provision was incompatible with the Commonwealth Constitution and therefore invalid. The decision was seen as strengthening the independence of judges in State courts. The decision effectively prevents State governments to their courts which are incompatible with the exercise by them of federal power.

Lawyers

Public Service Bill, 1996 - Queensland

On 25 July, the Public Service Bill, 1996 was read in the Queensland Parliament. The proposed Bill would allow for the Premier of the state to remove any public office holding officer, including the Chair of the Criminal Justice Commission and the Director of Public Prosecutions (DPP) *without notice or reasons*. Further, anyone dismissed will not have the right to judicial review or to the state industrial-relations system. After Royce Miller, the DPP expressed his alarm, Premier Borbidge announced that the Government intended to draft a regulation exempting

the DPP from the provision. As Mr. Miller pointed out, regulations can be changed at any time, including the one which would exempt the DPP from the provision.

Other concerns focused on the Bill's effect on the Criminal Justice Commission. Its Chair warned that it could "by regulation make provisions of the Act applicable to employees of the CJC" which "would effectively destroy the careful legislative framework by which the CJC is made accountable not to the Government but to Parliament, and by which its independence was supposedly guaranteed".

Legal Practice Act, 1996 - Victoria

The Legal Practice Act 1996, put into place the Legal Practice Board which is responsible for the accreditation of legal professional associations for regulatory purposes and for overseeing the rules of professional conduct made by Recognised Professional Associations (see *Attacks on Justice, 1995*). Although it had been the subject of much concern, the Act confirmed the provision that requires the Board to consist of a judge or retired judge as chair, three elected members of the legal profession and three community representatives appointed by the Government. Members of the legal profession had expressed concern that the three representatives appointed by the Government would permit the Government to control the Board.

The Chief Justice of Victoria, Justice John Harber Phillips also criticised provisions of the Act and in particular, those which restructured the Board of Examiners and the Council of Legal Education. The Board of Examiners is to "consider applications by persons for admission to legal practice and certify to the Supreme Court that an applicant for admission meets all the requirements of the admission rules". Under the proposal, judges could be appointed to the Board, which some viewed as conflicting with their role as members of the judiciary. The functions and powers of the Council of Legal Education include the determination of the qualifications required for admission to legal practice.

Cases

Ken Carruthers, QC {Retired New South Wale Supreme Court Judge and Chair of a Criminal Justice Commission Inquiry}: In March 1996, Judge Carruthers was appointed by the Criminal Justice Commission (CJC) to investigate allegations that Police Minister Russell Cooper and the Premier of Queensland, Mr. Robert Borbidge had signed a secret agreement with the State's police union just prior to a crucial by-election in February 1996. The deal reportedly gave the union extensive influence over police administration.

On 29 October 1996, Judge Carruthers resigned from the Inquiry, after a judicial inquiry into the Carruther's inquiry itself (the Connolly-Ryan Inquiry) was launched by the Government. The Connolly-Ryan inquiry was reportedly authored by Premier Borbidge and Police Minister Cooper themselves, who would of course be investigated by the Carruthers Inquiry. It was reported that the Connolly-Ryan Inquiry was designed to "undercut any adverse finding against Police Minister Russell Cooper and Premier Rob Borbidge from their alleged secret pre-poll deal with the police union". The appointment of Mr. Connolly Q.C., placed the inquiry in an even more suspicious light as Mr. Connolly had already given a report favourable to Police Minister Cooper to Judge Carruthers. Judge Carruthers resigned after the Connolly-Ryan Inquiry warned him that it would use its powers to compel him to produce evidence about his investigations into the deal with the police union of Queensland. Such powers could have ultimately led to the arrest of Judge Carruthers.

When announcing his resignation, Judge Carruthers said that "[t]he actual independence of my inquiry which could not hitherto be questioned had been fatally compromised (and) the perception of independence which had been critical had been irretrievably lost". The Chair of the CJC, Frank Clair advised that "...despite his resignation, the investigations will continue...".

The incident led to a motion for a vote of no-confidence on 31 October 1996, which the Government successfully resisted. The Borbidge Government reacted to the resignation of Judge Carruthers saying that the Connolly-Ryan Inquiry had been established pursuant to an election promise to review the CJC and that it was "wholly independent."

Angelo Vasta {Judge of Queensland Supreme Court}: Dismissed from the bench in 1989, calls for a review of his removal were made in 1995 by the Australian Section of the ICJ, together with the Federal Minister for Veterans' Affairs. (see *Attacks on Justice, 1995)*. In August 1996, Attorney-General Beanland was considering a parliamentary re-examination of the dismissal and suggested using the Legal, Constitutional and Administrative Parliamentary Committee to reconsider the removal. At the end of 1996, the matter was still being considered.

GOVERNMENT RESPONSE TO CIJL

On 19 August 1997, the Permanent Mission of Australia to the United Nations in Geneva, forwarded to the CIJL the response of various federal and State departments to CIJL's request for comments. Some comments included clarification or additional information. Those were incorporated in the text. In addition, the departments made the following comments:

THE FEDERAL ATTORNEY GENERAL'S DEPARTMENT - CIVIL LAW DIVISION

"... There is no strict demarcation between the legislative and the executive powers of the federal government. However, the separation between the Federal Judicature on the one hand, and the Parliament and the Commonwealth Executive on the other, is strictly observed.

...[T]he Commonwealth Constitution (but not the State constitutions) embodies the principle of the separation of powers ... [J]udges of federal courts enjoy constitutionally entrenched tenure, and protection against reduction of remuneration, both of which are designed to ensure their independence... (T)he discussion of the arrangements under which judges are appointed by the Governor-General or State Governor gives unwarranted emphasis to merely formal arrangements (the real power being with the respective elected governments).

.. [I]t should be noted that the Commonwealth Government has decided in principle to amalgamate a number of the existing federal merits review tribunals into a single tribunal and has reiterated its commitment to the independence of merits review tribunals."

THE DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AFFAIRS

" ...The review of the effectiveness and efficiency of the immigration decision making process addressed delays in the refugee and migration review systems, including timeliness and productivity in the Tribunals, and the increasing numbers of applicants proceeding to the Courts after merits review. The review was conduced by the Principle Members of the Immigration Review Tribunal (IRT) and the Refugee Review Tribunal (RRT) and senior members of the Department of Immigration and Multicultural Affairs from May -September 1996.

RRT Members with terms of appointment expiring in September 196 and March 1997 were reappointed in September 1996 until June 1997. In March 1997 the Minister for Immigration and Multicultural Affairs decided to conduct a selection process to fill RRT vacancies expected to arise in June and September 1997. A full and fair selection process was conducted and resulted in 19 existing Members being reappointed and 41 new Members being appointed in May and June 1997. IRT Membership has not changed. In November 1996 there were 86 Members of the IRT and RRT, including the executive Members."

THE FULL RESPONSE OF ATTORNEY-GENERAL JAN WADE MP - VICTORIA DATED 31 JULY 1997

"I refer to your letter of 17 July to Mr ... in relation to the draft 1996 Annual Report of the CIJL entitled "Attacks on Justice: The Harassment and Persecution of Judges and Lawyers.

Those parts of the draft relating to Victoria are, in many respects, false or misleading, incomplete and based upon inaccurate newspapers reports.

In Victoria there have been no "Attacks on Justice" and there has been no "Harassment and Persecution of Judges and Lawyers." The contents of those parts of the draft relating to Victoria are simply directed to those topics. However, they include serious attacks upon Victoria's two most senior lawyers. For example:

A. Conflict of interest in contempt proceedings.

1. This topic is far removed from the subject-matter described by the title of the report.

2. There is no basis for any criticism of the conduct of the Attorney-General in determining not to institute proceedings for contempt of court against BHP. Under the relevant legislation she can bring such proceedings if so advised by the Solicitor-General. He advised against the institution of contempt proceedings because the conduct in question plainly did not constitute contempt.

3. The Solicitor-General was required by statute to provide to the Attorney-General on the occasion in question. It has never been suggested that his advice was influenced by external considerations and the broad consensus of opinion in the legal community is that the advice given was clearly correct.

4. ...

5. The complaint to the Bar council concerning Mr. Graham's conduct was subsequently dismissed by its Ethics Committee.

B. Independence of administrative tribunals.

1. Members of the Accident Compensation Tribunal who lost office when the Tribunal was abolished initially accepted payments of compensation in amounts ranging from A$126,538 to A$246,201. Proceedings instituted by none of those members were settled under an agreement pursuant to which they together agreed to accept a further payment of A$1.5 million in compensation, such agreement being disclosed at the time.

2. The proposals for the establishment of the Victorian Civil and Administrative Tribunal were received with approval by the judiciary and the legal community. If implemented, they will establish in Victoria a tribunal system which will enjoy a status and independence superior to that of any other State or Territory.

3. The growth of administrative review tribunals in Victoria and elsewhere, far from being caused by alleged funding shortfalls, is in fact a response to the desire of the courts not to be involved in the exercise of the executive rather than judicial functions.

4. The establishment of additional tribunals in Victoria, which occurred primarily in the 1980s, was a response not to alleged funding shortages, but to the perceived slowness and formality of the courts.

5. The Victorian Government has provided, and will continue to provide, a proper level of funding for the courts.

C. Legal Practice Act

1. The members of the Legal Practice Board appointed by the Attorney-General are not in any way representatives of the Government. They are legally bound to act independently having regard to the functions of the Board and have already demonstrated that independence.

2. The Board of Examiners does not include and never has included any members of the judiciary."

THE DEPARTMENT OF JUSTICE- QUEENSLAND:
CONCERNING CONSTITUTIONAL GUARANTEES OF JUDICIAL TENURE - QUEENSLAND

"... [The District Courts Legislation Amendments Act 1996,] amended section 28 of the Criminal Justice Act 1989 to provide that the Legislative Assembly cannot rely solely on the report from CJC to remove a Supreme Court *or District Court* judge from office. [Editor's note: Emphasis in the original] However the report suggests that this protection is limited to Supreme Court judges and states "presumably, District Court judges can still be dismissed directly by the Governor on the address of the Legislative Assembly." District Court judges cannot be dismissed directly by the Governor on the basis of a CJC report. The Legislative Assembly must appoint a tribunal of serving or retired judges to inquire into the matter before taking any further action."

BAHRAIN

The State of Bahrain is a hereditary monarchy ruled by the head of state, the Amir Sheikh Issa bin Sulman Al-Khalifa who governs through an appointed cabinet composed, for the most part, of the Al-Khalifa family members. According to the 1973 Constitution of Bahrain, adopted two years after its independence from Britain, the Bahraini political system is based on the principle of separation of powers. Legislative power is supposed to be vested in the Amir and the National Assembly which is made up of the Cabinet and 30 other members elected by popular vote. However, the last National Assembly was dissolved in 1975 by Amiri Decree N° 14 and another had not been re-elected by the end of 1996. This situation violates Article 65 of the Constitution, which states that if the National Assembly is dissolved, elections for a new Assembly shall be held within two months from the date of dissolution, and until new elections are held, the dissolved Assembly is to retain its complete constitutional authority. However, Article 65 of the Constitution was also suspended along with other provisions relating to parliamentarian life although Article 108 prohibits the suspension of any articles of the Constitution except in the case of a state of emergency. The Amir has since been ruling unconstitutionally by decree.

In late 1992, limited political reform introduced an appointed 30 member Consultative Council (Shura Council), the composition of which was increased to 40 members in September 1996. The Shura Council's authority was restricted to providing its opinion on laws drafted by the Council of Ministers before they are issued by the Amir. It does not have the National Assembly's constitutional and legislative authority.

In November 1992 and October 1994, petitions calling for the restoration of the 1973 Constitution and the dissolved Parliament were at the root of significant friction, largely between Shia opposition and the Government. The circulation of these petitions and the arrest of cleric Sheikh Ali Salman in late 1994, created unrest which continued to increase. The Government did not accede to any of the opposition's demands, and instead responded with arbitrary arrests and mass repression of opponents, particularly from the Shia community, through its security forces. Clashes and riots led to the arrest and arbitrary detention of hundreds of opposition activists. On 26 March 1996, Isa Ahmad Hassan Qanbar was executed after being convicted of murdering a police officer. His execution was the first in 20 years. Also in March 1996, death sentences were issued against three political defendants convicted of a firebomb attack on a restaurant. The government further tightened its grip in an effort to control the unrest by extending the jurisdiction of the State Security Courts to crimes formerly dealt with by the ordinary courts (see State Security Law and Security Courts, below). Security forces held over 3000 persons in detention in 1996, including some who were arrested, released and then arrested again. At the end of the year, the number of those held without charge was estimated at 1500.

THE JUDICIARY

Chapter IV of the Constitution describes the judiciary as being independent. The reality however is far different.

The courts are comprised of civil, Shari'a (Islamic) and military courts. Civil courts adjudicate civil, commercial and criminal matters as well as personal status matters for non-Muslims. They are organised in three levels: the Supreme Civil Court of Appeal which also sits as a State Security Court, the High Civil Court and lower courts. Shari'a courts have jurisdiction over personal status matters for Muslims. Military courts deal with military crimes that arise within the army and the security forces. Their jurisdiction can be extended, however, to civilians in a state of emergency. There is no administrative court system in Bahrain, and according to the Judiciary Act of 1971, courts are forbidden to review acts of State.

The High Council of the Judiciary which is provided for in Article 102(d) of the Constitution was never established. According to Article 29 of the Judiciary Act, the President and the judges of the Supreme Civil Court of Appeal as well as the President of the High Civil Court are appointed and dismissed by Decree issued upon the recommendation of the Head of the Department of Justice. Judges of the High Civil Court and of lower courts are appointed or dismissed by decision of the State Council upon the recommendation of the Head of the Department of Justice. Although Article 27 of the Judiciary Act states that foreign judges can be appointed in exceptional circumstances only, a significant number of judges in Bahraini courts are of a foreign origin and often Egyptian. The Court of Cassation consists of four judges, three of whom are Egyptian (the President is Sheikh Khalifa bin Mohammad Al-Khalifa). Many of these judges are appointed on limited term contract and do not enjoy security of tenure. The result has often been decisions favourable to the government, apparently in an effort to ensure renewal of their contracts.

STATE SECURITY LAW AND SECURITY COURTS

The State Security Law of 1974 allows the Minister of Interior to order the detention of a person who committed a security related infraction for a maximum of three years without trial. Security related infractions are defined very broadly as comprising acts, declarations, activities or contacts inside and outside the country which are considered to be a threat to the internal or external security of Bahrain, to its religious and national interests or to its political, social or economic structure etc. Persons detained under this Law can appeal against the detention order three months after their arrest, and every six months thereafter if the appeal is rejected. In practice, however, persons detained under this act are not informed of their right to appeal against the decision of their detention. Government security forces used the State Security Law regularly to detain persons engaging in anti-regime activities and those attempting to exercise their rights of free speech, association or other rights in opposition to the Al-Khalifa regime.

The State Security Courts, which were established in 1975, consist of three courts with a majority of Egyptian judges sitting. Two of these courts are presided over by members of the ruling Al-Khalifa family. Consequently, separation of powers and the conventional safeguards associated with the appointment of judges are disregarded in these courts.

On 10 March 1996, the jurisdiction of the State Security Courts was extended by Amiri Decree N° 10. Previously, according to Decree N° 15 of 1976, the State Security Court was only vested with jurisdiction over matters referred to in Articles 112 to 184 of the Penal Code which relate to offences affecting state security. Decree N° 10 of 1996 however, transferred the following additional offences to State Security Court jurisdiction:

- crimes under Articles 277 to 281 inclusive of the Penal Code concerning damage to the public caused by fire and explosives, including setting fire in a way that may expose the life or property of people to danger and using or attempting to use explosives in a manner which may expose the life or property of people in danger;
- crimes defined under Articles 220, 221, 333 and 336 to 340 concerning assault of any kind on public servants;
- crimes under Article 18 of Decree N°. 16 of 1976 concerning explosives, arms and ammunitions; and
- any crime linked to another crime under the jurisdiction of the State Security Court.

This expansion of the State Security Court jurisdiction is worrisome given the fact that the Court has the authority to sentence defendants to death and life imprisonment on the basis of confessions extracted during *incommunicado* detention and reportedly often under torture. Defendants often have no opportunity to prepare a defence and they may be publicly pronounced guilty by the State before the trial begins.

In addition to these concerns, the procedures of the State Security Court continued to fall far short of international standards which are clearly defined by the United Nations and have led to various violations of human rights, including:

- the decisions of the State Security Court are not subject to any appeal or challenge which is of particular concern in instances of sentences of death or life imprisonment;
- from the time of arrest until the first day of trial, defendants are denied access to legal counsel;
- the State Security Court holds its trials *in camera* as provided for in Article 2 of the 1974 State Security Law;
- the State controlled media publishes the names of some defendants as

guilty before the trial begins, violating the right to the presumption of innocence until proven guilty according to law;

- the primary source of evidence used for convictions is often obtained from confession obtained while in custody despite credible reports of confession extracted under torture; and
- some individuals remain in prison after their sentence has elapsed (by more than a year sometimes), and some have been kept in detention even though found innocent by the State Security Court.

LAWYERS

The Bahraini Legal Profession Statute was issued by Amiri Decree on 8 December 1980. Two decisions issued by the Minister of Justice and Islamic Affairs complement the law and specify the way it should operate.

Article 19 of the Statute guarantees the right of lawyers to appear before courts, police stations and judicial commissions to defend their clients. Article 79 of Code of Criminal Procedure states that "an arrested or detained person must be allowed to confer with a lawyer no later than 48 hours after arrest". In reality however, lawyers are routinely denied access to their clients until the first hearing, which in political cases may be delayed until months or even years after arrest. Often, the trial has begun and the client has already confessed. If access to clients is allowed, it is often within the sight and hearing of policemen or the security services.

Lawyers are subjected to various forms of harassment, including lengthy periods of preventive detention for activities relating to the performance of their professional duties, and may be subject to expulsion or prevented from leaving the country. Lawyers are also often denied access to necessary documentation and their own records may be subject to illegal searches and seizures which is contrary to Article 23 of the Statute. Due to this harassment by the Government, many lawyers refrain from taking political cases, and do not demand access to investigation sessions.

The legal profession in Bahrain suffers from strong Government control, even within the confines of the law. Highly restrictive laws of association inhibit Bahraini lawyers in performing their professional duties and promoting the cause of justice. The law does not contain any provision establishing the right of lawyers to participate in public discussions of matters concerning the law, the administration of justice, or of the promotion and protection of human rights. The government does not inform citizens of their right to legal aid and the Bar is not allowed to do so. In almost all respects, the right to legal aid is an empty right.

CASES

Ahmad Al-Shamlan {Lawyer}: Mr. Shamlan is the attorney for many prisoners prosecuted in connection with the unrest. Ahmad Al-Shamlan was arrested on 7 February 1996, a day after he was scheduled to have spoken at a seminar entitled "Democracy and Shura" which was cancelled by the intelligence department. He is a member of the Committee for the Popular Petition which launched the 1994 petition calling for the restoration of the 1973 Constitution and the dissolved Parliament. His trial was heard on 16 April 1996 and he remained in detention until 22 April when he was released pending the verdict of the State Security Court. On 4 May 1996, the State Security court held that the Government had failed to prove the charge of "sabotage and arson," the main charge against him.

Abdallah Hashem {Lawyer}: Mr. Hashem was summoned and questioned by the Intelligence Department on 5 March 1996 and accused of "agitation and contacting outside organisations". The latter referred to an interview Mr. Hashem gave to BBC Arabic Radio on the political situation in Bahrain.

Abdulshahid Khalaf {Lawyer}: Mr. Khalaf was summoned and questioned by the Interior Ministry in April 1996 and warned that he might face the same punishment as Ahmad Al-Shamlan if he continued to voice his concerns about the manner in which the government is dealing with political prisoners.

Abdul Amir Al-Jamri {former Judge of the Shia religious court}: Judge Al-Jamri was a former member of the National Assembly and a member of the group that signed the petition of November 1994 demanding the restoration of the Constitution and the dissolved National Assembly. He was re-arrested on 21 January 1996 after having been released on 25 September 1995. After his arrest, he was detained in solitary confinement and had to be transferred to the hospital three times due to poor prison conditions. Judge Al-Jamri remained detained at the end of 1996 without any charge. He had been refused access to lawyers and his family was only able to see him for the first time in September 1996.

GOVERNMENT RESPONSE TO CIJL

On 26 May 1997, the Government of Bahrain responded to the CIJL's request for comments. The Government stated:

> "The Government of Bahrain fully supports the aims of the CIJL in promoting the cause of universal rights to justice through the inviolability of judges and lawyers and the Rule of Law, and therefore welcomes this opportunity to address in contemporaneous record the principal issues raised in the CIJL's 1996 summary Report on Bahrain.

The contents of the Report should be viewed against the background of the thoroughly discredited Hizbollah led terrorist campaign of violent destabilisation which Bahrain experienced from late 1994 through 1996.

The Government has succeeded in containing the violence by rigorous application of the Rule of Law, and despite continuing terrorist propaganda to the contrary, the situation in Bahrain is quite normal.

The issues apparently raised in the Report are propaganda illusions typical of the orchestrated disinformation which has been disseminated to the international Human Rights movement in support of the Hizbollah campaign.

The central issue is not the question of the independence of judges or lawyers, but the fact that the State Security Laws are effective anti terrorist measures and therefore unsurprisingly the subject of much terrorist propaganda attempting to discredit them, for example by attacking the credibility of the judiciary who administer such laws. The fact remains that without the State Security Laws the Government would have no lawful authority to combat acts of terrorist and political violence against the Bahrain community. This propaganda theme can be expected to continue notwithstanding the failure of the campaign of violence.

Although space does not permit a full discourse here, in addressing the alleged issues it must be borne in mind that Bahrain's Jurisprudence is inquisitorial and presumptions of innocence are not subject to or influenced by public opinion. The administration of justice, the independence of the judiciary and lawyers, and the due processes of law, are all codified in detail in the country's domestic legislation, fully in accordance with its Constitutional requirements and guarantees based on the classical doctrine of separation of powers as well as international norms.

For the record, the judiciary is fully independent and not interfered with in any way. Lawyers have never been nor will be persecuted or harassed for carrying out their professional duties and the allegation that they may be expelled or prevented from leaving the country for doing so is simply mischievous and nonsensical.

Issues of detention, trial and release are all determined by due process of law and none is denied access to lawyers nor denied their right to legal aid. Any allegation that the Bahrain Bar Association is not allowed to discuss or inform citizens of their rights to legal aid is absurd invention.

The following are the facts of record:

No-one has been executed on conviction by the Security Court, nor are any capital convictions executable, without review by higher authority.

The March, 1996 death sentences were for the wilful murder of seven Bangladeshi workers.

Only judicial confessions are admitted in evidence.

Article 79 of the 1996 Code of Criminal Procedure does not mention lawyers.

Article 26 of the 1971 Judiciary Law does not deal with foreign judges.

Al Shamlan was charged and acquitted of possessing materials for inciting terrorism, not for sabotage and arson.

Al Jamri was dismissed as a judge for political activism incompatible with the doctrine of separation of powers and his position as a judge. He is also the spiritual leader of Hizbollah-Bahrain, which is responsible for the terrorist violence in Bahrain. The so-called Petition was merely a propaganda device used as part of the Hizbollah terror campaign.

Neither Hashim nor Khalaf was interviewed concerning the conduct of their professional duties but for political agitation likely to result in violence. Neither was arrested or detained.

This Response necessarily cannot address every detail in the Report and the Government wishes to emphasise that this does not mean that any of the allegations are admitted or true. But the Government does wish to stress that the basic issue is a terrorist inspired attack on the Government's lawful authority to combat terrorism.

The Government is pleased to have had the opportunity to respond as a means of promoting international understanding, and appreciates the CIJL's efforts to identify the real human rights issues concerned."

BELARUS

After the collapse of the Soviet Union, Belarus declared its independence on 24 August 1991 and later joined the Commonwealth of Independent States (CIS). On 1 March 1994, the Constitution dating from the Soviet era was replaced. Although the new Constitution declared Belarus a democratic state based on the Rule of Law, it gave wide powers to the President, therefore distorting the balance of powers in the country. In July 1994, Alexsandr Lukashenka was elected president. Since his election, President Lukashenka has relied on Presidential Decrees to rule, expand his powers and contain public opposition.

In April 1995, President Lukashenka called a referendum to approve a number of proposals, which curtailed legislative power and increased his own authority. The amendments included assigning the Presidency the power to dissolve parliament and resume a strong economic relationship with Russia. Although the Parliament rejected all but one of President Lukashenka's proposals, the electorate supported his reforms on 14 May 1995, including his right to dissolve parliament in the event of "systematic or gross violation of the Constitution".

The President also issued a decree in April 1995 calling on the authorities (the KGB) to prevent unauthorised rallies and propaganda. This led to the arrest of more than 200 demonstrators in an April 1995 rally protesting the manner in which the President's liberal use of referendums. The arrested persons were given short term prison sentences by a judge who came to their cells to sentence them. Furthermore, the lawyer of one of the arrested opposition leaders was forced to sign a statement that she would not reveal the trial proceedings which were held behind closed doors.

ELECTIONS

The first round of Parliamentary elections were held on 14 May 1995, the same date President Lukashenka's proposals were accepted by a referendum vote. By law, there must be a voter participation rate of a least 50 percent before a seat can be filled in any one district. Although the overall participation rate was 52.4 percent, some districts failed to produce a 50 percent participation rate and as a result, seats in those districts could not be filled. In the end, only 119 deputies were elected to the 260 available seats.

The low voter turnout was attributed, at least in part, to President Lukashenka's tactics. He himself said that he would not vote in the on-going parliamentary elections, making it even more apparent that he did not feel the need for a Parliament at all. The election campaign was heavily restricted, both through the Law on Elections, which allowed nominees to spend no more than the equivalent of $US 50 on their campaign, and through the restricted media coverage and censorship. On 30 May 1995, the head of the delegation of observers from the Council of Europe reported that the elections had been neither free nor fair.

The electoral law allowed for elections to be repeated continually until sufficient seats are filled, and in a final run-off election in December 1995, after several rounds of elections, the number of deputies was brought to a total of 198.

Prior to the final electoral run-off, and although its term had expired, the old Parliament announced that it would retain and continue its functions until a new Parliament was in place. It continued to pass legislation and attempted to amend the electoral law to lower the number of deputies required to form the Parliament. It also declared that new elections would be held in November 1995 to ensure a proper quorum was attained. President Lukashenka however, did not accept the legitimacy of the old Parliament, refused to sign any laws passed by it and instead approved budget revenues and expenditures and issued Presidential decrees that reportedly exceeded his authority and intruded upon the competence of the Parliament.

Parliament then resorted to the Constitutional Court. Throughout September and October 1995, the Court considered the legitimacy of 14 Presidential decrees and ruled that 11 of them were unconstitutional, and therefore invalid. On 11 October 1995, the Constitutional Court specifically held that the old Parliament was a legitimate body until valid elections were held and confirmed. It also confirmed a legislative amendment which lowered the minimum voter turnout from 50 per cent to 25 per cent.

President Lukashenka ignored the Court's decisions. He stated that he saw no need for a Constitutional Court, called for its dissolution and told the Chairman of the Court that if he would not resign voluntarily, he would be forced to do so (see **Chief Justice Valeriy Tikhinya,** below). On 23 November 1995, the Constitutional Court suddenly reversed its ruling with respect to the election amendment.

Thereafter, in order to avoid having his decrees overruled by the Constitutional Court, President Lukashenka began to make use of presidential rulings instead, which cannot be brought before the Court. In December 1995, he issued a decree directing the government and local authorities to ignore the Constitutional Court's rulings. In April 1996, the Constitutional Court declared this decree unconstitutional.

Constitutional Amendments

On 9 August 1996, President Lukashenka again announced that there would be a referendum on 7 November, regarding *inter alia* significant amendments to the Constitution which would affect the balance of power between the Parliament and the Constitutional Court on the one hand, and the power of the Presidency on the other. Parliamentary deputies were alarmed and added their own questions to the referendum which they requested take place on 24 November 1996. The two competing amendments came before the Constitutional Court on 4 November 19956 which ruled that the

amendments were so fundamental that the document could be regarded as a new constitution. According to Belarusian law, a new constitution cannot be approved by referendum. The Court also stated in its ruling that the referendum would have only an advisory character. President Lukashenka in turn issued a decree saying that if the amendments were approved, they would be legally binding.

Despite the Parliament's decision to delay the holding of the referendum until 24 November, voting began on 9 November. When finished on 24 November, 70.5 percent voted in favour of the new draft constitution. The draft itself was not made available to the public until 12 November. This meant that very few people had actually seen the document on which they voted. President Lukashenka announced that the referendum was binding. He immediately proceeded to establish a new legislature called the House of Representatives, which according to the amended Constitution holds two chambers. The "old" Parliament claimed continued legitimacy, thus creating a situation involving two rival Parliaments.

The new amendments, adopted in conflict with the 1994 Constitution and by a non-binding referendum, involved numerous changes with alarming consequences. The system of checks and balances between the executive, legislative and judicial powers was distorted and President Lukashenka gave voice to his own theory of separation of powers, according to which the executive, legislative and judicial authorities all stem from the Presidency and therefore are subject to the President's control. The amended Constitution describes the President as "guarantor of the Constitution and of the human and civil rights and freedoms". It is feared this broad wording could allow the President to do virtually anything, allegedly in fulfilment as the "guarantor of the Constitution..." The President is to be elected for a five year term, but President Lukashenka considered his term to have begun with the amended Constitution, thus extending his term by two years. Further, the President is immune from civil action and criminal prosecution, and the provision does not make it clear if the immunity will continue even after the end of the Presidential term. Former Presidents will automatically become life time members of the Senate (the upper chamber of the House of Representatives).

In relation to the legislative power, the most obvious attempt of the President to control this branch was his new authority to appoint one third of the members of the Senate. The effect of this is further aggravated by the fact that many important functions of the legislative power now lie only with the Senate, including that several checks on the President's power only can be performed after a qualified majority of the Senate approves them.

Another encroachment on the legislature is the President's power to issue decrees "on the basis and in agreement with the Constitution" which "are binding on the whole territory of the Republic of Belarus". The amended Constitution does not outline any limitations on the scope of such decrees. A final example of the vast powers the amended Constitution vests

in the President is that he can introduce a state of emergency for as little as "disorders accompanied with violence of threat of violence from a group of persons and organisations as a result of which a threat arises to lives and health of people..." Although the Senate must approve the decision, the provision creates potential for the President to call a state of emergency when, for instance, an opposition group holds a demonstration.

THE JUDICIARY

Although the amended Constitution establishes the independence of the judges, consistent interference from the President has undermined the judiciary.

The court structure is still based on the former Soviet model and comprises district courts, regional courts and a Supreme Court. Judges of the Supreme Court, including the Chair are appointed by the President, upon the consent of the Senate, one third of which is appointed by the President himself. The amended Constitution also seems to give the President power to appoint judges of all courts of general jurisdiction. The amended Constitution fails to provide judges with life tenure; in fact, the President can dismiss the Chairman of the Supreme Court, thus completely undermining any potential security of tenure. All other judges can be dismissed on any basis determined by law, a provision which also gives the President the possibility to manipulate the judiciary through his power to render decrees.

The executive continued to ensure judges remained dependent on it in various practical matters also affects their independence. For instance, judges must rely on the Ministry of Justice for upholding the court infrastructure and on local executive authorities for their personal housing.

President Lukashenka permitted the Constitutional Court to retain the competence to control the conformity of normative acts in relation to the Constitution. Its independence and competence have however been severely restricted by the amended Constitution. To consolidate the President's grip on power, six of the 12 judges who form the Court are appointed directly by the President, one being the chair. The other half of the Court is elected by the Senate, which itself is dependant on the President. Their term of office is for eleven years only. The Constitutional Court can no longer on its own initiative review the validity of acts of the President, the legislature, the Supreme Court and the Cabinet, nor is it able to consider cases of impeachment. Those entitled to appeal to the Constitutional Court have been narrowed to the President, the legislature, the Supreme Court and the Cabinet, thus excluding the possibility for individuals and NGOs to ask the Court to review the constitutionality of legislation.

Pre-trial Detention

The Criminal Procedure Code makes it possible for the police to detain a person suspected of a crime for three days without a warrant. Prosecutors on different levels (district, regional and republic) can order that a detainee be kept in pre-trial detention up to three months, with possible extensions to a maximum of 18 months. Because prosecutors' decisions may overlap, pre-trial detention has been known in some cases to last for more than three years, sometimes even without the detained knowing what are the charges against him or her. The requirement that a judge must initiate a trial within three weeks time from the filing of charges is also meaningless. Because courts are overloaded, the time limit often expires and the defendant may have to wait several months before his or her case is brought before the court. Criminal cases, including capital cases, are tried by a bench of three judges, where only one judge is professionally trained, the other two being lay judges who usually serve for four weeks every two years. The verdict is passed by majority vote. Cases involving capital punishment are automatically heard at a higher level than the first instance, thus reducing the opportunities to appeal such cases.

Cases

Mikhail Pastukhau and two others {Judges of the Constitutional Court}: In the beginning of December 1996, Judge Pastukhau and two other judges of the Constitutional Court resigned in protest to the amended Constitution. They believed that the existence of a Constitutional Court had been rendered meaningless under its provisions.

Vasily Sholodonov {Chief Prosecutor}: Mr. Sholodonov resigned from his post on 6 May 1995. It is not clear what made him step down. He was officially accused of making it too easy for foreigners to adopt children, but some suggested that this was only a pretext for getting rid of him after he had become increasingly critical of decisions made by the Belarusian authorities.

Valeriy Tikhinya {Chief Justice of the Constitutional Court}: During 1995 and 1996, President Lukashenka repeatedly called for the resignation of Chief Justice Tikhinya, because the Constitutional Court had ruled that a number of Presidential decrees were contrary to the Constitution (see above).

BELGIUM

Belgium is a Federal state composed of Communities (French, Flemish and German speaking) and Regions (Walloon, Flemish, *bruxelloise* and non-Belgian). The King is vested with the executive power, subject to the Constitution and appoints at least 15 members to the Council of Ministers.

Legislative power is exercised collectively by the King, the Chamber of Representatives and the Senate. The 150 members of the Chamber of Representatives are directly elected. Sixty one members of the senate are elected in different proportions by the electoral colleges, the Councils of the Communities while the remaining ten are designated by the elected senators themselves. The King appoints and dismisses all ministers without the advice of the Chamber of Representatives. In 1995, a coalition government formed by the Christian Democratic Party and the Socialist Party governed.

THE JUDICIARY

A new Constitution was adopted in 1994. Article 40 provides that judicial decision and judgments "are enforced in the name of the King" in his capacity as head of the Executive and Article 151 of the Constitution permits the King to nominate the judges of the lower courts and the judges *(conseillers)* in the Courts of Appeal from a list drawn up jointly by the judiciary and the legislator. This power became a focal point in the Government's proposals for sweeping judicial reform born out of the public's outrage over the events of the "Dutroux affair" (see below.) The

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

COURT OF CASSATION

The Court of Cassation is the highest court in Belgium. It is composed of a chamber for civil and commercial matters, a chamber for criminal and police matters, and a chamber which hears cases from the Labour Courts and Tribunals. The regulations concerning the Court of Cassation are established by the King on the opinion of the First President of the Court, the Procurator General, the Chief Court Clerk and the President of the Order of Advocates to the Court of Cassation. Its jurisdiction is limited to the review of cases based on an error of law. Judges *(Conseillers)* of the Court of Cassation are appointed for life by the King from two lists of two candidates, one by the Court of Cassation itself and the other alternately submitted by the Chamber of Representatives and by the Senate. The lists are made public at least 15 days before the appointment is made.

Cour d'Assises, Courts of Appeal, Labour Courts

The *Cour d'Assises*, the Courts of Appeal and the Labour Courts are the higher courts.

There are five Courts of Appeal in Belgium, and have a civil, criminal and juvenile chamber. A First President, a President of each chamber and Conseillers compose the Courts of Appeal. The Labour Courts sit in the regions of Courts of Appeal. The Labour Courts are comprised of a First President, Presidents of the chambers, *conseillers* and *conseillers sociaux*. The regulations concerning the Court of Appeal and the Labour Courts are established by the King on the advice of the First President of each of the courts, of the Procurator General, and the Chief Court Clerk, and the assembly of *bâtonniers* of the bar associations of the place where the Court of Appeal sits and the presidency of the First President of that Court. The *bâtonniers* advice the First President of the Court in writing. The judges of the Courts of Appeal (*Conseillers*) are appointed for life by the King in the same manner as those who are appointed to the Court of Cassation except the two lists of nominees are submitted by the Courts of Appeal and the other Provincial Council or the Council of Brussels-Capital, as the case may be.

The *Cour d'Assises* sits in each province and the administrative district of the Brussels-Capital. It hears criminal cases referred to it by the Chamber of Accusations. It is composed of a President and two assessors who sit with a jury. The President of the *Cour d'Assises* is a member of the Court of Appeal. The assessors are designated for each case by the President of the Court of First Instance.

District Administrative, Commercial and Labour Tribunals, and Tribunals of First Instance

District Administrative, Labour and Commercial Tribunals and Tribunals of First Instance (Civil, Criminal and Juvenile) exist at the lower levels. The District Administrative Tribunal is composed of the Presidents of each of the Labour Tribunals, the Tribunals of First Instance and the Commercial Tribunals. The Labour Tribunals are composed of at least two chambers, each of which is presided by a judge and also composed of two *juges sociaux*. The Commercial Tribunals have at least one chamber and cases are heard by one judge of the tribunal and two *juges consulaires*. The *juges sociaux* and *juges consulaires* are lay persons who represent different socio-professional groups of the Belgian society. The Tribunals of First Instance are composed of civil, penal and juvenile chambers.

The President and Vice-Presidents of the Tribunals of First Instance are appointed for life in the same manner in which the judges of Appeal Court Judges are appointed. The judges of these tribunals are nominated directly by the King. All judges are required to meet specified qualifications and pass an examination before being appointed.

In accordance with the *Code d'instruction criminelle, Juges d'instruction* within the Criminal Tribunal of First Instance investigate criminal allegations and compile the facts and evidence both in favour of and contrary to the defendant's case. If the *juge d'instruction* is of the opinion that the facts indicate no crime has been committed, the judge will declare there is no need for a trial. Otherwise, the judge will send the file to the appropriate court for prosecution.

"Additional Judges" are designated to each of the Courts of Appeal, Labour Courts, Tribunals of the First Instance, Labour and Commerce. These judges are called to hear cases when a judge is absent, ill or incapacitated. They are appointed for life and the majority of them are lawyers, law professors or notaries. Local lawyers report that the use of acting judges has complemented the judicial structure. In fact, the Minister of Justice proposed to appoint Acting Judges to expedite cases waiting to be heard by the Courts of Appeal: in 1996, it was reported by local lawyers that there was a delay of at least three years before an appeal could be heard.

Discipline of Judges

Sanctions against judges who fail to perform their duties or who harm the dignity of their character are subject to a range of sanctions including, a warning, censure, suspension for 15 days to one year and removal. Only the Court of Cassation is able to remove judges. The Courts of Appeal are able to otherwise discipline *Conseillers,* judges of the Tribunals of First Instance, the Commercial Courts, the *juges consulaires,* and the Justices of the Peace and of the Police Tribunal. The Labour Courts may discipline, (except for removal) the *Conseillers, Conseillers Sociaux, the* Judges and the *juges sociaux.*

Discipline procedures are carried out by the competent authority. In the case of discipline exercised by the Court of Cassation, the Courts of Appeal and the Labour Courts, the procedure is conducted in chambers, but the decision is pronounced publicly. All proceedings must be heard and are appealable. All decisions made must be reported to the Minister of Justice through the Procurator General.

The "Dutroux Affair"

The Belgium judiciary was in crisis for much of 1996, as a result of an investigation carried out into a paedophile ring. In August, two young girls were found still alive by the investigating magistrate, **Jean-Marc Connerotte,** in the basement of a house owned by Marc Dutroux who had been arrested on 15 August in connection with the disappearance of another girl. The bodies of two young girls were found in the backyard. The two girls starved to death when Dutroux was in police custody during the first part of 1996.

Public outrage ensued when it was revealed that Dutroux had been released in 1992 after serving only three years of a 13 year sentence for the

rape of several other young girls. It was also discovered that in fact, the police had been present at the house on more than one occasion when the two deceased girls were being held in the basement. Police documents then indicated that they had been told in 1993 that Dutroux was building cells in one of his houses, allegedly to hold children before sending them overseas and failed to act. Documents also revealed that regional police intentionally failed to communicate with one another. Some members of the police forces reportedly suspected that Mr. Dutroux had been involved in the 1991 assassination of Belgian businessman and politician Andre Cools and that corrupt police officers who were also involved in the assassination would warn him if information was shared.

Eventually, at least ten suspects were arrested in connection with the murders and kidnappings of the girls, including a police officer who was charged with theft, fraud and forgery but was also suspected of protecting the paedophile ring. He was later released. child's rights activist, Marie-France Botte suggested that the Justice Ministry had a list of high profile consumers of paedophile videotapes produced by the accused. Justice Minister Stefaan de Clerck ordered an inquiry into the conduct of the police. The public inquiry began on 25 October and its conclusions were expected to be released in March 1997.

The public outcry reached a new level when on 16 October, the Court of Cassation ruled that the investigating magistrate who had found the two girls still alive, Jean-Marc Connerotte, had compromised himself and was removed from the case. Mr. Connerotte had attended a fund-raising dinner held for the parents of the victims. It is the task of the investigating magistrate to compile two files; one in support of the defence, the other in support of prosecution. It is then left to the public prosecutor to decide if any charges will be pursued. In performing this task, the investigating magistrate must be strictly neutral under Belgian law. Citing the impartiality of magistrates as a "fundamental rule" the Court of Cassation made the ruling despite tremendous pressure to do the contrary from the public, the press and members of all political parties who asserted that his attendance had been a "humanitarian act". The Prime Minister himself asked the Court of Cassation to be "creative" in applying the law. After the decision, Magistrate Connerotte wrote a letter to the King objecting to his removal. Belgians took to the streets protesting the decision and the parents of the girls moved to appeal the decision, although they later withdrew the appeal.

On 20 October, amidst a protest of 250,000-300,000, the Prime Minister proposed constitutional reform to address, among other things, the political appointments of investigating magistrates and prosecutors, who have always been appointed by the King. The balance of judges have been appointed by the King and the legislator (see above) and traditionally, it was thought that such political appointments would lead to a judiciary representative of society. Instead, it inevitably led to the dependence of the judiciary on the

political parties. All major political parties supported the Prime Minister's proposal to reform the appointment process. A Parliamentary Commission of Inquiry was to conclude its report on the reformation of the judicial procedure by 30 June 1997.

On 5 November 1996, the Chamber of Representatives proposed, among other things, to amend Article 151 of the Constitution which provides that Justices of the Peace and Judges of the Police Tribunal and the Tribunals of First Instance are to be appointed by the King. The proposed amendment would require Justices of the Peace, Judges of the tribunals, *Conseillers* of the Courts of Appeal and the Court of Cassation to be appointed by the King, but, in accordance with the law. Without prejudice to Article 152, (which requires judges be appointed for life), the law would define the conditions and the duration of the appointment of the judges of the courts and tribunals and the functions of the First President, President, President of the Chamber, President of the Section and Vice-President. Further, a Superior Council of the Judiciary would be established by law, the competence of which would be determined by law. The Chamber of Representatives, in its Note of Explanation to the proposal, indicated that the proposed amendment would allow for objective criteria which could evolve with society. Further, the proposed law could require the advice of consultative bodies to guarantee the objectivity of the nominations.

In a document entitled, *"Justice Penale, Police et Organisation Judiciaire"*, dated 26 February, the Chamber of Representatives outlined proposals for the law to be enacted pursuant to the amended Article 151. It must be noted that these are proposals only and at the end of 1996, no concrete bill had been drafted.

The proposals envisaged the creation of a College of Nomination and Promotion. The College would have 22 members, 11 of which would be Dutch speaking, with the remaining 11 being French speaking, among whom one member and one acting member must have knowledge of the German language. Ten of the members would be judges designated by the judiciary itself and designated by the Senate. The remaining 12 would be lawyers, academics or experts in other fields. There will be an examination jury and a selection commission for each language.

Judicial candidates would be selected by the College in accordance with a procedure and criteria determined by law and ranked accordingly. The College will recommend those candidates it selects to the Minister of Justice. If the candidates selected are accorded different ranks, the Minister will appoint the candidate with the highest ranking. If all candidates selected are of equal rank, and if the Minister chooses to nominate one of the Candidates, the Minister must follow the recommendation of the College. The Minister however, can refuse to make a nomination and if he or she does so two times, the procedure must begin anew. Candidates will be able to appeal all decisions made to the *Conseil d'Etat*.

In the future, the senior positions of the First President, the Procurator General, Auditor General, President, Procurator of the King, Auditor of Labour and Auditor of the Military would, under the proposed law, be appointed for a five year renewable term. A candidate for these positions will have to present a "program of action" outlining the manner in which he or she intends to exercise the function. The President and Section President of the Court of Cassation, the President of the Chambers of the Court of Appeal, the Vice-President of the Tribunal and the Judges of Instruction, Youth Tribunal and the Tribunal of Executions (*saisie*) will be elected either by the General Assembly and/or presented by the president of the relevant court.

A system of evaluation for all permanent judges was to be put in place.

The Government proposed also to create a Superior Council of Justice to supervise the judiciary. It would be composed of 24 members, from varied experiences. Lawyers, professors and academics in the humanitarian sciences, management or other relevant areas will be eligible candidates; political representatives will be excluded. The Council will establish the mandates of the heads of the courts.

The role of judges of instruction was also being examined within the reform process.

Cases

Virginie Baranyanka and **Julien Pierre** {Lawyers}: Me Pierre acted for M. Dutroux and Me Baranyanka acted for at least one of the co-accused. It was reported that they both received criticisms and threats as a result of their representation of the defendants.

On 16 October, the *Ordre National Des Avocats de Belgique* issued a press release reminding the public that all persons have the right to a defence in all matters and circumstances. It condemned the threats being made at the time against "certain advocates" in the exercise of their profession.

The Government Response to CIJL

On 8 August 1997, the Government of Belgium responded to the CIJL's request for comments. The response, which was made in French and English, contained some calcifications the translation of which were incorporated into the text. The Government added in French:

> "... Marc Dutroux was preventatively detained from 1 March 1985 to 2 April 1985 and subsequently detained from 3 February 1986 to 8 April 1992, hence for more than 6 years."

The sentence "Some members of the police forces reportedly suspected that Mr. Dutroux had been involved in the 1991 assassination of Belgian businessman and politician Andre Cools and that corrupt police officers who were also involved in the assassination would warn him..." is not correct.

Concerning the sentence "On 20 October, amidst a protest of 250,000-300,000, the Prime Minister proposed constitutional reform to address, among other things, the political appointments of investigating magistrates and prosecutors, who have always been appointed by the King" the Government said, "there is no need for constitutional amendment to reform the [the system of] appointment of investigating magistrates."

The government contested that "All major political parties supported the Prime Minister's proposal to reform the appointment process."

The Government also said that it is not aware of a document entitled, "*Justice Penale, Police et Organisation Judiciaire* dated 26 February.

BOLIVIA

Executive power is held in Bolivia by the President and the Cabinet is appointed by him. Legislative power is vested in the bicameral Congress, comprising a 27 member Senate and a Chamber of Deputies with 130 seats. If no candidate obtains a majority of the votes in the presidential elections, the Congress elects the President from among the two candidates who gained the highest number of votes. Gonzálo Sánchez de Lozada was elected President in 1993 to a five year term and remained in office in 1996.

The Constitution provides for the fundamental rights and freedoms of the individual. A Defender of the People (*Defensor del Pueblo*) and a Constitutional Court were new institutions incorporated into the reformed Constitution of 1994, entrusted with the respective tasks of supervising the protection and implementation of rights and freedoms, and controlling the constitutionality of legal norms, including those pertaining to human rights. However, no legislation establishing either of these institutions has been elaborated since the entry into force of the Constitution, with the result that the Defender of the People and the Constitutional Court do not exist in practice.

These and other legal and institutional deficiencies permitted human rights abuses and violations to continue in 1996, primarily in the form of excessive force and arbitrary detentions by the police, lengthy pre-trial detentions, harsh prison conditions and violence and discrimination against women, children and indigenous people. Despite a report in 1995 by the Bolivian Human Rights Commission of the Chambers of Deputies (*Comisión de Derechos Humanos de la Cámara de Diputados*) describing violations committed by the security forces between June 1989 and April 1993, no action was taken in 1996 to charge those allegedly responsible.

THE JUDICIARY

The Constitution establishes that judges are independent in their administration of justice. The Bolivian judiciary however, has a long tradition of politicisation, which continued to affect its independence, in addition to inefficiency and widespread corruption in 1996.

STRUCTURE OF THE REGULAR COURTS

The Supreme Court of Justice is the highest court of civil and criminal jurisdiction, followed by Superior District Courts (*Cortes Superiores de Distrito*), Trial Courts (*Juzgados de Partido*) and Investigative Courts (*Juzgados de Instrucción*). A system of military courts and special courts also exists for cases involving security and traffic police (see under Police Courts, below). As indicated above, the Constitutional Court, incorporated through constitutional amendments in 1994, was still not operational in 1996. According to

the Constitution, it is to be composed of five judges, elected for ten years by a two-thirds vote in the Congress. The Constitution charges the Court with the control of the constitutionality of the legal norms, protection of the rights and guarantees of the individual and resolving conflicts of competence between the entities of the state.

Appointment Procedures

In 1994, the Council of the Judiciary (*Consejo de la Judicatura*) was introduced in the reformed Constitution, to supervise administrative and disciplinary matters of the judiciary. The Constitution charges the Council with the preparation of lists of nominees from which the Congress shall elect the judges. The Council itself is to be composed of four members, who must have a law degree and ten years of practical experience or working in the academic field. The President of the Supreme Court is to preside over the Council, the remaining members to be elected for ten years by a two thirds vote in the Congress. However, no regulations were enacted for its creation and functioning and by the end of 1996, the Council had yet to be created.

Prior to 1994, the Senate nominated Supreme Court Judges to be elected by Congress. Since there was no established criteria as to what should be taken into consideration when forming the list of nominees, political interests lay behind the nominations. According to the Constitution, the 12 Supreme Court judges are to be elected from a list of nominations presented by the Council, on a two third majority vote in the Congress. As long as there is no Council of the Judiciary, the transitory articles to the Constitution establish that Supreme Court Judges are elected by the Chamber of Deputies, from a list approved by two thirds of the members of the Senate, i.e. according to the procedure established in the old Constitution. Supreme Court judges are elected for a period of ten years. They can be re-elected after a time period equal to that already held as a Supreme Court judge has passed, that is, usually ten years.

With the eventual creation of the Council of the Judiciary, political influence may become less obvious, but it must be kept in mind that the Council itself is to be elected by the Congress, and the election procedure for Supreme Court Judges is to remain the same, allowing the Supreme Court to continue to reflect the political representation in the parliament.

For at least 18 months in 1994 and 1995, the Supreme Court itself was not fully functional. In mid 1995, five new judges were due to be elected to the Supreme Court. By the end of 1996, the Court had not elected a president from amongst its judges.

In July 1996, the Transitory Regulations on Selection and Designation of Judges (*Reglamento Transitorio de Selección y Designación de Jueces*) introduced a system of nation-wide public announcements for examinations so that judges would be appointed on their merits. The examinations were to be corrected by a separate commission and the results made public.

Resources

The Constitution guarantees financial and administrative autonomy, while the Law on the Organisation of the Judiciary establishes that the judiciary shall receive no less than three percent of the total income of the state. The Council of the Judiciary sets the budget for the judiciary, however, it must be confirmed by the Congress, thereby violating its financial autonomy. The judiciary suffers from low salaries, lack of equipment and poor working conditions, all of which facilitates corruption at all levels, in the form of bribes and demands in return of favours. In 1996, **five Supreme Court judges** were facing investigation on possible corruption charges, together with **many lower court judges**. On 15 March 1996, Judge Luis Mazzone Roca, who was working on cases involving drug offences, was caught allegedly accepting a US$ 3,000 bribe from a defendant.

In the administration of justice, rigid and complex procedures and an overload of cases have led to extensive delays in processing cases, causing prolonged pre-trial detentions. Civil cases are based entirely on written documentation. The Government was reportedly attempting to address the problems within the judicial reforms commenced in 1994 (see under Judicial Reform, below).

Police Courts

Although exceptional courts are forbidden, the Constitution does allow the creation of other courts, in accordance with the law. The Criminal Courts for Security and Traffic Police were created under this provision and established through the Organic Law on the National Police. According to the Organic Law, the Police Courts are operative organs of the National Police. The law further establishes that the President exercises authority through the relevant minister. The Police Courts are, to a large extent, composed of members of the police, lacking legal training. They may hear cases involving torts and offences committed by the police, but the law fails to define the scope of the torts and offences that fall within the jurisdiction of these courts. This creates the potential to make arbitrary interpretations, for instance, when violations of human rights by the police are involved. This becomes particularly troubling when considering that the National Police have primary responsibility for national security in Bolivia. In addition to undue executive influence and the risk of arbitrary decisions, the police are reluctant to prosecute their own members.

Public Ministry

Prior to the constitutional amendments in 1994, the Attorney General was elected directly by the President. Presently, the Attorney General is elected by the Congress by a two thirds majority vote. The executive interference was thus diminished, but no established criteria exist to guide and

control the Congress in electing the Attorney General. It has been expressed by some that the Public Ministry is merely an appendix to the Ministry of the Interior.

Judicial Reform

Council of Judicial Reforms/World Bank funding

In 1993, the Ministry of Justice was created and charged with carrying out judicial reform to respond to the concerns expressed by, *inter alia*, the judiciary and bar associations. A Council of Judicial Reforms was established in 1994 and in 1995, the program of modernisation was initiated, with an estimated duration of three years, financed mainly by the World Bank.

The main objectives of the reform involve improving the resolution of cases, rationalising the procedures and securing adequate access to justice. Within the reform, there are three main programs:

- the improvement of the administration of justice, involving *inter alia* the establishment of new procedural principles and uniform jurisprudence, as well as the installation of and training in computer systems;
- human resources, comprising the training of judges, including judicial ethics, and the development of systems of evaluation; and
- constitutional strengthening, involving the incorporation of a system outlining the management of the courts and units for legal and scientific studies to analyse the necessity of legal reforms.

Reform to address delay

Studies on the time required to decide a case showed that an ordinary case which should take three to four years to resolve in reality lasted between five and twelve years. The grave problem of delay in the resolution of cases was addressed by the proposal of a Law on Procedural Abbreviation, which is, at least in theory, to considerably reduce the procedural time limits in civil cases.

Penal reforms

A practical example of improvements as a result of reforms of criminal law is the Personal Recognisance Law (*Ley de Fianza Juratoria contra la retardación de la Justicia Penal*, Law No. 1685), passed in February 1996. The law is applicable in cases where there has been an unjustified delay in the administration of justice. According to the law, detention can only be justified if there is a well-founded presumption that the accused will not appear, will obstruct the investigation, or if there are indications that the person will continue with criminal activity. The law has reportedly led to the

provisional or unconditional release of 1300 persons from detention. According to a report issued in November 1996 by the Ministry of Justice, the number of detainees that had not yet appeared before a court had decreased in 1996 to 59 percent of all detainees, compared with 91 percent in 1995. However, another study made in September 1996 in the country's largest prison revealed that 80 percent of the inmates were awaiting trial or sentence.

Oral proceedings, which should reduce the time required for trials, and a jury system were also introduced in 1996. Draft laws were still pending for a new Code on Criminal Procedure (*Código de Procedimiento Penal*) and to reform the Criminal Code (*Código Penal*).

Public Defenders

The Constitution establishes that the judiciary is responsible for providing free legal counsel for those who cannot afford it themselves. Reportedly, an estimated 70 percent of those imprisoned could not pay an attorney, and public defenders were overburdened with cases. A Public Defender Program was created in 1994 to guarantee access to justice for everyone. Twenty-one offices were opened throughout the Bolivian territory, and the program of mobile public defenders, who go to remote areas in the country, proved successful and was being expanded. Not only do the Public Defenders give legal counsel, but they try to intervene as early as possible when a person has been arrested, in order to make sure that the rights and guarantees of the person are respected. They also distribute information concerning human rights. Between 1994 and 1996, the Public Defenders processed 42,000 cases. From those, 23,000 detainees were released, who otherwise probably would have remained incarcerated because of lack of legal defence. In the coca growing Chapare region, where most allegations of abuse by public officials originate, Public Defenders represented persons in 2,141 cases between October 1994 and September 1996. Releases were obtained in 1,502 cases.

Cases

Waldo Albarracín Sánchez [Attorney and President of the Permanent Human Rights Assembly of Bolivia (*Asamblea Permanente de Derechos Humanos en Bolivia*, APDHB)]: On 25 January 1997, Dr. Albarracín Sánchez was abducted by eight agents of the Ministry of the Interior, when he was travelling from his home to the San Andrés University where he teaches. Dr. Albarracín Sánchez was forced into a jeep and severely beaten and almost suffocated while driven around in La Paz. After four hours of torture, the perpetrators, who presented themselves as terrorists wanting

revenge on Dr. Albarracín Sánchez for turning in two of their colleagues to the government, left him in a cell at the headquarters of the Technical Judicial Police, PTJ.

After the abduction, the National Police stated that Dr. Albarracín had been arrested pursuant to a detention order by the police, issued because of statements attributed to him in an interview. Contrary to Bolivian law, Dr. Albarracín was never requested to meet with the investigators.

Dr. Albarracín Sánchez identified two of the persons participating in his abduction as Police Captains Alberto Antezana and Leonel López. He filed charges against the Minister of the Interior and the Commander of the National Police, Gen. Willy Arriaza. Gen. Willy Arriaza resigned from his post as a consequence.

The Commission of Constitution, Justice and Judicial Police of the Chamber of Deputies (*Comisión de Constitución, Justicia y Policía Judicial de la Honarable Cámara de Diputados*) initiated an investigation into the attack on Dr. Albarracín.

Throughout February 1997, Dr. Albarracín received anonymous telephone threats, against himself and his family. They were also under surveillance by unidentified individuals.

Alberto Costa Obregón {Third Examining Judge (*Juez III de Instrucción en lo Penal*)}: In the beginning of March 1996, Judge Costa Obregón received a death threat from a "People's Tribunal" consisting of members of the guerrilla movement MRTA (*Movimiento Revolucionario Tupac Amaru*).

Juan del Granado {Lawyer and President of the Human Rights Commission of the Chamber of Deputies}: In February 1997, Dr. Juan del Granado received telephone threats at his home from anonymous callers threatening him with death and abduction. The threats were believed to be linked to Dr. del Granado's public condemnation of the abduction and torture of Waldo Albarracín (see above). Members of the Government gave assurances regarding Dr. del Granado's safety.

Alvaro Infanto de la Torre {Lawyer working for the Centre for Legal Studies and Social Investigations (*Centro de Estudios Jurídicos e Investigación Social*, CEJIS)}: In January 1997, Mr. Infanto de la Torre was threatened, reportedly by intelligence police. He was defending a client accused of stealing cars. Apparently, one of the cars belonged to a prominent figure who contacted the Prefect (*Prefecto*) in Santa Cruz, who in turn spoke to the police. Thereafter, the accused was reportedly subjected to torture, and Mr. Infanto de la Torre received threats. After Mr. Infanto de la Torre informed the media about the torture, he was "requested" to remove himself from the case. Unidentified men also came to his house threatening him and the police threatened to arrest him.

Manuel Morales Dávila {Lawyer}: Mr. Morales Dávila was imprisoned in La Paz on 7 March 1996, accused of sedition and contempt of

presidential authority (*sedición y desacato al Presidente de la República*). The accusations were based on public declarations he had made against the Government's economic policies.

While held in the San Pedro Prison in La Paz, there were concerns for the conditions in which he was being held, including the fact that he was held incommunicado for several days and denied access to a lawyer.

The 9th Penal Court Judge seized with the case failed to immediately rule on the application for *habeas corpus* presented on behalf of Mr. Morales Dávila by the Bolivian Bar Association. On 16 April 1996, after 40 days in prison, Mr. Morales was released on bail. Despite reports stating that government representatives wanted to annul Mr. Dávila's conditional release, rearrest him and impose stricter security measures by detaining him in a high security prison, he remained free at the end of 1996, although legal proceedings against him were still pending.

GOVERNMENT RESPONSE TO CIJL

On 22 July 1997, the Government of Bolivia responded to the CIJL's request for comments. Below is a translation into English of the Government's comments which were submitted in Spanish:

> *"Paragraph 1*
>
> With regard to the constitutional term of office of the present President of the Republic, Gonzálo Sánchez de Lozada was elected in 1993 for a four-year term and will remain in office until August 1997.
>
> The constitutional reform of 1994 established a constitutional five-year term of office for the Presidency. However, Art. 3 of the Transitory Regulations of the reformed Political Constitution of the State specifies that "...the new constitutional terms of office of the President and Vice-president of the Republic, Senators, Deputies, Mayors and Councillors (...) will become effective when the new term of office of the relevant power, body or authority begins...".
>
> *Paragraph 2*
>
> With regard to the constitutional reforms, the Ministry of Justice drafted the Constitutional Tribunal Law and the Defender of the People Law. These drafts were sent to the President of the Republic on 29 August 1995 and 17 June 1997 respectively, and are currently going through the legislative procedure in the National Congress.

Paragraph 3

Studies carried out on the functioning of the penal system in 1992 and 1995 have identified as one of the most serious problems of the system "the lengthy pre-trial detentions". In response to this situation, the Ministry of Justice enacted the Personal Recognisance Law on 2 February 1996.

The Personal Recognisance Law modifies the use of preventive detention and establishes maximal periods of preventive detention for the various stages of the process. It has led to the release of 2138 persons, which represents 40% of the national prison population.

The Judiciary

Structure of the Regular Courts: Paragraph 5

The Constitutional Court and the Council of the Judiciary are independent and self-governing bodies which are part of the Judiciary Power, together with the Supreme Court of Justice, District Courts and other courts and authorities.

Appointment Procedures: Paragraph 6

The draft Law of the Council of the Judiciary, formulated by the Ministry of Justice together with the courts involved, was presented to the President of the Republic on 30 April 1996. Currently it is passing through the Senate Chamber, its legislative adoption having begun at the end of the 1996 Congressional session.

Paragraph 8

It is the function of the Council of the Judiciary to propose to the National Congress nominees for the appointment of Supreme Court Judges, to the Supreme Court nominees for membership of the District Courts, and to the latter Courts nominees for the appointment of judges, official notaries and recording officials for property rights. The list of nominees will be made up from the Judiciary Promotion List, which will guarantee that the election of the members of the judiciary will be based on criteria of competence.

The election system of the members of the Council of the Judiciary, Constitutional Court Magistrates and Supreme Court Judges by a two-thirds vote in the National Congress is the most suitable way of depoliticising the appointments, since those elected have obtained a majority vote which transcends political interests.

Resources: Paragraph 11

The Council of the Judiciary sets the Annual Budget for the Judiciary; as established by the Political Constitution of the State, this Budget must be confirmed by the National Congress in order to ensure that the Executive, through the Ministry of Finance, cannot grant less in the way of resources to those to whom they have been allocated. The Budget is drawn up and administered without the involvement of any other State power, which guarantees financial and administrative autonomy.

It is not certain that "in 1996, five Supreme Court judges were facing investigation on possible corruption charges"; further, the report should provide the source of this information.

Police Courts: Paragraph 13

In view of the problem presented by "Police Courts", which are dependent on police organs, on 18 February 1993 the Organic Law on the Judiciary came into effect. This law unifies the special juridical organisms and replaces police and traffic courts dependent on the National Police and on the Traffic Administration by courts dealing with torts. It also specifies the same conditions and independence for the judges in these courts as for all others. However, these courts have not been established.

The draft Code on Criminal Procedure of the Ministry of Justice, which is currently passing through the Chamber of Deputies of the National Congress, establishes a simple and rapid procedure for the judgement of torts and offences, underpinned by constitutional rights and known to the Justice of the Peace.

Public Ministry

Reform to Address Delay: Paragraph 17

One of the main aims of the Law on Procedural Abbreviation for Civil Cases and of Family Assistance, which was enacted on 28 February 1997, is to address the delay in civil justice. Its implementation has achieved positive results in the acceleration of civil procedures, since it has allowed the Supreme Court of Justice to reduce the procedural time limits by an estimated 85% by eliminating quashing in cases of recusation, as well as procedures for executing judgement. It has enabled the Court to attend to cases without the previous delay of approximately two to three years. Similarly, since this Law has come into effect, sentences which used to wait an average of

approximately eight years before implementation are now carried out in only two months, and recusations are resolved in only 15 days.

Penal reforms: Paragraph 18

According to the statistical information obtained by the National Administration of Public Defence, 2138 persons were released from detention on bail; this is equivalent to 40% of the entire prison population of the country.

The Report mentions another study, carried out in September 1996, which gave different statistics for the number of persons in preventive detention. The source of this information must be given for purposes of reliability and credibility.

Paragraph 19

The draft Code on Criminal Procedure, which was sent to the Chamber of Deputies in January 1997 for legislative processing, includes oral proceedings, accusatory proceedings, continuous proceedings and trial by jury, within the scope of constitutional rights; it aims to establish efficient and rapid procedures which respect human rights.

The Law of Reform of the Criminal Code was enacted on 10 March 1997. Its purpose is to limit the arbitrary use of criminal law and to introduce mechanisms for effectively combating impunity, especially against organised crime, public corruption, terrorism and the laundering of money.

Public Defenders: Paragraph 20

The Ministry of Justice has established 27 Public Defender offices throughout the departments of the country, in the capitals, prisons, offices of the technical judicial police and in the provinces. The Rural Mobile Public Defender Program exists in four departments: La Paz, Cochabamba, Chuquisaca and Potosí.

Between 1994 and 1997 the Public Defenders processed a number of cases equivalent to ten times the total prison population in the country."

BOSTWANA

The Republic of Botswana has a multiparty, presidential system. Executive power is vested in the President as head of the state who is elected by absolute majority by the National Assembly for a renewable term of five years. The President appoints the Vice-President and the members of Cabinet, who are responsible to him and not the Parliament.

The Parliament consists of two Houses, the National Assembly and the House of Chiefs. The National Assembly is directly elected for a term of five years and enjoys the legislative power. The second House is composed of 15 members from the eight principle tribes of the Tswana Native, whereas other groups are excluded. The House of Chiefs, which enjoys consultative powers, considers draft legislation concerning amendments of the Constitution and chieftaincy matters. It can make representations to the President on issues affecting tribal organisation and traditional authorities.

Legislative elections held on 15 October 1994, were won by the Botswana Democratic Party, in power since independence, obtained in 1966. President Ketumile Masire was re-elected on 17 October 1994.

THE JUDICIARY

Botswana has a dual court system, which comprises customary traditional courts and civil courts. Customary Courts deal with minor offences involving land, marital and property disputes. The sentences are determined by tribal judges appointed by the traditional leaders or elected by the community. Defendants do not enjoy legal counsel and usually there are no precise procedural rules, leading to unpredictable results. Sentences rendered by the Customary Courts may be appealed through the civil court system.

The structure of the judiciary is set out in Chapter VI of the Constitution which establishes the composition and the jurisdiction of the two high courts: the High Court and the Court of Appeal. The High Court, which enjoys extensive original jurisdiction, is a superior court of record. According to article 95 of the Constitution, it has the jurisdiction "to supervise any civil or criminal proceeding before any subordinate court." The High Court is headed by a Chief Justice appointed by the President and it is composed by such a number of other puisne judges as may be prescribed by Parliament. The puisne judges are also appointed by the President, acting in accordance with the advice of the Judicial Service Commission (see below).

The Court of Appeal is a superior court of record with a plenary review, appellate and first instance jurisdiction and hears all the appeals from the High Court. Individuals may appeal to the Court of Appeal on questions of law and fact; however the persecutor's right of appeal, whether as of right or

by leave of court, is limited to questions of law. The President of the Court of Appeal, according to section 99 of the Constitution, is appointed by the State President. The Justices of Appeal, whose number is prescribed by Parliament, are appointed by the President in accordance with the advice of the Judicial Service Commission. Magistrates' Courts exist at the lower level, but most citizens are heard by the judiciary through the traditional courts.

The Constitution provides for an elaborate process for judicial appointment, removal and security of tenure. Sections 97(3) and 101(2) and (3) of the Constitution establish that a judge of the High Court and of the Court of Appeal may be removed from office only for inability of performing the functions of his office and for misbehaviour. Where the President considers that an investigation into the conduct or ability of a judge is required, he shall appoint a tribunal consisting of a Chair and at least two other members who have held high judicial office. The tribunal is to, after enquiring into the facts, report to and advise the President if the judge should be removed for incapacity or misbehaviour.

Although articles 97 and 101 of the Constitution require a judge to vacate office on attaining the age of 65 years or such other age as may be prescribed by Parliament, it is reported that security of tenure is not a reality. These guarantees against removal have little practical impact. Most of the judges, in Botswana, are hired on contract.

The need to rely on expatriate personnel to staff the courts at all levels, through direct recruitment, aid from the British government, the Commonwealth Legal Bureau and bilateral agreements with other countries encourages contract positions. Between 1966 and 1991, no judge of the High Court was appointed with tenure. Judges are hired on contract and generally, the contract is for a three year renewable term. It appears that one of the main criteria for appointing judges is "political acceptability." In fact, the Chief Justice and the President of the Court of Appeal are appointed by the President alone, thus the heads of both the two highest courts of the country are appointed by a political figure. This could be manipulated and degenerate into political appointment. The Executive intervenes also in the appointment of puisne judges and appeal judges, as highlighted above. Moreover, the renewal of the contract is matter for the Judicial Service Commission, which itself is prevented from enjoying real independence because of its composition (see below). Appointment by contract violates Principle 12 of the UN Basic Principles on the Independence of the Judiciary (1985), which requires that "judges, whether, appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expire of their term of office, where such exists".

Another concern is the constitution of the Judicial Service Commission. This Commission plays a crucial role in the administration of the judiciary. Article 104(1) of the Constitution states that "power to appoint persons to hold or act in offices to which this section applies, to exercise disciplinary

control over persons holding or acting in such offices and to remove such persons from office shall vest in the President acting in accordance with the advice of the Judicial Service Commission." The JSC consists of the Chief Justice, as chairman, the Chairman of the Public Service Commission and one other member who shall be appointed by both the Chief Justice and the Chairman of the PSC acting together. This Commission is supposed to be completely independent and may regulate its own procedures. However, both the Chief Justice and the Chairman of the PSC are appointed by the President alone, making the JSC, which should guarantee the independence of the judiciary, dependent on the Executive. Furthermore, in practice, the Chairman of the PSC is a civil servant or a former civil servant. In the past, both the Chairman of the PSC and the third member of the JSC have had no legal background, so that it was likely to be dominated by the Chief Justice.

Minutes of the Judicial Service Commission meetings indicate that in some instances, recommendations concerning the appointment of judges, have been made to the Judicial Service Commission from the Office of the President.

Cases

Mr A.C.N. Nchunga {Senior magistrate at the High Court}: Mr Nchunga was removed from the office of Senior Magistrate of the High Court on 29 February 1996, with immediate effect. The President, purportedly acting in accordance with the advice of the Judicial Service Commission, decided to revoke his appointment and remove him from his office. He was transferred to the office of Attorney General. The charge was that Mr Nchunga allegedly engaged in "protracted correspondence", which according to Mr. Nchunga, included writing an article for a local newspaper alleging corruption, writing to the High Court Registrar to clarify the judicial training policy and the scope and the power of the Judicial Service Commission and writing several other letters attacking the weakness of and unfair practices within the administration of justice in Botswana. At no time was Mr Nchunga charged or found guilty of any misconduct or unprofessional behaviour. Although he asked for the disclosure of the full reasons which led to his removal from the judiciary, as of December 1996, none had been made public. He believes that his removal from office was "unlawful and or unprocedural".

BRAZIL

Fernando Henrique Cardoso won the Presidential elections in October 1994 and took office on 1 January 1995. As President, Mr. Cardoso exercises the executive power, assisted by his cabinet of ministers. The President is elected for one term of four years and according to the Constitution, cannot be re-elected. However, in 1996, Mr. Cardoso suggested an amendment to the Constitution in order to allow re-election of the President, which was likely to be passed by the Congress in 1997.

The legislature consists of a bicameral National Congress, comprising a Chamber of Deputies and the Federal Senate. Since Brazil is a federal republic, the 23 states, three territories and the Federal District of Brasilia have their own Governors and legislatures.

Brazil continues to suffer from problems of land disputes, extra judicial killings and excessive use of force by the police, security forces and death squads. In its Concluding Observations, the UN Human Rights Committee in July 1996 said that,

> [t]he enormous disparities in distribution of wealth between different sections of the population would appear to be a major factor behind phenomena described in the report that are incompatible with enjoyment of the most basic rights protected under the Covenant.

Throughout the year, clashes between the military police and groups such as the Landless Workers Movement (MST) over seizures of land were frequent and violent, to a point where President Cardoso declared that the illegal seizure of land would be considered a national security problem and that the army would assist the police in the eviction of land squatters. In April 1996 for instance, military police killed between 19 and 23 people in Eldorado de Carajás in the state of Pará, when trying to remove a road blockade organised by MST. According to autopsy reports, ten of the dead were summarily executed. After the massacre, and pressure from the public, the President promised to address the problem of police immunity from prosecution.

Street children continued to be a target for arbitrary executions, involving security forces or death squads. Notwithstanding the impunity most often enjoyed by the perpetrators of these crimes, a military police officer was found guilty on six counts of murder and sentenced on 30 April 1996. He confessed to having killed street children in Rio de Janeiro in July 1993. However, it must be noted that the case was decided before a civil court and not in the special military police courts that usually tries cases involving the military police.

Positive developments came in the measures taken to allow the Attorney General to bring cases of human rights violations before the federal courts. Another important event was the establishment of the Office of the Public

Defender, which was active in the monitoring of abuses by the police and bringing police perpetrators before the courts. A National Plan of Human Rights was launched through Decree N° 1904 of 13 May 1996. Its stated purpose was to improve the respect and observance of human rights, including the intention to reduce injustices and racism, mainly by introducing new legislation. However, it was not clear when the legislation was to be implemented.

The Judiciary

The Constitution provides that the executive, legislative and judicial powers are independent from each other. Brazil has a judicial system at both the federal and state levels. Judicial power at the federal level embraces the Supreme Federal Court, the Superior Court of Justice and Federal Regional Courts. In addition to these, there is a system of Military Courts and a separate judicial system for the State Police, commonly known as Military Police (see Military Police Courts, below).

The President appoints all federal court judges of general and special jurisdiction, with the exception of the Electoral Courts. It also appoints the 11 justices of the Supreme Federal Court, after their nomination has been approved by an absolute majority of the elected Federal Senate. The states organise their own court systems.

The Constitution provides for one-fifth of the seats of the Federal Regional Courts and the Courts of the States to be engaged by members of the Public Prosecution, the institution whose task is to initiate criminal and civil investigations and institute legal proceedings.

Judges enjoy life tenure, although only after they have been in office for two years. The Constitution establishes the administrative and financial autonomy of the judiciary. The courts are to prepare their own budgetary proposals, but since the executive prepares the final budget, the judiciary is, in reality, dependent on the decisions of the executive.

Resources

The actual lack of financial resources led to an involuntary impediment to judicial activities in several states, resulting in a serious suspension of the administration of justice in 1996. Governments in various states ceased to pay the monthly allotments to the judiciary, as required by the Constitution. For instance, in the State of Mato Grosso do Sul, the failure to make these payments continued for four months. This situation also created a conflict between the powers of the state, since the executive alleged that the judiciary was wasting its resources, with the Superior Courts of Justice responding by refusing to account for its expenditures, despite requests from the executive and legislative branch.

Brazil also continued to suffer from a shortage of judges, a continuing problem because of difficult exams that eliminate most of the applicants and because of low salaries for those who do become judges. In 1995, 73 of the 176 municipalities in the State of Pernambuco did not have a judge. In rural areas, where the local landowners hold the power, the judiciary seemed to be susceptible to their demands, which were often accompanied by threats. This was particularly obvious in cases involving gunmen hired by landowners to remove land squatters or rural union activists. The inevitable result of the shortage of judges is a backlog of cases. In turn, this delays the administration of justice and sometimes judges were persuaded to deliberately prolong a case to the point where it would be dismissed, owing to the relevant statute of limitations.

Military Police Courts

The practice of using special military courts when trying military police accused of human rights abuses continued in 1996 (see *Attacks on Justice, 1994* and *1995*). These courts are composed of four military police officials and one judge. Policemen were seldom found guilty of the alleged crime and allegations of bias were the obvious result. Studies made by human rights organisations on crimes committed by the police against civilians and tried in these special courts showed that between 1970 and 1991, only eight percent of these cases resulted in convictions. The courts were overloaded and inefficient. Investigations were often hindered by acts of intimidation, including death threats against witnesses, prosecutors, judges and human rights monitors, which further contribute to the climate of impunity.

An attempt in May 1996 to transfer cases involving military police to civilian jurisdiction was blocked in Congress by senators supporting the police and influential land owners. They proposed instead that civilian courts should have jurisdiction in cases where police intentionally had harmed people, whereas cases involving accidental injuries should remain under military jurisdiction. In August, the President signed legislation transferring cases related to active duty police officers accused of intentional homicide of civilians to civilian jurisdiction. The impact of the law in practice however, was difficult to ascertain as the investigation of the crime lies with the same police, and it is the Military Police Court that determines whether a case shall be forwarded to a civilian court. These procedures potentially leave room for arbitrary and biased decisions.

Cases

Fransisco Gilson Nogueira de Carvalho {Lawyer}: In the morning of 20 October, Mr. Gilson Nogueira was shot dead on the entrance of his house in Natal, Rio Grande do Norte reportedly by six men participating in the assault, firing approximately 13 bullets. The killing was most probably

linked to Mr. Nogueira's work. He was a member of a special commission investigating the activities of a death squad known as the Golden Boys (*Meninos de Ouro*), who were suspected of being involved in various killings, tortures and death threats and who reportedly enjoy protection from the local authorities. Mr. Nogueira was also working with the Centre for Human Rights and Collective Memory (*Centro de Direitos Humanos e Memória Popular*) and represented families who had suffered human rights violations. Prior to his death, Mr. Nogueira received death threats and was given protection by the federal police for six months, which however was suspended just before his assassination. The Human Rights Commission of the Federal Chamber of Deputies sent a special commission to follow the investigation into the murder.

Emmanuel Cristovão de Oliveira Cavalcanti (State Attorney General), **Jose Maria Alves, Fernando Batista Vasconcelos, Anisio Marinho Neto, Paolo Leao Dantas, Luis Lopes de Oliveira Filho** and **Jose Augusto Peres** (State Prosecutors): These names appeared on a death list which was discovered during the investigations into the murder of Fransisco Gilson Nogueira de Carvalho. All of the above were involved in the investigations of the death squad "Golden Boys", which probably provoked the murder of Mr. Nogueira. Due to several death threats, the prosecutors suspended their work.

CANADA

Canada is a federal state with ten provinces and two territories. A member of the Commonwealth, the British sovereign serves as head of state of Canada and is represented by a Governor-General, largely a ceremonial role. The federal legislature is comprised of the directly elected House of Commons, and the Senate which is appointed by the Governor-General on recommendation of the Prime Minister. The executive power is found in the Cabinet which is formally appointed by the Governor-General on recommendation of the Prime Minister. The provincial system is similar, with a Lieutenant-Governor representing the Queen, an elected legislature and an executive cabinet in each province. Throughout 1996, the Liberal Party governed the country, with Jean Chrétien as the Prime Minister. The *Bloc Québecois*, which represents the separatist movement at the Federal level in Québec, was the official opposition in 1996.

THE JUDICIARY

The Supreme Court of Canada sits at the apex of the Canadian judicial system and serves as a final court of appeal from both the federal and provincial courts. The Federal Court and Federal Court of Appeal generally hear matters in which the Federal Government is a party. The Tax Court of Canada is also a Federal Court, although not a superior court established under Section 96 of the Constitution. In the provinces, the provincial superior courts (trial and appeal) established under Section 96 of the Constitution have jurisdiction in more serious criminal cases and most civil matters. The lower Provincial Courts have jurisdiction over most criminal and some civil matters, while administrative tribunals deal with issues such as professional licensing matters, workers' compensation or rent review.

GUARANTEES OF JUDICIAL INDEPENDENCE

Neither the separation of powers nor the independence of the judiciary is specifically guaranteed by the Constitution Act. However, Article 99 of the Constitution is generally considered as entrenching the constitutional guarantee of judicial independence of Superior Court judges. It provides that "the judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons." In 1982, this guarantee was further strengthened with the introduction of the Canadian Charter of Rights and Freedoms, and specifically, Section 11(d) which provides that any person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an *independent and impartial tribunal*" (emphasis added). Tradition and case law have also been relied upon to ensure the judiciary remains independent.

Case law has, for example, specifically confirmed the independence of the judges of the Provincial Courts which are not established pursuant to Section 96 of the Constitution Act. Instead, Section 11(d) of the Charter is seen as applying to the Provincial Courts. In 1985 in *Valente v. The Queen*, the defendant, who had been charged with a driving offence, challenged the independence of the Provincial Court Judge hearing his case. The defendant claimed that the judge could not be impartial given his salary and pension were fixed at the discretion of the Ontario Executive. The Provincial Court Judge declined to hear the case and it was appealed to the Supreme Court of Canada which found that in the circumstances, the relevant group of judges were sufficiently independent. Of lasting significance was the Supreme Court's determination, in considering section 11(d) of the Charter, that the essential conditions of judicial independence are security of tenure, financial security and institutional independence.

Canadian courts are generally regarded as independent. However, in 1996, issues relevant to the United Nations Principles of the Independence of the Judiciary were raised at both federal and provincial levels.

Challenges concerning the independence of Provincial Court Judges

Provincial Court Judges rely on the executive, legislatures or various commissions, some fully comprised of government appointees, others with a mixed composition, to set their salaries. Some of the commissions' recommendations have been binding while others have not been. In recent years, this uncertain procedure has allowed provincial governments to unilaterally roll back or change the manner in which provincial court judges' salaries are fixed. The governments have argued *inter alia*, that they are fighting the deficit and that the measures are being applied in an all inclusive public economic measure.

Provincial Court Judges challenged changes in their remuneration in two cases in Prince Edward Island (PEI) in 1994 and 1995, and in one case in each of Manitoba and Alberta in 1996. The judges claimed their independence was threatened by the provincial governments' failure to guarantee adequate compensation. At issue in a third case in PEI was whether or not the Provincial Court Act affects the independence of the judiciary because it permits the Executive to suspend and remove a judge after an independent inquiry has been conducted but does not require an independent inquiry to hear arguments from the judge in question (see *Attacks on Justice, 1995*). Given the parallel nature of the pleadings in these cases, they were heard together by the Supreme Court of Canada on 3 and 4 December 1996, although one of the PEI cases challenging the remuneration was abandoned. The Court reserved its decision which was expected to be announced in the fall of 1997.

Other challenges

Provincial Court Judges in British Columbia and Saskatchewan also challenged procedures governing their remuneration.

In British Columbia, the unanimous recommendations of the Judicial Compensation Committee which were supposed to be binding on the provincial government unless "unfair or unreasonable", were rejected by the British Columbia Legislative Assembly on 12 June 1995. The Provincial Court Judges brought an application challenging the Legislative Assembly's decision, claiming it had acted arbitrarily in rejecting the Compensation Committee's recommendations. The Chief Justice of British Columbia dismissed the application on 19 August 1996. The Provincial Court Judges appealed the decision but at the end of 1996, the appeal had not been heard.

In Saskatchewan, the Provincial Court Judges challenged as unconstitutional the government's decision to repeal 1993 legislation which established an independent commission with power to set legally binding judicial salaries. The judges argued that as the legislation was enacted to protect judicial independence, its subsequent repeal could only interfere with judicial independence. At the end of 1996, the matter had not been heard.

The Independence of the Superior Court Judges

Throughout Canada, each province and territory now has a Judicial Appointments Advisory Committee (JAC) comprised of persons nominated by each jurisdiction's Law Society, the provincial or territorial branch of the Canadian Bar Association, the Chief Justice of the province, the provincial Attorney-General and three members who are appointed by the Federal Minister of Justice. Judicial candidates may be nominated to the relevant JAC by third parties or by the candidates themselves. Candidatures are discussed by the JACs *in camera* and the JACs then report to the Federal Minister of Justice, rating each candidate according to a scale of "highly recommended," "recommended" or "not recommended". The Federal Minister of Justice then issues his or her own recommendation from among that list to the Federal Cabinet which in turn names the judicial appointee. Appointments of Chief Justices and members of the Supreme Court of Canada are however, still made on the recommendation of the Prime Minister.

Compensation and pensions of the judges of the Superior Courts are fixed and provided by the Parliament of Canada. Salaries are to increase every year according to a formula set out in the Judges Act. The adequacy of Superior Court Judges' salaries is reviewed every three years by a committee appointed by the Minister of Justice, which then makes a recommendation to Parliament. The common complaint is that the committee's recommendations may not always be implemented.

Prior to the mandatory retirement age of 75, Superior Court Judges may be removed only from office on recommendation of the Canadian

Judicial Council which is composed entirely of members of the judiciary. The Council receives and investigates allegations made against a judge through a Committee of lay members. The Council reports its findings to the Minister of Justice and may make recommendations concerning the removal of a judge. Parliament may then remove the judge on the address of both the Senate and House of Commons pursuant to section 99 of the Constitution Act and Section 65 of the Judges Act. Judges may be removed only after a finding of incapacity or disability due to age or infirmity, misconduct, failure of the due execution of the judicial office, or after being found in a position incompatible with the due execution of judicial office.

In August 1996, the Federal Canadian Judges' Conference was held where reforms to the removal procedures for federal court judges were on the agenda. The Conference submitted a proposal to the federal government wherein it asked the Government to enact legislation which would require more than a simple majority vote by Parliament prior to the removal of a judge. The Conference also requested legislated clarification of the standard of proof which must be met before a judge is removed and clarification of a judge's entitlement to be heard and his or her right to a review of any recommendation of removal.

The number of complaints made against Canadian judges have increased over recent years. In the 1970's, an average of five or six complaints were received each year. In 1996, approximately 200 were received. In a paper prepared for the Canadian Bar Association's annual meeting in Vancouver, British Columbia Chief Justice Allan McEachern noted that most of the complaints came from special interest groups and were little more than "disguised appeals against judicial decision". He also noted that "public attitudes about the administration of justice seem to have changed, probably for the worse. This changed social climate creates risks that judges will be influenced, consciously or unconsciously, by extraneous voices." He urged judges to remain steadfast in the face of such criticisms to ensure the independence of the judiciary was protected.

Recommended removal of Justice Bienvenue

In December 1995, Quebec Superior Court Justice Jean Bienvenue made controversial comments when sentencing a woman convicted of killing her estranged husband by slitting his throat. He said that women could be more cruel than men, and that "even the Nazis did not eliminate millions of Jews in a painful or bloody manner — they died in the gas chambers without suffering". After a public outcry and despite Justice Bienvenue's apology for his remarks, an inquiry was commenced by the Canadian Judicial Council. In September 1996, the Council, 22 in favour and 7 in dissent found that Justice Bienvenue had become "incapacitated or disabled from the due execution of the office of judge and recommends that he be removed from the office of judge of the Superior Court of Quebec". The Council said that "[t]he judge's remarks about women and his deep-seated ideas behind those

remarks legitimately cast doubt on his impartiality in the execution of his judicial office....Because of his conduct during all the incidents that marked Tracy Theberge's trial, Mr. Justice Bienvenue has undermined public confidence in him and strongly contributed to destroying public confidence in the judicial system".

Since Confederation in 1867, only five proceedings which could have led to the removal of a judge have been conducted. The Bienvenue recommendation represented only the second time that a disciplinary proceeding resulted in a recommendation that a superior court judge should be removed from office. It was the first such recommendation in the 25 year history of the Canadian Judicial Council.

Immediately after the decision, Justice Bienvenue refused to resign. However, when it appeared that the matter would be referred to the House of Commons and the Senate, which could remove him on a joint resolution, Justice Bienvenue resigned in October 1996.

Delays in the administration of justice and resources

Most Canadian courts and Human Rights Commissions throughout the country faced significant backlogs in 1996. The Ontario Human Rights Commission, in 1995, closed 1,240 files, but opened 2,452. Although inadequate funding was generally thought to be the cause of the Commission backlogs, the ever expanding classification of what constitutes a prohibited ground of discrimination has contributed to the problem. In 1961, the Ontario Human Rights Code enumerated six prohibited grounds. In 1996, the Code enumerated 15. Lack of administrative controls and the structure of the complaint system itself have been cited as additional reasons for a review of the operation of the human rights commissions.

In 1996, Ontario judges were openly critical of the Ontario Government for failing to fund the courts properly and particularly after it was reported that a Government proposal would entail a one-third reduction of the budget over two years. On 17 January, Ontario Chief Justice Charles Dubin, Chief Justice Roy McMurtry of the Ontario Court of Justice (General Division) and Chief Judge Sidney Linden of the Ontario Court of Justice, (Provincial Division) wrote to the Ontario Attorney-General, Charles Harnick, "to express our grave concerns about the process in which we are now engaged regarding proposed changes to the system of justice in Ontario". The three Chief Justices offered to meet with the Ministry of the Attorney General "for meaningful discussion about potential improvements to the justice system". They advised the Attorney-General that unless there was a moratorium on any of the proposed cuts until a proper analysis of the impact of the proposed cuts could be made, the "result may well be chaotic".

In February 1996, Justice McMurtry, who was formerly Attorney-General of Ontario in a Progressive Conservative Government, denounced government plans for cost-cutting in a paper prepared for a Canadian Bar

Association conference. He warned that "[a]ny individual engaged in litigation with the government could be excused for perceiving — wrongly, I believe — that individual judges might be wary of 'ruffling the feathers' of their government paymasters." Justice McMurtry urged the creation of a quasi-independent court services agency to administer the court system, but only after the government reconsider it cost-cutting plans. In August 1996, Justice McMurtry also responded to a report released by the Canadian Bar Association which called for deadlines to be given to both judges and lawyers in order to resolve civil lawsuits more quickly. While Justice McMurtry did not disagree with the recommendation, he pointed out that it would be "impossible without additional staffing".

The failure to provide funding was reported to have resulted in at least three trials being stayed as a result of delays. Mr. Justice Alfred Strong, a former Liberal Member of Provincial Parliament who stayed one of the proceedings in December 1996, was quoted as saying "[i]t is incumbent upon the states to provide finances for its institutions". Indeed, Article 7 of the United Nations Basic Principles on the Independence of the Judiciary requires states to do just that. In his decision, Justice Strong relied on the 1990 case in which the Supreme Court of Canada stayed charges of conspiracy to commit extortion against Elijah Askov after finding that lengthy delays violated the constitutional right to a fair trial within a reasonable time. The "Askov" decision led to approximately 50,000 charges being stayed.

In *Attacks on Justice, 1995*, the CIJL reported the significant reductions which were being made to the traditionally generous legal aid plan in Ontario in order to address the plan's deficit. The reductions were seen as interfering with access to legal representation, particularly by minority groups. In November 1996, the Attorney-General for Ontario, Charles Harnick, announced a comprehensive review of the 30 year-old Legal Aid Plan would be conducted.

Complaints against Justice Julias A. Isaac

Delays in processing were also an issue in the Federal Courts. On 1 March 1996, J. E. Thompson, Q. C., then Assistant Deputy Attorney-General, Civil Litigation, telephoned Justice Isaac, Chief Justice of the Federal Court of Canada, and stated that there were "gross delays" in citizenship decertifcation cases which were before the Trial Division of the Federal Court. The cases concerned accused Nazi war criminals. Mr. Thompson informed Justice Isaac that the Department of Justice was about to recommend that the Department refer the issues directly to the Supreme Court of Canada.

In response, Justice Isaac invited Mr. Thompson to his chambers to discuss the issues. Mr. Thompson outlined his concerns, including the fact that many witnesses were elderly and dying and that the Department of Justice was concerned that the cases would not be heard on their merits. Justice

Isaac asked Mr. Thompson to put his concerns in writing and to include a chronology of events on each of the outstanding cases. He then conferred with the Associate Chief Justice James Jerome who was seized with the case management of the cases and who agreed to ensure the cases were heard promptly. The Chief Justice wrote to Mr. Thompson confirming this but at the same time used the phrase "to avoid a reference (to the Supreme Court of Canada)" and elsewhere, the phrase, "as the Government would like". The letter formed part of the court record.

On 30 April 1996, the respondents in three of the cases brought a motion to stay all proceedings before the Associate Chief Justice on the grounds that Justice Isaac had received representations from one party to the proceedings in the absence of the other. The Associate Chief Justice removed himself from the cases and Mr. Justice Cullen was appointed to hear them. On hearing the motions for a stay of proceedings, Justice Cullen found that the cases were "so tainted by the 'egregious actions' of Justice Isaac and Mr. Thompson", that he granted the stays. He described the actions of Justice Isaac and Mr. Thompson as an "affront to judicial independence". Justice Cullen's decision was overturned by the Federal Court of Appeal in January 1997 which found that a chief justice has, in fact, a "duty to take an active and supervisory role in this respect". In the view of the Court, "the intervention of the Chief Justice in the circumstances of this case did not constitute an interference with the judicial independence of the presiding judge; ... and could, in no way, affect the impartiality of the presiding judge". The respondents' appeal to the Supreme Court of Canada was to be heard later in 1997.

In or about June 1996, a complaint was filed against Justice Isaac with the Canadian Judicial Council (CJC) by Mr. R. I Gillen, reportedly a nephew of one of the respondents.

Justice Isaac responded to the CJC by letter dated 14 June 1996 and denied all allegations of wrongdoing, citing his duty to ensure cases were handled expeditiously by the courts. The CJC reviewed the complaint and the surrounding facts to determine if a hearing was warranted. By correspondence dated 8 October 1996, the CJC advised Justice Issac that it had determined, *inter alia,* that there is a special societal interest in expediting cases involving war criminals and that Mr. Thompson was not in fact counsel on the cases, but the manager of litigation in the Justice Department.

The Council did find however, that the wording used by Justice Isaac and in particular the phrases referred to above ("to avoid a Reference" and "as the Government would like") "could imply deference by the Judiciary to the Executive". After considering the context of the phrases, the Council decided that "in spite of the wording of your (Justice Isaac's) letter, it was not made in response to a threat, nor was there any inappropriate deference in your conduct". The Council also noted that Justice Isaac's correspondence was circulated to all counsel for the parties in the cases in question.

Finally, the Council determined that the "appropriate course of action ... would have been to give notice to counsel for all of the parties of the meetings with both Mr. Thompson and Associate Chief Justice Jerome, as well as the substance of those meetings". Justice Isaac's failure to do so was seen as an "inadvertence" and did not warrant "even the consideration of ... (Justice Isaac's) removal from the office of judge".

An inquiry was also commissioned by the Department of Justice into the facts, and specifically to determine if the conduct of Mr. Thompson or any other departmental officials fell below the standards expected of departmental employees. Although the inquiry held that Mr. Thompson had been "properly motivated," the inquiry found that in failing to give notice to counsel for the respondents, Mr. Thompson had departed "from the standards expected of departmental employees". Mr. Thompson was reassigned from managing the federal government's civil litigation department to be a senior advisor to the Associate Deputy Minister, Legal Operations.

Cases

Louise Arbour {Judge of the Ontario Court of Appeal, Chief Prosecutor of the United Nations War Crimes Tribunal for the former-Yugoslavia}: In November 1996, Anne Cools, a senator, called on Governor General Romeo LeBlanc to remove Judge Arbour, claiming that, "[b]y her wilful absence from bench and country, she has abandoned her judicial office and neglected the duties of said office." The Minister of Justice, Allan Rock, responded to the motion by saying that by assuming her post with the UN Tribunal, Judge Arbour had not breached the Judges Act.

Following this incident, the Judges Act was amended to address Justice Arbour's specific circumstance.

Dale Hewat, Jerry Kovacs and Roman Stoykewych {Lawyers and Vice Chairs of the Ontario Labour Relations Board}: By Order-in-Council dated 2 October, the three year full-time appointment of each of these three Vice-Chairs of the Ontario Labour Relations Board was revoked. The same Order-in-Council purported to re-appoint them as part-time Vice-Chairs "at pleasure". The part-time appointments were for the limited purpose of completing the matters of which they were seized at the time. This was the first time in the history of the Board that a Chair, Vice-Chair or Member of the Board had been appointed "at pleasure".

Ms. Hewat, Mr. Kovacs and Mr. Stoykewych had originally been appointed by the previous government for fixed terms of 3 years, on 3 February 1993, 11 May 1994 and 4 May 1995 respectively. During the appointment process, each of the Vice-Chairs were advised that although there was no guarantee that they would be re-appointed at the end of their terms, Vice-Chairs had been re-appointed in virtually every case to

subsequent terms. In the beginning of 1996, the Chair of the Board indicated that the re-appointments might not be automatically forthcoming and that the Conservative Government had expressed a desire to "restore balance" at the Board as there were too many young Vice-Chairs who had represented unions prior to their appointments to the Board. Mr. Stoykewych, whose initial term had expired, was re-appointed on 8 February for a second three year term, without limitation or qualification.

The Vice-Chairs jointly brought an application for judicial review against the Government of Ontario, requesting a declaration that the Orders-in-Council were invalid and of no force and effect and that the Vice-Chairs were entitled to serve the balance of their three year terms. They also sought an order reinstating them to their positions on the Board.

The Vice-Chairs argued that the Ontario Labour Relations Act "established a Board which is to function as an independent quasi-judicial tribunal. At a minimum, this requires that the appointment process be fully consistent with the requirement of independence. In order to avoid an apprehension of bias, the Vice-Chairs must be free to exercise their responsibilities independently, without the possibility, or even the perception of political or government interference." In their argument, the Vice-Chairs referred to the Government of Canada's obligations to provide a fair trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. They also relied on, *inter alia*, the following two cases recently decided by the Supreme Court of Canada which stated:

> The minimum requirements for independence do not require that all administrative adjudicators, like judges of courts of law, hold office for life. Fixed term appointments, which are common, are acceptable. However, the removal of adjudicators must *not simply be at the pleasure of the executive.* (2747-3174 Quebec Inc. v. Quebec (Regie des permis d'alcool), 21 November 1996 S.C.C.)

> Where tribunal members may be removed from their positions at any time, this leaves open the possibility of considerable abuse, and contributes "to an apprehension of insufficient institutional independence". (C.P. Ltd. v. Matsqui Indian Band, 1995, S.C.C.)

On 11 February 1997, a bench of three judges of the Divisional Court of the Ontario Court (General Division) followed a recent decision of its own, *R. v. Dewar,* and confirmed that each of the Vice-Chairs had been appointed for a term of three years and not one during pleasure. Accordingly, they were entitled to a declaration that the Orders-in-Council were invalid to the "extent that it purports to revoke his or her appointment as Vice-Chair and to a declaration that he or she was entitled to serve the balance of the three year term as Vice-Chair of the Board". The Court declined to require reinstatement but granted a declaration that each "of the

applicants is entitled to full reimbursement for any loss suffered as a result of the unlawful termination of his or her appointment". It declined to accept the argument that "the need for independence in a tribunal like the Board, whose members discharge quasi-judicial functions, affects their tenure".

The applicants, although entitled to compensation, filed a Notice of Motion for Leave to Appeal to the Ontario Court of Appeal on 25 February 1997. The grounds of the motion, among others were that the Court erred in finding that the applicants did not have a right to be reinstated and that their tenure was not "affected by the need for the independence of the Board". The Ontario Government had notified the solicitors for the applicants that it also intended to appeal, although at the beginning of March 1997, its materials had not been served. It was reported that this appeal could be joined with the *Dewar* case, also under appeal.

The Government Response to CIJL

On 9 June 1997, the Government of Canada responded to the CIJL's request for comments. The Government made some editorial comments. They were incorporated into the text.

CHINA

The People's Republic of China is a unitary state with 22 provinces, five autonomous regions and three municipalities. Under the 1982 Constitution, legislative power is vested in the National People's Congress (the People's Congress), the 2,970 members of which are indirectly elected. Executive power is exercised by the State Council, which is elected by the People's Congress; however, in 1996, effective political control remained in the hands of the Communist Party of China (CCP), still theoretically dominated by the ailing (and not seen for two and a half years) Deng Xiaoping who died in February 1997. Members of the CCP held most senior positions in the civil, police and military services.

On 28 April 1996, the Chinese government launched its *Yanda*, or "Strike Hard" campaign to fight corruption. Reports indicated that tens of thousands were arrested and it was estimated that in May and June alone, at least 1,000 people were executed: on 27 June, the *People's Daily* reported the execution of 231 people convicted of drug offences. It was feared that pressure on the police to eradicate corruption likely resulted in the increased use of torture to force confessions. Further, trials were expedited: in one case, three men were executed on 31 May after being arrested on 21 May and accused of robbing a car "loaded with bank notes". Although the campaign was officially directed towards offenders of serious crimes, it was reported that those convicted of minor offences were also executed.

Frequent reports of human rights violations occurred throughout 1996. Dissidents had effectively been silenced and reports of extra-judicial killings and torture were released. The Supreme People's Procuratorate reported in March that it had investigated 412 cases in which torture was used to extract a confession in 1995. It did not however, inform as to what measures were taken to discipline the perpetrators of the torture. In April, the Chinese delegate to the United Nations Commission on Human Rights stated that "the Chinese judiciary deals with every complaint of torture promptly after it is filed, and those found guilty are punished according to the law".

AMENDMENTS TO THE CRIMINAL PROCEDURE LAW

On 17 March 1996, the Eighth National People's Congress adopted the "Decision Regarding Revisions to the Criminal Procedure Law of the People's Republic of China" (CPL). It was the first time that the 1979 CPL had been revised. Amendments were made to 110 clauses and the number of articles was increased from 164 to 225. The amendments were heralded by a Professor of China University of Politics and Law as making "a great improvement in further guaranteeing human rights".

Among the most significant amendments to the CPL were the following:

EVIDENCE

- After a trial, the People's Court may now announce the accused innocent for lacking sufficient evidence to find the accused guilty (Article 162). Further, Article 46 now prevents a defendant from being found guilty on the basis of a confession alone.
- Prior to the amendments, a judge could return the file to the prosecutor for further investigation as many times as he or she believed was necessary if the judge was not satisfied there was sufficient evidence for a conviction. Now these questions are determined through court examination and cross examination.

DETENTION

- Previously, persons suspected of organised crimes were "sheltered" during an investigation, a measure seen as an administrative function invoked by the public security organs. Detainees could be held for up to three months. A suspect in custody may now apply for bail on deposit of a security of a guarantor (Articles 51-53).
- Despite this improvement, Article 69 of the amended CPL actually increases the period of detention before charge for "ordinary suspected criminals" from 10 to 14 days. Those who previously were classified as "shelter and investigation" detainees (now "major suspects") may still be detained for up to 37 days without charge. Although the government has claimed the "shelter and investigation" system is to be abolished, the amendments do not specifically repeal the regulations that authorise the system. It is important to note, that the amended CPL does not affect "re-education-through-labour" whereby authorities may extra-judicially sentence detainees to three years in labour camps. In 1995, the State Compensation Law provided an avenue by which citizens may recover damages for illegal detention. The Chinese press reported cases where in fact, citizens have successfully sued the government for damages.

ROLE OF LAWYERS

- Lawyers will be entitled to take part in criminal proceedings at an earlier stage. (The original CPL only permitted lawyers to commence their duties at the time of trial, or in some cases, seven days before trial.) Article 96 recognises that a suspect now may hire a lawyer after the first time he or she is questioned by an investigative body or from the day on which he or she is subjected to a coercive measure. It is important to note that this is not a "right" - Article 96 is permissive only. Further, the permission to hire a lawyer does not necessarily mean the lawyer may actually meet with his or her client and in the event the lawyer does receive permission to meet with the client, personnel from the investigating organ may be present at any meeting which occurs.

Only Article 33 provides the right to a lawyer and then only from the time the case is transferred to the Procuracy, and after the investigation, which may be as long as two or seven months, depending on the "complexity" of the case and severity of the potential sentence (Articles 124-127).

A lawyer will now also have the right to know the charge(s) brought against his or her client, the right to provide legal advice, and the right to appeal, bring a lawsuit or apply for bail on behalf of the client. The Deputy Director acknowledged that "by entering criminal proceedings earlier, the lawyer can know the relevant information earlier, make full preparation for the defence and safeguard the rights of his clients". However, under Article 151 of the amended CPL, a copy of the bill of prosecution must be delivered to the defender only 10 days prior to the opening of the court session.

The Vice-President of the Beijing Lawyers' Association, interviewed by *China Law* acknowledged that these amendments will require a significant number of new lawyers. He pointed out that this may pose a problem as lawyers are reluctant to deal with criminal cases because their arguments have traditionally been ignored, law enforcement was inadequate and the fees are very low. He noted that the quality of lawyers will have to be improved to meet the new obligations imposed by the amendments. The government did take steps to address these concerns. It announced its intention to ensure there would be 150,000 lawyers, 30,000 notaries and 40,000 legal service centres by the year 2,000 (see also under "Lawyers" below).

ROLE OF JUDGES

- Judges will no longer be given the entire file in advance of trial. Previously, a judge reviewed all the evidence at a pre-trial and it was only if the judge determined that a criminal act had been committed and there was sufficient evidence to prosecute that a trial would be held. In fact, the People's Procuratorate could not "bring suit against one who, under conditions prescribed by the Criminal Law, does not need punishing or is exempt from penalty." Effectively, the judge was required to pre-determine the matter before the trial. Pursuant to Article 150 of the amended CPL, a judge "shall decide to open the court session and try the case" if the Bill of Prosecution contains clear facts of the crime charged and attaches a list of evidence, with names of witnesses, and photocopies or photographs of major evidence. It was thought by the People's Congress that this would avoid the phenomenon of "decide the case first and hear it later".

  Previously, judges gave evidence in court. A judge interviewed by the journal, *China Law* acknowledged that prior to the amendments, the judge and the prosecutor could be seen as colluding with one another

against the defendant. The amendments now permit only the public prosecutor, the parties concerned and the defence lawyers to make statements and to cross-examine witnesses.

While the above amendments were seen as generally positive, there is genuine concern that the tradition of a dependent judiciary will prevent actual implementation of these provisions. Further, the amended CPL still lags behind international standards.

For example, the presumption of innocence is not clearly established and the burden of proof remains on the defendant. Article 35 reads "[t]he responsibility of the defender shall be: to present, according to facts and the law, materials and opinions to prove the innocence or pettiness of the crime suspect or the defendant, or to prove to mitigate or exempt his criminal responsibility, and to safeguard the legitimate rights and interests of the crime suspect and the defendant".

Article 7 provides the "people's courts, the people's procuratorates and the public security organs shall...co-ordinate their efforts and check each other so as to ensure the correct and effective enforcement of law". This appears to require the judiciary to report to government departments to ensure they are performing their functions properly.

Further, a summary procedure in criminal matters is now available under Article 174 of the CPL in cases where the facts are clear, the evidence is sufficient, the situation is simple, the offence is minor and the possible punishment would be less than three years imprisonment. Criminal cases instigated only upon complaint and by the victims may also be processed through the summary procedure.

Court Structure

The Chinese court system is comprised of four levels of courts: the People's Courts, Intermediate People's Courts, High People's Courts and the Supreme People's Court. Judges are appointed by the People's Congress. The "People's Courts" jurisdiction includes criminal, civil and administrative cases together with the resolution of commercial disputes. The amended CPL continues the practice that trials of first instance shall be conducted by a collegial panel of judges, people's assessors and lay people. Military Courts serve as the judicial branch of the People's Liberation Army and are to adjudicate military offences committed by army personnel and "other criminal offences".

Although Article 126 of the Chinese Constitution of 1982 provides that the People's Courts are to be free from interference, it also provides that the courts will be part of the executive and under the control of the authority of the People's Congress. Their mandate includes upholding respect for the laws and the legal system, the protection of the social order and guaranteeing that property, personal, democratic and other rights are not infringed.

"Moreover, the Constitution of the Communist Party of China requires all judges and lawyers to be Communist Party members. Further, the Standing Committee of the People's Congress has the power to appoint and remove judges without cause, an obvious threat to any purported independence. Despite this clear interference with judicial independence, the Chinese Embassy, in a Press Release issued in New Delhi on 8 February 1995 claimed that the Chinese legal system contains a concept similar to the separation of powers, saying "there is a rational division of labour for the state organs brooking no mutual intervention and intrusion".

LAWYERS

In 1979, the government authorised lawyers to recommence practising law. They had been prohibited from doing so for 20 years. On 15 May 1996, The Law of the People's Republic of China on Lawyers was adopted by the Eighth National People's Congress. The Law was to take effect on 1 January 1997. The stated purpose of the law was to, *inter alia,* regulate the conduct of lawyers, protect the rights and interests of clients, uphold the correct implementation of the law and "give full play to the positive roles of lawyers in the building of the socialist legal system". Lawyers continued to be supervised by the Minister of Justice, and specifically the "justice administrative authority under the State Council" has the power to supervise and instruct lawyers, law firms and associations of lawyers. The law does, however, recognise that lawyers act for their clients, and not the State.

The justice authority will grant licenses to practise law to those who have attained the required legal education or level of professional skills or to those who have received education in other faculties but have passed the uniform national bar examination, to be set by the justice authority. However, only those "who support the Constitution of the People's Republic of China" are permitted to apply for a license to practise law. Article 9 forbids a licence to be issued to those, among others, "who have no capacity for civil conduct or limited capacity for civil conduct". It also forbids those "who have been discharged from public employment" from applying.

Lawyers have already begun to organise private self-regulating law firms: officials from the Ministry of Justice were reported as saying that there were approximately 1000 of such firms whose budget and personnel were not directly controlled by the state.

The All-China Lawyers' Association is to be established directly "under the Central Government". Articles of the All-China Lawyers Association and those of any local associations are to be reported to the justice authority. Lawyers must join their local law associations.

Lawyers who breach any of the provisions of the law or commit other "acts liable to be disciplined and punished," will be disciplined by the

justice administrative authorities of the people's governments of the provinces, autonomous regions, municipalities directly under the Central Government and municipal districts.

As the "Law on Lawyers" was not scheduled to take effect until 1 January 1997, lawyers in 1996 continued to be denied access to their clients prior to trial and any opportunity to prepare an adequate defence. The 1979 Criminal Procedure Law which was in force provided that lawyers could not be retained prior to seven days before the trial. Permission of the court was required before a lawyer could interview or produce witnesses or have access to evidence. Lawyers who acted for political dissidents would often find their licenses revoked. Further, the few lawyers who do practise criminal law depend largely on an official work unit for employment, housing and other benefits and accordingly were often reluctant to represent political dissidents.

COLOMBIA

The President of the Republic of Colombia is elected for one period of four years and exercises executive power assisted by his cabinet. Members of the bicameral Congress, comprising a Senate and a House of Representatives, hold legislative power and are elected for four year terms. President Ernesto Samper Pizano who was elected in 1994 continued to hold office throughout 1994.

The turbulent situation in Colombia continued in 1996, marked by civil conflict, human rights violations and institutional crises. Despite the numerous national governmental organs and bodies empowered to address human rights violations, including a Human Rights Ombudsman, the Attorney General's Office for Human Rights, the Special Human Rights Unit of the Prosecutor General's Office and 208 human rights offices of the Ministry of Defence Secretariat for Human Rights, there were reports of alarmingly high rates of extra-judicial killings, disappearances, kidnapping, arbitrary detentions and torture.

POLITICAL VIOLENCE

A study by the Colombian Commission of Jurists (CCJ) indicated that the number of political killings and forced disappearances carried out by members of the armed forces and police had decreased since 1993, whereas those committed by paramilitary organisations had increased. The statistics revealed that in cases of political killings, forced disappearances and social cleansing committed from October 1995 to September 1996 in which the perpetrators could be identified, paramilitary members committed 62.5 percent of those crimes, compared with 18 percent in 1993. Guerrilla organisations reportedly committed 27 percent of the offences, compared with 28 percent in 1993.

STATE OF INTERNAL COMMOTION

According to the Colombian Constitution, "a state of internal commotion" (*Estado de Conmoción Interno*) may only be imposed as a temporary measure (a maximum period of 90 days which may be extended for two additional periods) and only when the ordinary powers of the state are insufficient to address the problem. In Colombia however, these measures were used five times from 1990 to 1996 to implement a policy of national security to end the internal fighting through military measures.

In 1995, proposals for peace talks between the Government and the main opposition movements were abandoned and the internal conflict involving the security forces, paramilitary groups and the guerrilla groups intensified.

Two states of internal commotion were undertaken as part of a "National Agreement against Violence", signed by the controlling political parties and economic corporations. The first state of interior commotion was declared on 16 August 1995, for which the Government cited the crisis within the judicial and prison systems as justification. This declaration was held to be unconstitutional by the Constitutional Court on 18 October 1995 with the Court finding that the although the level of violence was high, it was not increasing. The second decree establishing a state of interior commotion was issued on 2 November 1995, provoked by the killing of a prominent Colombian politician. This time the Constitutional Court decided that the state of emergency was justified, and ratified it in January 1996. The state of interior commotion was extended in April and July 1996. It expired at the end of October 1996.

The declarations of a state of interior commotion permitted ruling by decree which in turn allowed far reaching encroachments upon the rights and freedoms of the individual. As well, the declarations weakened the powers of the judicial system to redress such violations. One of the most serious measures implemented during the second declaration was the creation of Special Public Order Zones, established by Decree 717 of 18 April 1996 and further elaborated upon in Decree 900 of 22 May 1996. These special zones were established in areas where a high level of guerrilla movement was considered to exist. This area covered one-third of the Colombian territory. The military was given exceptional powers to combat such movement and the military power superseded that of the civil authorities. The Decrees authorised the military to restrict, *inter alia*, the freedom of movement and the right to liberty, including curfews, obligatory registration and identity controls. Members of the public forces, including any police officer or soldier, was allowed to detain a person for "justifiable reasons" which led to a conclusion that the suspect was involved in criminal activities. Suspects could be detained on military premises for a maximum of 36 hours before being brought before a judge.

Despite the severe intrusions that the Public Order Zones imposed on the constitutional rights of the population living in the specified areas, the Constitutional Court, on 4 July 1996, upheld them, repealing only a few articles that did not affect the severity of the measures. The Special Public Order Zones remained in place until the state of emergency expired in October 1996.

DRAFT CONSTITUTIONAL REFORM

In August 1996, the Government introduced proposals to reform the 1991 Constitution. At the same time, the armed forces, through a group of Senators, presented another proposal. The Senate hastily approved the reform of some 50 articles of the Constitution on 16 December 1996, the last

date before the end of its session. Due to irregularities in the approval procedure, the Government decided to withdraw the reforms, for fear the Constitutional Court would declare them unconstitutional due to procedural deficiencies. However, at the end of 1996, both the Government and the armed forces still intended to pursue their reforms. If passed, they will primarily affect each of the four areas described below.

1. Concerning states of emergency, the proposed reforms will:
   (i) eliminate the time limit for the duration of states of emergency;
   (ii) allow the government to issue exceptional decrees for reasons that did not exist when the state of emergency was declared;
   (iii) restrict the powers of the Congress in relation to its legislative powers;
   (iv) give permanent effect to the penal sanctions dictated during the state of emergency;
   (v) allow the armed forces to perform functions that normally pertain to the judicial police; and
   (vi) allow the government to invoke a state of emergency not only in case of external war, but also in order to prevent such war.
2. The *tutela*, (judicial review of constitutional rights), will be restricted, with the exception *habeas corpus*, in the following way:
   (i) *tutelas* against members of the public forces will be administered exclusively under military jurisdiction; and
   (ii) *tutelas* against members of the public forces will not be considered during times of war or during a state of emergency.
3. The Constitutional Court will be restricted in that the reforms will:
   (i) eliminate the power of the Court to exercise judicial control over declarations of state of emergency; and
   (ii) restrict the Court from passing "conditional" sentences on the constitutionality of norms, i.e., it will be prevented from establishing the framework within which a legal norm must be interpreted to be constitutional.
4. The reforms will also:
   (i) allow members of the armed forces to be investigated by the Prosecutor General only upon referral from the military courts;
   (ii) allow for administrative detention of a maximum of seven days, when an attempt against public peace is suspected; and
   (iii) authorise the creation of a national militia to involve citizens in the defence of "the sovereignty, independence, the integrity of the national territory and the constitutional order". This would, in practice, imply the constitutional acceptance of the paramilitary.

The proposed reforms of the Constitution are a regression which will seriously affect the human rights situation in the country, in particular during states of commotion, an instrument which has been used excessively in recent years.

ALLEGATIONS OF CORRUPTION

Allegations against President Samper that he accepted money from drug cartels during his electoral campaign in 1994 culminated in formal charges of illegal enrichment and electoral fraud being laid by the Prosecutor General in February 1996. This further put into question the legitimacy of the Government. Nevertheless, in June 1996, the House of Representatives, many members of which themselves faced investigations for corruption, acquitted the President.

On 26 April 1996, the Supreme Court asked the Senate to suspend Procurator General Orlando Vásquez Velásquez for 90 days, as he was facing charges of obstructing the course of justice. He was also under suspicion of being involved with the Cali drug cartel and fabricating evidence of illegal conduct against the Prosecutor General, who was investigating President Samper. On 3 May, the Procurator General surrendered to the authorities, where he was arrested and charged with receiving large payments from the Medellín and Cali drug cartels.

THE JUDICIARY

The Constitution provides for the separation of the executive, legislative and judicial branches and their respective independence. The judicial branch comprises the court system, the Office of the Prosecutor General (*Fiscalía General de la Nación*) and the Superior Council of the Judicature (*Consejo Superior de la Judicatura*). The court system is composed of courts of ordinary jurisdiction, where the Supreme Court of Justice is the highest judicial organ, followed by higher courts, first instance courts of one judge and Justices of the Peace. The higher courts and the courts of first instance have jurisdiction over civil, criminal, family, agrarian and labour matters. The Regional Courts, formerly called Public Order Courts and known as "Faceless Courts", formed part of the ordinary criminal jurisdiction (see further below under Faceless Courts) while Military Criminal Courts functioned separately. Indigenous communities could exercise some jurisdictional functions within their territorial limits.

The Constitution provides for the autonomous functioning of the judiciary. In 1991, the Superior Council of the Judicature was charged with the administration of the judiciary, including selecting candidates for vacant posts. The selection of judges through the Superior Council was established

as a means to de-politicise the judiciary, after demands from various sectors of the society. The Council is composed of 13 judges. Judges of the Supreme Court are elected by the Supreme Court itself, from lists prepared by the Superior Council. The judges are elected for a period of eight years and cannot be re-elected.

The Superior Council of the Judicature also prepares the judiciary's budget proposal, which is submitted to the Government and later approved by Congress. In 1996, both the police and the judiciary lacked resources to investigate and prosecute crime. In June 1996, the Superior Council of the Judicature announced that 74 percent of all crimes went unreported and between 97 and 98 percent of all crimes go unpunished. The Colombian Commission of Jurists continued to maintain that impunity for political crimes was virtually 100 percent.

At the same time, the Colombian judiciary was unable to process the criminal cases before it because of an overload of cases and inefficient equipment. This entailed other concerns: instead of being brought before a judge within 36 hours as the law required, criminal suspects often remained in pre-trial detention for extended periods of time, notwithstanding that 72 percent of the human resources of the judiciary were devoted to criminal cases. During 1996, various projects for resolving the problem of delay were discussed.

In December 1996, the 40,000 employees of the judicial branch initiated a strike to exact higher salaries and the payment of the US $14 million the government owed in pensions.

The Constitutional Court

The Court is composed of nine judges elected for one period only of eight years by the Senate, upon proposals made by the President, the Supreme Court and the State Council (*Consejo de Estado*). In 1996, Article 241.7 of the Constitution authorised the Constitutional Court to review all legislative decrees issued by the Executive under the state of interior commotion. The proposed constitutional reforms discussed above would remove this power.

Since its creation in 1991, the Constitutional Court has played an important role in the protection of human rights and other constitutional guarantees in Colombia. During 1995 and 1996, the Constitutional Court *ex officio* ordered revisions to several decrees of the Executive.

As noted above, the Constitutional Court was not consistent in its consideration of the decrees which established the states of interior commotion, issued in August and November 1995. The Court did not consider that the circumstances relied on by the Government to declare the first state of internal commotion were exceptional nor a state of emergency was required to remedy the problems. The decree was accordingly declared

unconstitutional on 18 October 1995. However, the second state of internal commotion declared only two weeks later was accepted by the majority of the Constitutional Court. The Executive had based the second Decree on the murder of a conservative politician which the Court held fulfilled the constitutional requirement of a serious disturbance of the public order, which directly threatened institutional stability or the security of the state or its citizens. The dissenting opinion however found that despite the serious and repulsive nature of the murder of the politician, as an isolated incident, it did not justify the resumption of a state of internal commotion. The dissent noted that the general situation in the country had not change because of the incident or any other which occurred between the first and the second declaration of state of internal commotion.

Faceless Courts

Regional Courts, formerly called Public Order Courts, were established in a reported response to threats and violence against judges, prosecutors and defence attorneys when dealing with cases involving guerrilla, paramilitary groups and narcotic organisations. These courts have special jurisdiction in cases where there is a threat against the national security, such as terrorism, subversion, drug trafficking, kidnapping and extortion (see *Attacks on Justice, 1995*).

Judges, prosecutors, witnesses and defence attorneys are anonymous, for security reasons. The offences over which these courts have jurisdiction have been broadly interpreted, leaving room for the prosecution of peasant, labour and other activists, whose legitimate protests and demonstrations are alleged to be acts of terrorism. The procedure further violates the rules of due process, since the rights of the defence are greatly limited. Faceless prosecutors have a heavy caseload, usually exceeding 100 cases at a time.

In 1996, the Prosecutor General agreed that the cases administered before Regional Courts needed stricter limits and control and the Statutory Law on the Administration of Justice, Law N° 192 was enacted. Pursuant to the Law, regional jurisdiction was to be maintained until at least 30 June 1999. The Law did however, establish that anonymity shall not be the rule. Furthermore, judges can no longer base a conviction only on the testimony of an anonymous witness.

Military Courts and Impunity

Although President Samper, after assuming the presidential post, announced that impunity should be energetically tackled, those vows were overshadowed by the political crisis. While impunity was common in general, military jurisdiction has established almost absolute impunity in cases of human rights violations committed by members of the armed forces.

The military court system, including the Military Appeal Courts and the Military Criminal Court, has jurisdiction over active members of the armed

forces and the police that have committed an offence in relation to their duties. The military judges are officials of the executive branch. The hierarchy and the structure of the military justice system nourishes the lack of impartiality and independence. The Military Penal Code allows active duty military officers to sit as judges in cases of offences committed by inferior officers. In relation to human rights violations, the military judge in the case may be the same person who ordered the military operation during which the violations were committed. It may also be that the judge, as a superior officer, was the very person responsible for the violations under investigation.

The Constitution establishes that "offences committed by members of the armed forces on active duty, in connection with that duty, shall be heard by military appeal courts or military tribunals". The concept of offences committed while on active duty or in relation to such duty has been broadly interpreted, to the extent that any act committed while in uniform falls within the concept of active duty. In 1996, the concept was enlarged by the Superior Council of the Judicature.

It is the Prosecutor General who is in charge of investigating offences and bringing charges. However, when there is a conflict of competence as to jurisdiction over the case, it is the Superior Council of the Judicature that decides if a case should be resolved under ordinary or military jurisdiction. The Superior Council has constantly favoured military jurisdiction, including in its consideration of cases involving human rights violations.

In 1995, the Government appointed a drafting commission to reform the Military Penal Code (see *Attacks on Justice, 1995*). However, there was dissension between members of the commission regarding whether crimes such as extra judicial executions, torture and disappearances should be considered as acts committed in relation to military service.

Further, as a consequence of a *tutela* decision (judicial review of a constitutional right) against a military commander, the Commission also suggested that only military courts should deal with *tutelas* initiated against members of the armed forces (see case of **Alejandro Molina** below). The UN Special Rapporteurs on Torture and on Extra judicial, Summary or Arbitrary Executions who visited Colombia from 17 - 26 October 1994, had specifically recommended that these crimes be excluded from military jurisdiction.

The Government had not presented its final proposals to reform the Military Penal Code by the end of 1996.

UN ACTIVITIES DURING 1996

In 1996, the UN Commission for Human Rights expressed its concern for the continued serious human rights situation in Colombia, in relation to

the reports by the Special Rapporteurs mentioned above, as well as those of Working Groups on violations of the right to life, forced disappearances and torture. The Commission in particular stressed the need to strengthen the Rule of Law, *inter alia* by excluding from military jurisdiction the investigation and prosecution of human rights violations and by restricting the use of "faceless courts". To this end, the Commission, through the Chairman's Statement, urged the UN High Commissioner for Human Rights and the Colombian Government to establish a permanent office in Colombia "to assist the Colombian authorities in developing policies and programmes for the promotion and protection of human rights and to observe violations of human rights in the country and to prepare analytical reports on the situation".

On 29 November 1996, the Colombian Government and the UN High Commissioner for Human Rights signed an agreement to establish a field office in Colombia, to be opened in 1997.

The Special Rapporteur, Dato' Param Cumaraswamy, visited Colombia on 15 to 27 September 1996, upon invitation of the Government. During his visit, the Special Rapporteur met with representatives of the main judicial and state authorities, as well as with NGOs. His report was expected in 1997.

Harassment of Jurists

In 1996, several prosecutors received threats from unidentified persons and self-named groups.

The independence of the judiciary became even more debilitated in recent years, given the states of emergency. Decisions that interfered with powerful bodies, such as the military, were often intensely attacked. One such serious and distinctive example of interference with the independence of the judiciary and its work was the case of **Judge Alejandro Molina**, who, after rendering a decision which placed restrictions of the authority of the military was removed. The judge's decision was condemned by the armed forces and other sectors of the society; it even caused the President to express opinions demonstrating manifest disregard for the role of the judiciary (see further below).

Cases

Two anonymous prosecutors and one anonymous ex-prosecutor in Cali: These prosecutors were threatened by means of a media communiqué delivered by a self-named group "Nacionales 100 %" (Nationals 100%).

Members of the Immediate Reaction Unite of the Prosecutor's office in Bogotá: These prosecutors were forced to change their place of work as a result of threats from unidentified persons.

Lucila Acosta de Rodríguez {Prosecutor}: Ms. Acosta de Rodríguez was killed by an unidentified armed man on 8 May 1996 in Bogotá. She was an expert on financial crimes.

Antonio José Cancino {Lawyer}: Mr. Cancino was President Samper's defence lawyer concerning the allegations that the President accepted drug trafficking money. There was an attempt to kill him in 1995 (see *Attacks on Justice 1995*). In early 1996, he received death threats over the telephone.

Ramón Castillo {Lawyer}: Mr. Castillo was shot and killed on 19 February 1996, when leaving the University of Manizales, where he was a professor. Mr. Castillo had spent four years abroad due to threats on his life in 1989.

Rodolfo Castro {Lawyer}: Presumed members of the FARC guerrilla group kidnapped Mr. Castro together with a doctor on 1 May 1996, when they were travelling in a car between Bosconia and Valledupar. Their car was set on fire

Teofilo Cervantes Pacheco {Lawyer and city councillor}: Mr. Cervantes Pacheco was assassinated by two men driving a car when he was entering his house in Aracataca, Magdalena. According to sources, all members of the city council were threatened with death.

José Gregorio González Cisneros {Lawyer}: On 4 March 1996, Mr. González Cisneros was killed in Arauca by two men on a motorbike. He was involved in the investigation of a 1991 murder case and also cases regarding misconduct involving public resources. It was suggested that the perpetrators belonged to the *Union Camilista Ejército Liberación Nacional* (UC-ELN), a guerrilla group, since a member of this group had left a message with a local radio station saying that this would not be the only fatal event in Arauca.

Alvaro Granados {Lawyer}: Mr. Granados was abducted on 6 May 1996 in Bogotá by four hooded men. He was forced to enter a red car. At the end of 1996, his whereabouts were unknown.

Clara Valencia Linares and **Hugo Roberto Otalora Huertas** {Lawyers, the former was also a delegate for the Procurator's office before the Judicial Police}: This married couple was assassinated on the evening of 19 February 1996 in Bogotá, by men riding a moped. According to one source, Mrs. Linares was dealing with delicate records from the Public Ministry concerning members of the DIJIN and SIJIN (intelligence groups within the national police). Other sources said that she was investigating the murders of some security chiefs and that she was a member of a special investigating commission questioning a series of mysterious murders that occurred over the past months. The couple had already been shot at outside their home only eight days before their assassination, and had planned to leave the country by the end of the year.

Gabriel López Patino (Assistant Prosecutor in Segovia): Mr. López Patino was shot and killed on 28 May 1996 by unidentified men when he was riding his moped in Segovia, Antioquia. Segovia was the scene of two separate but related massacres for which military officials and paramilitary are under investigation.

Felipe Alberto López Soto (Ex-director of the regional prosecutor's office): On 27 January 1996, an armed person fatally shot Mr. López Soto as he was leaving his apartment in Los Rosales, Bogotá.

Pedro Julio Mahecha Ávila (Attorney at the *Corporación Colectivo de Abogados José Alvear Restrepo*): Since October 1996, Mr. Mahecha Ávila was under surveillance by persons parked in cars in front of his home and communicating over radio. He was also followed while working. During the last week of November, he received anonymous telephone calls at his home, with the caller attempting to establish Mr. Mahecha Ávila's whereabouts, as well as those of his wife and son. The reason for the harassment appeared to be Mr. Mahecha's legal representation of political prisoners, and in particular his work representing members of the National Liberation Army (*Ejército de Liberación Nacional*, ELN).

Pedro Alfonso Márquez (Director of the Prosecutor's office of investigations in La Guajira): In August 1996, Mr. Márquez was abducted and killed by persons alleged to be members of the ELN guerrillas.

Javier Alfonso Martínez Villa and **Quintin Díaz Rondon** (Members of the technical investigations unit of the Prosecutor General's office): These two members of the Prosecutor General's office were killed in the restaurant *El Morichal* in Tibu on 13 March 1996, after two men opened fire on the group. Three other officials of the Prosecutor General's office were hurt.

Alejandro Molina (Judge of first instance court): On 16 August 1996, Judge Molina ordered a Commander in Chief to open roads after a group of farmers had brought a writ of *tutela* protesting the closure. When the Commander refused to comply with the decision, the judge ordered his arrest for 30 days and levied a fine against him.

Both decisions were opposed not only within the armed forces, but also by others, who questioned the right of a judge to obstruct the politics of public order as established by the Government and carried out by the armed forces. The Defence Minister requested the Superior Council of the Judicature to investigate Judge Molina's alleged interference with public order. On 11 September, Judge Molina announced to the press that he was being harassed by the military, to the extent that he was obliged to temporarily leave his office. On 16 September his ruling on the *tutela* was overturned by the second instance court and in October, the Superior Council of the Judicature ordered his dismissal, purportedly for administrative reasons. The extraordinary speed by which the Superior Council decided the case of Judge Molina and the timing suggested that there was external pressure to remove him.

Miguel Angel Palomino Cervantes (Lawyer, specialising in agrarian matters): On 2 May 1996, Mr. Palomino Cervantes was shot and killed by men in a jeep. He was a leading figure in the negotiations for obtaining land before the Colombian Institute for Land Reform in the Atlántico.

Marta Elena Sánchez Jiménez (Lawyer and director of the state penitentiary of Palmira): On 13 January 1996, Ms. Sánchez Jiménez was killed by four men in a car. Prior to the killing, she had received threats and had been warned that she should reinforce her security.

Alfonso Valdivieso Sarmiento and **Adolfo Salamanca** (Prosecutor and Vice Prosecutor respectively): On 18 May, the Group *Coordinadora Guerillera Simon Bolívar* (CGSB) threatened the two lawyers by means of a communiqué stating that they should leave the country and resign from their work, or else they would die.

Reinaldo Villabalba Vargas (Lawyer): This defence lawyer of political prisoners and member of the *Corporación Colectivo de Abogados José Alvear Restrepo*, was threatened on 1 March 1996 together with his client Margarita Arregices, by the paramilitary group COLSINGUE (*Colombia sin Guerillas*, "Colombia Without Guerrilla"), A communiqué was delivered to Mr. Villabalba Vargas by the group, threatening to come to his work place. He also received a threat in form of a condolence note lamenting his death, a common practice in Colombia.

Ivan Augusto Zapata Castano (Prosecutor): On 17 June, Mr. Zapata Castano was assassinated by four men as he was entering his house in Vegachi, Antioquia.

CROATIA

The Republic of Croatia was recognised as an independent state in January 1992, six months after it declared its independence from Yugoslavia. The executive power is vested in the Government which, according to Article 108 of the Constitution, consists of the Prime Minister, Deputy Prime Ministers and other members, all of whom are appointed by the President of the Republic. Franjo Tudjman, was elected President in August 1992 to a five-year term. As President, he has pervasive powers under the Constitution. He may appoint and relieve of duty the Prime Minister, and the Deputy Prime Ministers and Government members at the proposal of the Prime Minister. The President is the Commander in Chief of the armed forces and may "pass decrees with the force of law and take emergency measures in the event of a state of war or an immediate threat to the independence and unity of the Republic or when government bodies are prevented from regularly performing their constitutional duties". Legislative power is exercised by the Croatian *Sabor* (parliament), which consists of a 136-seat Chamber of Deputies and a 63-seat Chamber of Districts, each elected by universal suffrage for a four year term. In the legislative elections in October 1995, the ruling Croatian Democratic Union (HDZ), which has been in power since 1991, won 45.2% of the votes.

The Croatian police and military forces continued to commit or allow serious human rights violations, in particular against ethnic Serbs who stayed behind after Croatian troops regained the Krajina region in a massive military offensive, in August 1995. Murders, looting, destruction of houses and intimidation of ethnic Serbs continued throughout the year, but the authorities made little effort to investigate, arrest and punish the perpetrators.

On 23 August 1996, Croatia signed an agreement with Serbia-Montenegro aimed at the normalisation of relations between the two countries. This agreement paved the way for the adoption of a general amnesty in September for ethnic Serbs who had fought against Croatia since 1991. However, only several thousand of the approximately 150,000 Serbs who had fled the Croatian attack in 1995 were able to return. The September 1995 suspension of the sections of the Law on National Minorities continued in 1996 as did the Government's efforts to legalise the population changes that resulted from its 1995 offensive.

In May and September 1996, two amnesty laws were adopted. The first amnesty law, which covered the region of Eastern Slavonia, resulted in the release of 282 persons. The second amnesty law applied to the entire country and any persons charged, arrested or convicted in relation to the armed conflict in Croatia. Among the amnestied persons were 15 Serbs arrested in 1995 on charges of espionage, including Judge Radovan Jovic (see below). Those in detention who were eligible for amnesty were to be released and those who had been charged or convicted *in absentia* would have their charges or convictions withdrawn. By October 1996, 95 persons had been

released, among whom 26 were charged again for war crimes. According to lawyers involved in these cases, the second arrests of many of the Serbian defendants constituted double jeopardy as they had been charged with the same crimes for which they were amnestied, despite a lack of new evidence.

Despite constitutional guarantees, freedom of expression and of the press were increasingly restricted in Croatia. In October, the Law on Public Information was adopted to regulate the media. Most newspapers and television broadcasting were controlled by the Government. Independent publications faced constant pressure throughout the year, particularly after the amendments to the Penal Code which were adopted in March 1996, authorising criminal prosecution of journalists who publish state secrets or slander the President, the Supreme Court, judges, or parliamentary figures. Under these amendments, legal actions were undertaken against three independent newspapers: *Feral Tribune, Novi List* and the weekly *Nacional*. The acquittal in September of *Feral Tribune*, charged with slandering the President, was appealed by the state prosecutor. The trial of the two other publishers accused of damaging the honour and reputation of the Croatian Democratic Union (HDZ) were pending at the end of 1996.

THE JUDICIARY

The Judiciary is dealt with in Articles 115 to 121 of the Croatian Constitution. According to Article 115, "[j]udicial power shall be autonomous and independent". Despite various laws adopted recently to this end, the independence of the judiciary remained theoretical. Moreover, the 1993 Judiciary Act granted the Ministry of Justice significant power over the judiciary and Article 37 of the Act explicitly states that the Ministry of Justice "shall conduct judicial administration".

Supreme Court

Only the Supreme Court and the Constitutional Court are created by the Constitution. The Supreme Court is the highest judicial authority in Croatia and "shall ensure uniform application of laws and equality of citizens". In 1996, it was comprised of 25 judges. It is organised in departments, each of which deals with specific legal matters. It has competence to hear extraordinary legal remedies against final decisions of all courts, the appeals against first instance decisions of district courts and against judgments of the military courts. It may also hear appeals from the High Commercial Court and the High Administrative Court and resolve conflicts of jurisdiction between various courts.

The Supreme Court holds a general session, called "Convention", upon the request of any of its departments or one-fourth of its judges, in order to establish general rules to ensure it fulfils its mandate. It also prepares opinions on draft laws of the Parliament relating to its powers or the power

of the courts in general. Decisions of the Convention are only binding when two-thirds of the judges are present and a majority of those present approve them.

Constitutional Court

The Constitutional Court consists of 11 judges. It has jurisdiction to *inter alia,* decide the conformity of laws and regulations with the Constitution and the law, protect the constitutional freedoms and rights of citizens, decide jurisdictional disputes between the three branches, decide on the impeachability of the President, supervise the constitutionality of the programmes of political parties and may, in conformity with the constitution, ban their work and supervise the constitutionality of elections.

Courts of general and special jurisdiction

The Judiciary Act created general jurisdiction courts and special jurisdiction courts. The general jurisdiction courts are organised in two levels: Municipal Courts and District Courts. The special jurisdiction courts include Commercial Courts, the High Administrative Court and Military Courts.

Municipal Courts are courts of first instance and have the jurisdiction to hear criminal offences punishable by a prison sentence of less than ten years, civil matters and "all cases which are not otherwise in the competence of another court or Notary Public". There are approximately a hundred Municipal Courts in Croatia, each of them in the territory of one or more municipalities.

District Courts comprise Courts of First Instance and Courts of Appeal. There are 14 District Courts in Croatia, and their competence extends to crimes punishable by more than ten years of imprisonment. They also examine conflicts of jurisdiction between different Municipal Courts, and hear appeals from the Municipal Courts and Military Courts. District Courts may also conduct investigations, public proceedings and disciplinary proceedings and decide cases in first instance.

In addition to the courts of general jurisdiction, there are Misdemeanour Courts which adjudicate minor offences such as the disturbance of the peace or traffic violations punishable by monetary fines and/or short prison terms. Decisions of the misdemeanour courts may be appealed before the High Court in Zagreb.

Commercial Courts are first instance tribunals which adjudicate disputes dealing with commercial actions or entities. There are eight throughout Croatia and their jurisdiction usually extends over one or more districts. Their decisions may be appealed to the High Commercial Court in Zagreb, which may confirm, reverse or alter the decision of the lower court. Only in the last case may the Court's decision be appealed before the Supreme Court, otherwise its decisions are final.

The High Administrative Court is located in Zagreb and has jurisdiction over the entire territory of Croatia. It is comprised of 14 judges and divided into finance, construction and social property departments. It hears appeals against decisions of administrative bodies ranging from local governments to ministries. Cases are first heard by a panel of three judges whose decision may be reviewed by a panel of five judges and occasionally by the Supreme Court of Croatia.

In November 1996, the Croatian *Sabor* provided for the abolition of the military court system which had operated throughout the war. These courts, however, will continue to operate until all outstanding cases are resolved.

Appointment Procedures

According to Article 121, "[j]udges and public prosecutors shall, in conformity with the Constitution and law, be appointed and relieved of duty by the High Judiciary Council of the Republic, which will also decide on all matters concerning their disciplinary responsibilities" (the Council). The Council is composed of a President and 14 members appointed by the Parliament, on recommendation of the Chamber of Counties, for eight years from among senior judges, public prosecutors, lawyers and law professors who have at least 15 years experience.

In many countries, such a council would select potential candidates and recommend those candidates to the executive for the final selection. In fact, in Croatia, and pursuant to the Law of the High Judicial Council, it is the Ministry of Justice which publishes a list of judicial vacancies in the *Official Gazette*, reviews the applications, gathers additional information on the applicants and then provides the Council with a list of eligible applicants. The Ministry must inform those applicants who were rejected the reasons for the rejection and of their right to appeal within eight days. The Council then selects the candidates for the vacancies. This process effectively gives the Minister of Justice the authority to pre-determine judicial candidates.

Any citizen of Croatia who holds a degree from a faculty of law and has passed a judicial examination, usually administered by a justice, state attorney or private practitioner, may be appointed to the judiciary. "Passing the examination" requires a minimum of 18 months practical experience as an intern in a court, state attorneys office or private law firm. Thereafter, each of the courts have specific requirements which must be met before a judicial appointment can be made.

In *Attacks on Justice, 1995*, the CIJL reported that in 1995, the Council announced it planned to appoint an entirely new judiciary as the then judges of the Supreme Court had been appointed by the ruling party in the early 1990's and were not impartial. A struggle ensued between the Council and the Minister of Justice, with the Council appointing only 25 judges to the Supreme Court instead of the 37 judges required by the Minister of Justice, who, pursuant to Article 46 of the Judiciary Act, is entitled to determine the

number of judges for each court. The Council's decision was challenged two times before the Constitutional Court, which decided both times that the Council's decision to appoint only 25 judges was contrary to the Judiciary Act. At the end of 1996, the dispute had not been resolved and the appointments to the Supreme Court remained outstanding. All other judges, except for those of the district and municipal courts whose selection is still underway, have been appointed.

Removal Procedures

Once they are appointed, judges enjoy permanent tenure and may not be transferred against their will. Their performance, however, is evaluated by the judicial department or President of the court every three years on, *inter alia* their ability to meet deadlines and achieve satisfactory work results. According to Article 120 of the Constitution, a judge is "relieved" of judicial office at his of her own request or in one of the following situations: if the judge has become permanently incapacitated to perform the duties of office; if the judge has been sentenced for a criminal offence or if the judge has committed "an act of serious infringement of discipline". The same Article allows the judge to submit an appeal to the Chamber of Districts of the Croatian *Sabor*.

Resources

Although the security of tenure of Croatian judges constitutes a guarantee for their independence, the latter is hampered by the lack of constitutional or legal guarantees against a reduction in judicial salaries. The issue of salaries is one of the most serious problems that the Croatian judiciary faces. Although the court budgets and salaries are now financed centrally by the general state budget which prevented past inequities when they were determined by local authorities, the overall adjustment led to a decrease in the salaries of those judges who previously received higher wages and to a modest increase for those judges paid lower salaries in the past. As a result, lawyers and judges themselves are no longer attracted by the judiciary and are turning to the private sector or practising as notary publics which offer more attractive salaries. The lack of judges has in turn resulted in long delays in case resolution. Another problem related to the courts' insufficient financial resources is the lack of adequate training for judges who need continuous judicial education in order to be able to properly decide cases being brought under the many new laws being enacted.

Cases

Slobodan Budak {Civil rights lawyer and President of the Croatian Law Centre}: On 30 April 1996, Mr. Budak was attacked by two men in the coffee shop of the Intercontinental Hotel in the centre of Zagreb. The attack

was reportedly carried out before many witnesses. Mr. Budak received a concussion, a broken nose and contusions on his face. He was hospitalised for some days. On 20 May, Mr. Budak pressed criminal charges against the two men with the Commune State Attorney in Zagreb. He also wrote to the State Commune Attorney of Croatia, asking for an investigation as reportedly, it had previously failed to pursue cases in which Mr. Budak was a victim.

On 14 October 1996, the Commune State Attorney dropped the criminal charges, citing lack of evidence of a criminal act. Acting as a subsidiary prosecutor, Mr. Budak himself pursued criminal charges against the two men in Zagreb District Court. On 5 March 1997, Mr. Budak wrote to the State Attorney of Croatia, asking for its office to assume the prosecution. On 12 March 1997, the State Attorney of Croatia informed Mr. Budak that it agreed with the decision to drop the criminal charges. Mr. Budak chose to pursue his action in the Zagreb District Court.

Radovan Jovic {Former judge of the Municipal Court in Glina and prominent human rights activist (see *Attacks on Justice 1995*)}: Mr. Jovic, who is of Serbian origin, was arrested on 24 October 1995 and detained in a military prison in Zagreb on charges of espionage in favour of the self-declared Republic of Krajina under Articles 111(2) and 118(3) of the Basic Criminal Code. It was alleged that he was "creating an information service for a foreign state, and the act was committed during an immediate danger of war". His trial before the Military Tribunal in Zagreb to which the CIJL sent an observer began on 11 March and continued throughout April and May 1996. Mr. Jovic was eventually released from detention and criminal proceedings against him were dropped on 7 October 1996, one day after a general amnesty law adopted in September came into force.

Krunoslav Olujic {Judge, President of the Supreme Court}: Judge Olujic was dismissed by the High Judiciary Council of the Republic on 14 January 1997. He had been suspended in November 1996 on charges of damaging the reputation of the court because of alleged "immoral behaviour" (associating with criminals and having sex with minors). According to Mr. Olujic, this action was part of a politically motivated smear campaign which was waged to get rid of him because he defends the independence of the judiciary.

Government Response to CIJL

On 24 July 1997, the Government of Croatia responded to the CIJL's request for comments. The Government stated:

"In the part of the Draft Report prepared for the 1996 edition of *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers* related to the Judiciary in the Republic of Croatia, it is stated that despite "various laws

adopted recently to this end, the independence of the Judiciary remained theoretical" and that "the 1993 Judiciary Act granted the Ministry of Justice significant power over the Judiciary and Article 37 of the Act explicitly states that the Ministry of Justice 'shall conduct judicial administration' ".

The Constitution of the Republic of Croatia (*Official Gazette* N° 56/90), Article 115, explicitly stipulates that the judicial power is independent and that courts administer justice in compliance with the Constitution and current legislation.

Article 6 of the Judiciary Act (*Official Gazette* N° 3/94 and 100/96) prohibits any type of influencing the court rulings, especially any use of official powers, media or public addresses intended to influence the course of justice and the outcome of court procedures. This article also stipulates that a court decision can be changed or revoked only by the court responsible for dealing with the case in question as prescribed by the law and that all persons in the Republic of Croatia have to comply with a final and effective court decision.

Therefore, under the Constitution and current legislation the courts are entirely independent.

It is true that according to Article 37 of the Judiciary Act the Ministry of Justice is in charge of judicial administration. However, Article 38 of this Act says that the judicial administration is related to matters subservient to the performance of judicial powers, which are: drafting of the laws and other regulations concerning the establishment, scope, competence, composition and structure of courts, as well as court procedure, responsibility for the education and professional specialisation of judges..., the provision of resources, finances, premises and other conditions required for the work of courts, rendering of international legal assistance, execution of sentences pronounced for criminal acts, economic or other offences, the collection of statistical and other data related to judicial practice, the consideration of complaints filed by citizens about the work of courts regarding matters such as delayed court proceedings or the attitude of the judge or other court officials towards a party involved in the proceedings or about the performance of other official actions, the auditing supervision of courts, making sure that the judicial work is performed on a regular basis and that the rules of procedure are observed, as well as the performance of other administrative tasks defined in the law.

In attending to the above described judicial administration duties the Ministry of Justice approaches the president of the court in question (para 2, Article 37 of the Judiciary Act) and in doing so can in no way affect the constitutionally and legally guaranteed independence of courts.

What Articles 37 and 38 of the Judiciary Act amount to is that the Ministry of Justice, by performing its judicial administration duties, should contribute to the efficiency and expeditiousness in the work of courts, not", as stated in the Draft Report.

As for the structure of the Croatian courts, the Draft Report says that "in November 1996 the Croatian Parliament provided for the abolition of the military court system which had operated throughout the war" and that "these courts, however, will continue to operate until all outstanding cases are resolved".

These allegations are inaccurate, because the military courts ceased to operate under the Decree repealing the decrees passed in the field of judicial power (Official Gazette N° 103/96). The provision of Article 2 of the mentioned Decree prescribes that unresolved cases with military courts are to be taken over by the competent municipal or county courts.

The Draft Report further states that "the Ministry of justice which publishes a list of judicial vacancies in the *Official Gazette,* reviews the applications, gathers additional information on the applicants and then provides the Council with a list of eligible applicants", with a comment that "this process effectively gives the Minister of Justice the authority to pre-determine judicial candidates".

To clarify the procedure for the appointment of judges it should be noted that the procedure is defined in the provisions of the High Judiciary Council Act (*Official Gazette* N° 58/93). Based on this Act, the Ministry of Justice, at the proposal of the president of the court with a judicial vacancy or at the proposal of the president of a higher court, publicly advertises a list of judicial vacancies. Upon expiry of the time set for the submission of applications, the Minister of Justice has to request opinions and information about all candidates from the president of the court where a president or a judge is to be appointed and from the president of the higher court. The data thus supplied are replenished by those in possession of the Ministry of Justice about the record of each applicant who has thus far served as a judge.

Therefore, the issue here is not of the gathering of information, it is a clearly prescribed procedure of collecting opinions by the chairmen of courts and data available to the Ministry of justice.

Para 3, Article 17 of the said Act stipulates that within 30 days given for the submission of applicants the Minister of Justice has to forward to the State Judiciary Council a list of candidates qualified for the respective appointment. It has nothing to do with any power of the Minister of Justice to "pre-determine judicial candidates", what it amounts to is an alphabetic compilation of the list of candidates who fulfil the conditions defined in the public announcement of vacancies (degree from a faculty of law, judicial examination successfully passed, required practical experience).

The applicants who do not fulfil the conditions defined in the public announcement must be informed by the Minister of Justice of the reasons for the rejection and of their right to appeal within 8 days (of the delivery of the notification), with the matter to be decided upon by the State Judiciary Council within 8 days.

The Draft Report further states that "a struggle ensued between the Council and the Minister of Justice, with the Council appointment only 25 judges to the Supreme Court instead of the 37 judges required by the Minister of Justice".

Pursuant to Article 46 of the Judiciary Act, the Minister of Justice, with his decision of 30 November 1994, designated 37 judicial posts for the Supreme Court and, according to this decision, the president of the Supreme Court, in his proposal of 1 December 1994, requested a public announcement for 37 judicial vacancies at the Supreme Court.

Upon completion of the procedure initiated by this public announcement, the State Judiciary Council appointed 25 judges to the Supreme Court.

In this case there was no "struggle" between the State Judiciary Council and the Minister of Justice, as both of these state authorities acted within powers vested in them.

As for the allegations concerning the salaries of judges, the Ministry of Justice drafted the Law on the Salaries of Judges and Other Judicial Officials (*Official Gazette* N° 75/96, 106/95 and 111/96) which separately regulates the salaries for each office (president of the court and judges, the president and magistrates of the magistrates' courts, public attorneys and their deputies, ombudsmen and their deputies); these salaries have been increased by 35 per cent on the average. This Law determines the salaries of the said officials by applying certain coefficients. Accordingly, the provisions of the earlier Law on Civil Servants and the Salaries of the Holders of Judicial Posts (*Official Gazette* N° 74/94) no longer apply.

Also, pursuant to the Amended Law on the Salaries of Judges and Other Judicial Officials (*Official Gazette* N° 111/96), the salaries of judges and other judicial officials have been increased by adding 0.5 per cent to the amount of salary for each completed year of service, but not in excess of 20 per cent."

DJIBOUTI

The Republic of Djibouti had a single party system since its independence from France in 1977 until a constitutional referendum in September 1992, which overwhelming approved a multi-party constitution. Despite these changes, and the creation of four different political parties, President Hassan Goualed Aptidon, who assumed power in 1977, was re-elected on 8 May 1993, to a fourth term in the first multi-party elections held in Djibouti, although the international observers declared the elections unfair. President Aptidon and his People's Rally for Progress (PRP) continued to rule the country in 1996. Elections were expected to be held in late 1997.

The Constitution establishes a system in which many powers and functions are vested in the President, including the executive power. The President himself appoints the Prime Minister and the other Ministers, and determines their portfolios. He presides over the Cabinet of Ministers and all the members of the Government are responsible to him. Although the Constitution embraces the principle of separation of powers and vests the legislative power in the National Assembly, the unicameral Parliament of Djibouti, it gives the President the power of regulation, with competence in several areas, effectively permitting the President to determine the policy of the nation.

It was reported that human rights violations continued in 1996, and members of the security forces committed several extra judicial killings. On 18 December 1995 and on 9 January 1996, the police fired on high school students demonstrating against the poor conditions of their school and the long delays in the payment of their scholarships. Several student were seriously injured and one was killed.

Throughout 1996, government harassment and persecution of human rights activists and political opponents continued. In early 1996 **Aref Mohamed Aref,** a human rights lawyer who has been repeatedly harassed, was kept under surveillance by the political police (see *Attacks on Justice 1995* and *1991-1992).* On 23 January 1997, M. Aref, was charged by an examining judge with embezzlement based on allegations made against him in early 1995 but not pursued. On 3 February 1997, he was temporarily suspended from practising law by the disciplinary council of the Bar Association of Djibouti as a result of these allegations. It was believed by some that the charges were suddenly laid after almost two years, because the Government wanted to disable M. Aref from representing political activists during the expected election campaign.

THE JUDICIARY

According to Articles 71 and 72 of the Constitution, the judiciary is independent and the judges are subject only to the law. The President of

the Republic guarantees the independence of the judiciary, together with the *Conseil Superieur de la Magistrature*. Judicial power is to be exercised by the Supreme Court and by "other courts and tribunals". The law is derived from Parliamentary legislation, executive decrees, French codified law adopted at independence, Shari'a law, and the traditions of native nomadic people. Shari'a law is restricted to civil and family matters, whereas penal crimes are prosecuted according to the French-inspired law in regular courts.

The dual court system, composed of secular and Islamic Courts, accommodates the various sources of law. Both the secular and Islamic courts have first instance and appeal courts. The appeals from both the courts are heard, in the last instance, by the Supreme Court.

Although Special State Security Courts were disbanded in June 1995, Chapter IX of the Constitution establishes a *Haute Cour de Justice* (High Court of Justice) to try the President and the Ministers accused by the National Assembly. The President can be charged only with high treason, whereas the Ministers can be accused of crimes committed in the performance of their function. The members of the *Haute Cour de Justice* are appointed by the National Assembly for every parliamentary term.

Magistrates are appointed for life terms and they are protected from any kind of pressure which could be prejudicial to their independence. In addition, their "irremovability" is guaranteed.

All these provisions have little practical impact, and the judiciary is not independent from the executive, as was evidenced by the arbitrary dismissals and transfers ordered by the President in 1996 (see below under cases).

Conseil Constitutionnel

The control of the constitutionality of laws and regulations is vested in the *Conseil Constitutionnel* (Constitutional Court), composed of six members appointed for a non-renewable term of eight years. Of them, two are appointed by the State President, two by the National Assembly and two by the *Conseil Superieur de la Magistrature* (see below). The Chairman is appointed by the President from amongst the members. The Constitution provides the former State Presidents to be members of the Court by law, a provision that has been meaningless until now, because the office of the presidency has been vested only in President Aptidon. However, when the provision is acted upon, it will subject the Court to even more influence by the Government. All the members of the *Conseil Constitutionnel* enjoy the same immunity as the members of the National Assembly not to be prosecuted with criminal or minor offences without the authorisation of the National Assembly itself.

Conseil Superieur de la Magistrature

The *loi organique* of 7 April 1993 provides that the *Conseil Superieur de la Magistrature* (Superior Council of the Magistrature), has the power to "self-govern" the judiciary, as set out in Article 73 of the Constitution. The members of the *Conseil* are the State President as chair, the Minister of Justice, the President and the Public Prosecutor of the Supreme Court and three judges elected by all the judges. The *Conseil* appoints judges on the nomination of the Ministry of Justice.

Given the significant governmental presence on the *Conseil,* and the fact that judges are appointed on nomination of the Ministry of Justice, there is real concern that the judiciary cannot be truly independent. It was reported that in cases brought against public officials, judges have refused to hear the case or failed to respond to the requests of the Plaintiff.

The *Conseil* is vested, as well, with the power to discipline members of the judiciary. However, in early 1997, the Statue of Magistrates, which, *inter alia,* is supposed to establish the powers of the *Conseil* was still not in force, leaving the judiciary without any established rules of discipline. Although the Statute was passed by the Parliament, the President of the Republic refused to promulgate it, in violation of Article 34 of the Constitution, which requires the President to promulgate laws passed by the National Assembly within 15 days from their transmittal to him unless a second reading is required. Reportedly, in November 1996, the President of the Supreme Court maintained that the independence of the judiciary relied on the promulgation of the Statute of Magistrates.

When the Statue of Magistrates does come into force, matters of discipline are to be private; neither the State President nor the Ministry of Justice will take part in the consideration of judicial discipline, in order to guarantee the independence of the judiciary. In fact, Article 13 of the *loi organique* prescribes that, when the *Conseil* sits to consider disciplinary proceedings against a sitting judge or a prosecutor, they are to be chaired by the President of the Supreme Court or by the Public Prosecutor respectively. The *Conseil*'s sentences will not be able to be appealed.

Cases

Zakaria Abdillahi {Judge of the Court of Appeal}, **Ali, Mohamed Abdou** {Judge of the Supreme Court} **Chantal Clement** {Judge of the Court of Appeal, **Emile David** {Judge of the Court of Appeal} and **Nabiha Djama Sed** {Judge of the Court of Appeal}: By *Déeret présidentiel* No. 96-0035/PR/MJ dated 2 May 1996, all these judges were dismissed or transferred from their positions, without their consent as follows:

Judge Ali was dismissed;

Judge Abdou was transferred to the *Boureau du Procureur* (Prosecutor's Office);

Judge Clement was transferred to the *Ministère de la Fonction Publique et des Réformes Administratives* (Ministry of Public Affair and Administrative Reform);

Judge David was transferred to the *Ministère de la Justice et des Affaires Pénitentiaires et Musulmanes* (Ministry of Justice, Prisons and Muslim Affairs); and

Judge Sed was transferred to the *Boureau du Procureur* (Prosecutor's Office).

The decree was issued contrary to Article 72 of the Constitution which provides for the irremovability of the judges of the bench. Further, The *Conseil Superieur de la Magistrature*, the organ responsible for the discipline of the members of the judiciary, was not consulted (see above. On 15 October 1996, the CIJL wrote to President Aptidon and asked for the annulment of the decree. No response was received.

Mohamed Ali Foulieh {Lawyer} and **Djama Amareh Meidal** {Lawyer and President of the *Conseil Constitutionnel*}: Me Foulieh acted for five leaders of the Popular Rally for Progress, the ruling party, who were imprisoned on 7 August 1996 for six months and deprived of their civil rights for five years. They had been charged with insulting President Hassan Gouled Aptidon. The *Conseil Constitutionnel*, headed by Me Meidal, refused to remove their Parlamentarian immunity. Despite this decision, the five defendants were tried and convicted by the Court of Appeal. In a speedy trial, they were deprived of the fundamental right to a defence, as set out in Article 10 of the Constitution. Me Foulier was refused access to them more than six times, even though he had written permission to visit them from the *Procureur Génèral* (Public Prosecutor). He was then prevented from representing his clients.

In addition to its decision being ignored, all the members of the *Conseil Constitutionnel* were harassed and intimidated by members of the Government and were openly criticised by the government-controlled newspaper *"le Progres"*.

In late 1996, Me Foulieh was accused of improper dealings with a client, (*"affaire de client"*) and Me Medial was accused of embezzling funds from one of his clients. After the complaint was laid, Me Medial's client reportedly wrote to Me Medial and stated that he had been threatened with imprisonment if he refused to make the complaint.

Despite the fact that Article 70 of the Constitution provides immunity to the members of the *Conseil Constitutionnel,* Me Medial was brought before an investigating judge at the end of January 1997, charged and provisionally

released. On 3 February 1997, the *Conseil de l'Ordre des Avocats de Djibouti* (Council of the Bar Association) temporarily suspended Me Medial from practising law.

As of early 1997, Me Foulieh had still not been brought before a judge nor the disciplinary council of the Bar Association. It was thought that the Government hesitated to do so given that two well-known lawyers, Me Aref (see above) and Me Medial had already been suspended.

EGYPT

The Executive power in the Arab Republic of Egypt is vested in the President of the Republic in conjunction with the cabinet which he appoints. The President is nominated by the unicameral People's Assembly and confirmed by popular plebiscite for a six-year term. President Mohammad Hosni Mubarak was sworn in for a third term of office in October 1993.

The legislative power is exercised by the People's Assembly. In the last legislative elections in November and December 1995, the ruling National Democratic Party which dominates the 210 member Consultative Council *Majlis Al-Shura*, gained 416 of the Parliament's 444 seats. On 2 October 1996, the Court of Cassation nullified the election results in 200 constituencies in response to legal challenges from losing candidates. The elections were marred by arbitrary arrests of supporters of the opposition party and independent candidates, irregularities at the polls and violence. Just prior to the elections, 54 non-violent prominent Islamists, including former parliamentarians and candidates running as independents, were sentenced by military courts to prison terms ranging from three to five years, merely on the charge that they were members of the proscribed Muslim Brotherhood Organisation. Although Article 93 of the Constitution states that the Court of Cassation is competent to investigate challenges to the validity of parliamentary membership, the final decision rests with the People's Assembly as it decides by a majority of two-thirds if a membership is deemed valid. This constitutes a serious prejudice to the principle of separation of powers. The Government, which controls most of the seats of the National Assembly, chose to exercise this option and refused to accept the Court's nullification of the election results, therefore undermining the authority of the Court of Cassation.

The State of Emergency Law, N° 162 of 1958 (the Emergency Law) continued in force as it had without interruption since 1981. It was scheduled to remain in effect until May 1997. This law grants the security apparatus wide power which undermines constitutional guarantees of individual liberties. Under this law, the police may, for instance, obtain an arrest order from the Ministry of Interior upon showing that an individual poses a danger to security and public order. This contradicts Article 41 of the Constitution which requires that an order of arrest, inspection, detention or any restriction of freedom, must be issued by the competent judge or the public prosecutor. Furthermore, the Emergency Law allows authorities to detain an individual without charge or trial. The detainee may demand a hearing to challenge the legality of the detention order before a State Security Court within 30 days of the arrest. There is no maximum time limit for the detention if the judge confirms the detention order, or if the detainee fails to exercise his right to a hearing. Hundreds of people detained under the Emergency Law have thus been incarcerated for several years without charge or trial.

Prison conditions are extremely poor. Although five new prisons were completed in 1995, overcrowding and unhealthy conditions continued to

prevail. Visits by family members or lawyers have been banned since December 1993. Restrictions on freedom of expression and association, and the use of military courts to prosecute civilians remained significant issues in 1996. In the cycle of violence between the Government and Islamist militants, the Security forces continued to operate with impunity, mistreating and torturing prisoners, arbitrarily arresting and detaining persons without trial for prolonged periods of time. At the same time, armed Islamist groups continued to kill civilians, deliberately targeting Egyptian Christians in southern villages and foreign tourists. A peace initiative by the militant Islamic groups, Gamma'a Al-Islamiya and Jihad, offering a halt to violence and armed attacks against security forces and tourists in May 1996, was reportedly rejected by the Government which said that it would not talk to "militant groups".

Political parties may not operate prior to obtaining a license from the Political Affairs Committee, according to the Political Parties Law N° 40. Violators of this law face a maximum of five years imprisonment. The Party Affairs Committee, a government-appointed body has so far denied license to 32 political groups since the law came into force in 1977. This Committee has the right to dissolve political parties, to prohibit their newspapers, activities or reports for considerations of "national interests".

Since 1985, human rights organisations such as the Egyptian Organisation for Human Rights and the Arab Organisation for Human Rights have also been refused licenses under Law N° 32 of 1964, on the grounds that they are political organisations. Nevertheless, they continue to operate openly in spite of constant pressure from the authorities through the State Security Investigation Services.

On 17 June 1996, the People's Assembly, following a series of protests by the press and after the President's personal intervention, approved legislation removing penalties specified in Law N° 93 of 1995 which provided for preventive detention and imprisonment for vaguely worded offences such as "publishing false or biased rumours, news and statements or disconcerting propaganda" if such material offended social peace, harmed public interest, or showed contempt for state institutions or officials. Many journalists and editors have been detained and interrogated under this law. Even after the amendment, the Government continued to prosecute journalists against whom charges were filed when the law was still in effect.

The Judiciary

Regular Courts

The regular judiciary is independent in Egypt. According to Articles 165 to 168 of the 1971 Constitution, judges are to enjoy independence, immunity from removal and freedom from interference by other authorities in the

exercise of their judicial functions. The High Council of the Judicial Authorities, which is headed by the President of the Republic and composed of the Minister of Justice, the Attorney General and senior judges, is entrusted with the supervision and co-ordination of the regular judicial divisions. The regular judiciary is comprised of civil and criminal courts, the State Council which is a separate administrative court structure, and a constitutional court.

The civil courts are composed of a Court of Cassation, courts of appeal, courts of first instance and magistrate courts. Judges are appointed, promoted and transferred by the President of the Republic upon approval of the High Council of the Judiciary, a body which is presided over by the President of the Court of Cassation, and composed of senior judges in addition to the Attorney General, all of whom are appointed *ex-officio.*

The State Council is an independent judicial body which is composed of three branches: judicial, consultative and legislative. The judicial branch comprises three types of administrative courts whose decisions can be appealed before the High Administrative Court. These courts adjudicate different matters such as administrative disputes, appeals concerning local elections, salaries of public employees and disciplinary cases.

The Supreme Constitutional Court is an independent judicial body whose role is to examine the constitutionality of laws and regulations and to interpret legislative texts. It is comprised of seven judges appointed by the President of the Republic following consultation with the High Council of Judicial Authorities. The President of the Court is also appointed by the President of the Republic and is third in line for the presidency of the Republic after the President and the Speaker of the People's Assembly. The potential to become head of state compromises the commission of the President of the Supreme Constitutional Court as a member of the judiciary.

Article 49 of the Supreme Constitutional Court Law states that "the rulings of the court in constitutional prosecutions and its interpretations are binding on governmental authorities". The President of the Republic has issued decrees and approved laws proposed by the executive authorities regardless of their constitutionality. Indeed, the Supreme Constitutional Court has found that 53 articles, or approximately 25% of all the articles of the Constitution, have been violated by legislation or decrees. Many of those laws held to be unconstitutional concern human rights and civil liberties as well as the principles of the rule of law and the independence of the judiciary. The Government has defended its legislative record by referring to the thousands of other laws which have been passed and not found to be unconstitutional.

State Security and Military Courts

While the regular judiciary generally guarantees international standards of fair trial, under the Emergency Law, cases involving terrorism and

national security may be tried in military or state security courts, in which the accused does not receive many constitutional protections.

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.

a. Emergency State Security Courts

The Emergency State Security Courts were established under the Emergency Law. According to this law, Supreme and Magistrate State Security Courts shall deal with crimes which violate the decrees of the President of the Republic or his representative.

Article 9 of the same law gives the President of the Republic or his representative the power to transfer crimes punishable by the regular criminal code to State Security Courts. Presidential Decree N° 7 of 1967 transferred the jurisdiction over several crimes to the Emergency Courts, including those threatening the internal security of the State, bribery and embezzlement, possession and use of explosives. These courts are not independent from the executive authority as the judges are appointed by the President upon the recommendation of the Minister of Justice or, if he decides to appoint military judges, the Minister of Defence. Article 8 of the Emergency Law allows the President, in some circumstances, to order the formation of Emergency State Security Courts which are composed of military officers only, thus becoming *de facto* military courts. Judgments passed by Emergency State Security Courts may not be subject to appeal or review by any other judicial body. The execution of sentences requires the ratification of the President of the Republic, who may alter or annul any decision of the Court, including an order to release a defendant. In 1996, State Security Courts tried at least nine cases involving over 175 defendants.

b. Permanent State Security Courts

Article 171 of the Constitution permits the law to organise State Security Courts with jurisdiction over particular crimes. On 1 June 1980, two weeks after the late President Anwar Al-Sadat put an end to the State of Emergency, Law N°. 105 of 1980 was issued to establish the Permanent State Security Courts. Law N°. 105 permits the Permanent State Security Courts to consider cases involving crimes which constitute a threat to internal and external security of the State, the crime of possessing and using arms and explosives, bribery and embezzlement of public funds.

According to Law N°. 105, Permanent State Security Courts are of two types: Magistrate State Security Courts which are seated in the regular Magistrate Courts, and Supreme State Security Courts which are seated in the Courts of Appeal (see above *Civil Courts*). The Magistrate State Security Courts are composed of one judge, whereas the Supreme State Security Courts are normally composed of three judges. The President may however

decide to add two military officers to the latter. Sentences issued by Supreme State Security Courts are not subject to appeal although they can be reviewed by the Court of Cassation. Those issued by the Magistrate State Security Courts can be appealed before a specialised chamber within the Court of Appeal and then reviewed by Cassation. The President of the Republic may order a retrial or alter or nullify the decisions of these Courts as long as the State of Emergency is in force.

2. Military Courts

Article 6(2) of the Law on the Military Judiciary N° 25 of 1966 states that "[d]uring a state of emergency, the President of the Republic has the right to refer to the military judiciary any crime which is punishable under the Penal Code or under any other law". While military judges are lawyers, they are also military officers appointed by the Minister of Defence and subject to military discipline. Sentences by these courts cannot be appealed but they can be reviewed by other military judges and confirmed by the President. In addition to the fact that they are generally not informed of the time or location of trials, in the event they are given notice of the trial date, it is usually insufficient to prepare a proper defence.

Since December 1992, with the rise of extremist violence, the President has referred hundreds of civilians accused of terrorism and membership in terrorist groups before military tribunals. From January to December 1996, approximately 66 civilian defendants were referred to military courts in five separate cases on charges of illegal political activities. In January, 24 individuals accused of involvement in terrorist plots were brought to trial before a military court. Six of them were acquitted, six others were sentenced to death and the remainder were sentenced to prison terms ranging from 3 to 15 years.

On 15 August, the High Military Court of Cairo issued its judgment in a case which involved 13 Muslim Brothers (university professors, former parliamentarians and candidates for Parliament in 1995). The trial began in civilian courts, however, it was soon transferred to military courts by presidential decree, with the charge that these persons "belonged to a secret and illegal group (the Muslim Brothers) aiming to advocate the violent reversal of the regime and to issue publications that incite hatred against the established order". Seven of the defendants were sentenced to three years in prison. The proceedings did not meet international standards of fair trial, including the right to appeal to a higher tribunal.

With the above-mentioned case, the number of cases examined by military courts rose to 24 since December 1992 with 605 accused, among whom 70 were sentenced to death, 337 were sentenced to various prison terms, and 197 were acquitted. Those acquitted were often not released however. For example, lawyer **Mansour Ahmad Mansour** was arrested on 15 June 1992 in connection with the assassination by militant Islamists of secular writer Farag Foudeh. He was acquitted by the court on 30 December 1993, but

was re-arrested by an administrative order. The court again ordered his release on two occasions in February and March 1994. In March 1994, he reported to his lawyer that after his transfer to the high security Tora Prison, he was clubbed and kicked so brutally that he suffered a punctured ear drum, bleeding of the gums and bruises. Despite the release orders, new detention orders were issued and he remained in detention at the end of 1996.

Two trials involving 19 defendants from the Islamic Group opened in December at a Supreme Military Court in Cairo. In the first trial, three individuals were accused of attempting to assassinate the Military Prosecutor in 1993. The second trial involved 19 defendants, including the three defendants from the first trial as well as 16 others, accused of killing a policeman, assaulting persons at two movie theatres and wounding 16 persons during an attack on a tourist bus in Cairo in 1994. On 19 January 1997, four of the defendants in the second case were sentenced to death and twelve others were sentenced to prison terms ranging from five years to life terms.

LAWYERS

The Bar Association has been facing a deep crisis with the Government since March 1994 when hundreds of its members took to the street to protest the custodial death of lawyer Abdel Harith Madani on 26 April of the same year. The crisis took on a new dimension, when on 28 January 1996, the Cairo Court of urgent affairs, following a request presented by fourteen lawyers in March 1995, decided to impose a judicial wardship on the Bar Association for allegedly using its funds and resources for purposes other than those for which it was created.

Lawyers have been complaining that the independence of the legal profession in Egypt is threatened by continued Government interference in the work of the Bar Association, notably since the passing of Law N° 100 of 1993. The Law provides for registered members to elect their own representatives but it requires certain conditions to be met in order for the election results to be valid. The main condition is that before the election of the head and the members of the Executive Council can be confirmed, a 50% quorum of registered members must cast their votes. If this quorum does not materialise, another election will be held two weeks later with a minimum of one third of registered members voting. If this condition is not met either, a temporary judicial committee shall be appointed to run the affairs of the association and supervise elections to be held subsequently. These conditions are quite restrictive as many lawyers may not be able to leave their cases, offices or other commitments to vote several times as may be required if the quorum is not met the first time. Moreover, elections can not be held on Fridays or on public holidays. Furthermore, this law made voting a duty rather than choice: members who do not vote will be fined.

This law was strongly rejected by various professional associations The law was seen as an attempt by the Egyptian authorities to restrict their freedom of association. When it is applied to the Bar, the Law violates Principle 24 of the 1990 United Nations Basic Principles on the Role of the Lawyers which states that the executive body of the professional association shall be elected by its members and shall exercise its functions without external interference.

Finally, Law N° 100 requires professional associations to refrain from activities that do not form part of their original objectives. This provision is reportedly aimed at restricting the involvement of professional associations in political matters. According to several lawyers, however, the Government often encourages associations that are run by pro-government councils to speak out in favour of government policies, but will not accept criticism from others. Principle 23 of the 1990 United Nations Basic Principles on the Role of Lawyers states that "[l]awyers like other citizens are entitled to freedom of expression, belief, association and assembly" and have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion of human rights.

Another cause of friction between lawyers and the Government seemed to stem from the problems faced by lawyers who defend security prisoners. Many lawyers have themselves been subject to administrative detention because they were defending suspected Islamist activists. Such reprisals violate Principle 18 of the 1990 Basic Principles that "lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".

CASES

Ragab Abdellatif {Lawyer, member of the Bar since April 1993}: Mr Abdellatif was arrested on 29 September 1994 and continued to be held without charge or trial at the end of 1996.

Mohammad Sayyed 'Eid Hassanein {Lawyer, member of the Bar since October 1988}: Mr. 'Eid Hassanein was arrested in early January 1993, and a detention order was issued against him on 14 February. At the end of 1996, he continued to be detained without charge or trial. He had previously been detained from 20 August to 15 November 1990.

Mahmoud El-Ghatrifi {Lawyer and member of the Bar since March 1992}: Mr. El-Ghatrifi was arrested on 24 December 1993 and at the end of 1996 he was still held at Abu Za'bal Prison without charge or trial.

Ibrahim Ali El-Sayyed {Lawyer, member of the Bar since 1990}: Mr. El-Sayyed was arrested in October 1993 after arriving at Shbein El-Koum Prison to visit a client. On previous occasions the prison authorities had cautioned him not to request a visitor's permit. At the end of 1996, he

remained in detention at El-Wadi El-Gadeed Prison. Mr. El-Sayyed had previously been detained three times: from 15 May to 29 June 1992, from 2 July to 13 August 1992, and from 20 December to 26 June 1993.

Nabawi Ibrahim El-Sayyed {Lawyer, member of the Bar since 1987}: Mr. El-Sayyed was arrested on 3 November 1993 while representing a group of Islamist activists on trial before a military tribunal. The defendants were charged with holding membership in the *Talae'Al-Fateh*, a group that carried out armed attacks on government and civilian targets. At the end of 1996, he remained in detention in El-Wadi El-Gadeed Prison. He had previously been arrested in connection with the group on 6 July 1993, but was released without charge two months later.

Hassan Gharbawi Shehhatah {Lawyer}: One of the longest serving administrative detainees, Mr. Shehhatah was arrested on 11 January 1989 and charged in connection with two cases relating to disturbances in Ain Shams. He was tried and acquitted in May 1990, but has remained in detention since, despite many court orders to release him. He was detained in 1996 in El-Wadi El- Gadeed Prison and was reportedly suffering from ill-health.

Ahmad Sa'ad Sobh {Lawyer and member of the Bar since October 1992}: Mr. Sobh was arrested in January 1994 and at the end of 1996 continued to be detained in Tora Prison.

Mu'awwadh Mohammad Youssef {Lawyer}: Mr. Youssef was arrested in Cairo on 18 May 1991. He was beaten up in his house by State Security Investigation (SSI) officers before being transferred to the SSI headquarters where he was reportedly tortured during interrogation. He was then transferred to Istiqbal Tora Prison where he was still held in 1996 without charge or trial and despite 21 release orders by various courts.

Summary of Government Response to CIJL

On 16 July 1997, the Government of Egypt provided the CIJL with a lengthy response to the draft chapter in Arabic. Unfortunately, due to space limitations, the CIJL was unable to reproduce the entire response. Below is a summary of the English translation of that response:

"The Egyptian Government wishes to conduct a serious and constructive dialogue based on objectivity and transparency with international human rights NGOs. The CIJL request that any Government response should not exceed 1,000 words restricts our response to preliminary comments without entering into details that require a long and in-depth clarification.

First, the title of the report reflects a pre-judgement on the state of justice in certain countries in the world and we call upon international NGOs to choose "scientific" connotations which portray objectivity and impartiality.

That said, we would like to emphasise that Egypt is a State of Law and Institutions which has ratified 18 international relevant conventions. Any violations of these obligations raises questions of responsibility on the part of the violator who will be brought before the appropriate courts and judged. There are no exceptions regulating these cases and the judicial judgements are irreversible.

Concerning the elections and the ruling by the Court of Cassation, the Executive Power had condemned the acts of violence and riots which were committed by some of the candidates and their supporters during those elections and developed guidelines and adopted measures to prevent this phenomenon from being repeated in the future.

As for the application of the Emergency Law, in a situation of public emergency which threatens the life of a nation the *ICCPR* allows all States Parties - Egypt included - to take appropriate measures derogating from their obligations under the *ICCPR*. The Egyptian Legislator rapidly promulgated regulations linked with the declaration of the State of Emergency and put clear guarantees to protect the rights and freedoms of the citizen despite the application of the Emergency Law. Also, any measure taken under this Law is subjected to the supervision of the Judiciary, with what it enjoys of immunities and independence. The law concerned only two categories of crimes: terrorism and drug trafficking. Both categories constitute, according to international consensus and relevant UN decisions, a direct threat to national security and basic human rights.

The report's classification of the courts - i.e, the description of the State Security Courts, Emergency State Security Court and Military Courts - lacks logic because the judiciary in any State is a complete and holistic system which functions according to certain well-defined rules.

We have already explained that all judges in Egypt are chosen according to their specialised legal studies, and after academic and practical training at the National Centre for Judicial Studies attached to the Ministry of Justice. There is no political or administrative considerations which intervene in their work. The State sought to confront terrorism within the Rule of Law and to consolidate the administration of justice and expedite the trial of these crimes without infringing upon the guarantees ensure by the law. Consequently, the judiciary base was expanded by postponing the retirement age of judges to 64. Also, some cases of terrorism were referred to the Military Courts.

Military Courts are permanent courts with public hearings and their decisions are made in accordance with the law. The Constitution permits references to Military Courts because of their gravity. Military Courts apply the same legal protections as in the regular Egyptian Courts. For example, a judge may be removed for impartiality, the accused has the right to legal representation and appeal any decision made against him or her. The penalties are also the same as those provided for in the Criminal

Law. Further, 33% of those brought before the military courts are found innocent.

Concerning the right to form trade unions, the Egyptian Legal System is based on those rights which are stipulated in the ICESCR. Article 56 of the Constitution guarantees the right to form unions and associations on a democratic basis. On this basis, the Law N° 100 of 1993 was promulgated to provide democratic guarantees to form trade unions which achieves broad political participation for all members of the union.

The Bar Association had experienced a crisis due to internal conflicts, transgressions and fiscal offences. The state's lawful intervention came as a result of an officially recorded complaint signed by the lawyers themselves. The matter was dealt with according to law and was not influenced by political or party affiliations.

Concerning the claims that oppressive measures have been taken against certain lawyers for political and religious reasons, there are approximately 135,000 members of the Bar Association in Egypt practising their profession objectively, without any constraint of intervention. The eight lawyers refereed to in the Report raise questions concerning the true nature of the activities of the individuals concerned. Hassan El Garbawi never practised law, but only studies law during his imprisonment. This shows that the measures adopted were based on personal capacity and not professional capacity. What is penalised is when lawyers use their position to help terrorists.

Concerning the situation of prisons, the Egyptian Legislator seeks to develop correctional institutions according to the most modern standards, We are pleased to present the CIJL with a copy of a study prepared by the National Centre for Social and Penal Research concerning the rights of prisoners.

Finally, the report used terms that lack accuracy. For example, the term "Islamist activists" was used although the Report itself referred to the savage practices against isolated civilians and religious shrines. Perhaps the term "terrorist", in accordance with the UN Committee for the Prevention of Crime (sic) is more appropriate.

Concerning the Law of Associations N° 172 of 1964, it does not prevent 15,000 associations from working successfully. The organisations mentioned in the report participate in regional and international meetings. They also organised a seminar held in co-operation with the International Federation for Human Rights between 4-10 May.

We hope this commentary has helped to clarify certain issues referred to by the Report...so that the reader may evaluate the situation in a context of objectivity and transparency."

Goverment Response to the Cases

In its responce, the Goverment said "that each of the named lawyers are members of an underground terrorist organisation which justifies the use of violence and terror for achieving its objectives." Each of the lawyers, except for Hassan El Garbawi Shahatah and Mansour Ahmed Mansour, who were found innocent, were convicted or indicted for various crimes. After their release[1], each of these lawyers were arrested again in accordance with Law N° 162 of 1958, as amended, based on information that they continued to engage in criminal activity and were preparing for new acts of terrorism. It should be noted that Mr. Noufal, although he has an LL.B., has never practised law and Mr. Joudah has a B.A. in Shariah and law."

1 *Editor's note*: The CIJL's information is that none of these lawyers were ever "released". Although their release was ordered by a Court, they were immediately re-arrested and their detention has been continuous from the date of their initial arrest.

ETHIOPIA

In August 1995, the Ethiopian People's Revolutionary Democratic Front (EPRDF), a coalition of three ethnically based political groups, won a majority of seats in what were described as "multi-party" elections. They were boycotted by the major opposition groups, the Oromo Liberation Front, the All Amhara People's Organisation and the Southern Coalition. The elections ended the mandate of the Transitional Government of Ethiopia (TGE), which was established after the EPRDF took control of Addis Ababa in May 1991. Meles Zenawi, former President of the TGE, was elected Prime Minister. The new Constitution of the Federal Democratic Republic of Ethiopia, drafted by a popularly elected constituent assembly, was formally implemented on 22 August 1995, when the Federal Democratic Republic of Ethiopia was proclaimed.

According to the Constitution, a federal state structure was established. The Constitution divided the formerly unitary state into nine ethnically based member states, which are to enjoy autonomy in legislative and executive affairs. Article 45 prescribes a parliamentarian form of government. The State President serves as head of the state and is elected by a joint session of the Federal Councils for a term of six years, renewable only once. The presidency is mainly a figurehead and in 1996 was held by Negaso Giadada, representative of the Oromo People's Democratic Organisation.

The Council of Peoples' Representatives is elected for five year terms and holds legislative power. The Federal Council, holds the power to, among others, interpret the Constitution, decide claims of self-determination and resolve disputes between states, is composed of representatives of "nations, nationalities and peoples".

The federal executive power is vested in the Prime Minister and the Council of Ministers who are together responsible to the Council of Peoples' Representatives. The Prime Minister is elected by the Council of Peoples' Representatives from amongst its members. Members of the Council of Ministers are nominated by the Prime Minister on approval of the Council of People's Representatives.

State Councils are the highest organs of the member states and enjoy legislative power in matters falling within their jurisdiction.

THE JUDICIARY

DISMISSAL OF JUDGES

The Ethiopian judiciary has encountered inumerable obstacles in recent history. After the fall of President Hail-Mariam and his Dergue Provisional Military Administrative Council which was overthrown in 1991, the EPRDF, who assumed power, dismissed qualified jurists who were thought

to be associated with the Dergue regime. Thereafter, in accordance with Proclamation N° 40, any Ethiopian over 25, loyal to the Constitution, with legal training or adequate legal skill through experience, a reputation for diligence, a sense of justice and good conduct could be appointed as a federal judge. Some of the new judges had only six months legal training; in one case, a biology teacher was appointed head of the Public Prosecutors Office of the Southern Nations, Nationalities and Peoples Region.

Subsequently, the Government failed to establish the Federal Courts or appoint sufficient judges. In fact, the Federal Courts were not established until February 1996 by the Federal Courts Proclamation N° 25/1996 and did not begin to function until May 1996. Judges in Addis Ababa and Dire Dawa were told they had no jurisdiction to hear cases because they had been appointed by the previous administration prior to ratification of the Constitution and therefore had no legal status as judges. These courts were virtually paralyzed. The inevitable result of these measures was an enormous backlog of cases; in 1995, there were thousands of detainees being held without charge.

In the beginning of 1996, the Government dealt the judiciary an almost fatal blow by dismissing at least 336 judges from among others, the Addis Ababa and Amhara National State Regions (for the names of 76 of those judges, see below). It was also reported that at least 270 judges were dismissed from the Oromya Region Courts. Prime Minister Ato Meles Zenawi, reportedly alleged that the judges were dismisssed in the name of court restructuring and because they were corrupt and peddlers of justice. The procedures followed by the Prime Minister to dismiss these judges were not available to the CIJL at the time of publication.

Even if the Prime Minister acted in accordance with procedures set out in the Constitution and the law, these judges may not have been dealt with fairly given the composition of the Federal Judicial Administration Council (FFJAC) which has jurisdiction to remove judges. Article 79(4) of the Constitution provides that no judge shall be removed from office before the mandatory age, unless the FFJAC "decides to remove him for violation of disciplinary rules or on grounds of gross incompetence or inefficiency" or because he can no longer carry out his responsibilities on account of illness. Although *prima facie*, this provision appears to provide some protection to judges, the independence of the FJAC itself is in doubt. Established on 15 February 1996 by Proclamation N° 24/1996, its members include the President of the Federal Supreme Court as chair and the Vice-president of the Federal Supreme Court, both of whom are appointed by the Council of Peoples' Representatives. The most senior judges of the Federal Supreme and High Courts, and the Presidents of the Federal High Court, and the First Instance Court are also members. Each of these judges are appointed to the FJAC by the Council of Peoples' Representatives on nomination by the Prime Minister drawn from selections made by the FJAC. The remaining three members of the FJAC come from the Council of Peoples'

Representatives. The result is that all members of the FJAC are, in reality, politcial appointees. The independence of the FJAC is consequently in question. When the CIJL raised this issue in *Attacks on Justice, 1995*, the Ethiopian Government informed the CIJL that when "...a judge is removed, the decision should be subject to an independent review. This is exactly what the Council of Peoples' Representatives will be doing".

Compounding the questionable independence of the FJAC, is the vagueness of the grounds for removal which further puts into question the fairness of the dismissal of these judges. Proclamation N° 24/1996, specifically permits the removal of a judge in the following circumstances:

1. upon resignation;
2. when the judge has reached the age of 60;
3. where it is decided that he is incapable of properly discharging his duties due to illness;
4. where he has committed a breach of discipline;
5. where it is decided that he is of manifest incompetence and inefficiency; or
6 has transgressed the Disciplinary and Code of Conduct Rules for Judges.

The proclamation specifies that a breach of discipline "includes a judge who is found guilty of an offence he is charged with, yields to bribes and go-betweens, practices of favouritism on account of race, religion, sex and political outlook or frustrates parties to a case brought before him." "Manifest incompetence and inefficiency [...] includes a judge who commits an error of law and fact unbecoming to the competence by training and experience which the profession requires or who unduly delays the disposal of the cases".

There is no provision requiring a full hearing before a judge is removed by the FJAC. This is contrary to the UN Basic Principles on the Independence of the Judiciary which requires judges to be given a full hearing and any incapacity or misbehaviour must be proven. The absence of such a provision combined with the vagueness of the grounds for removal *prima facie* permits the FJAC, acting in concert with the Council of Peoples' Representatives, to dismiss judges by simply alleging incompetence or bias.

The massive dismissal exasperated the already immense burden on the courts. It also necessitated the merging of several courts: in the province of Addis Ababa alone, the previous 62 *Woreda* (District) Court benches and the 12 High Court benches were reduced to just 12, although they were already unable to process the outstanding cases with their previous numbers. Over 35,000 of the cases to be heard by the 62 *Woreda* Courts and thousands of other cases before the High Courts were transferred to the five First Instance Courts.

Despite the obvious inability to process cases, it was reported that on 15 January 1997, the authorities in Addis Ababa announced that charges against 1,218 detainees being held since the fall of the Dergue regime in 1991 had been formally filed. On 9 February 1997, the President of the First Instance Court, Judge Getachew Mihretu, reported that about six thousand cases were pending before the First Instance Court and that the number of cases the judges were hearing each day had increased from approximately 60 to a number between 200 and 500. It was reported that since the dismissals, the remaining judges had to extend their working hours simply to allow time to fix dates for the hearings. Some courts remain in session until 2 a.m. Judge Mihretu asked the Government to appoint new qualified and experienced judges.

While reporting to the Council of People's Representatives in February 1997, Prime Minister Zenawi was asked why judges were not being appointed to deal with the backlog of cases. He reportedly alleged again that judges were thieves and asked people to wait until the candidates studying law at the Civil Service College graduated. It was reported that of those dismissed in 1996, 37 had LL.B degrees and 21 a diploma in law, likely making them more qualified than those who will graduate from the Civil Service College. In any event the independence of the new graduates has already been placed in doubt by reports that claim the College has been established to train supporters of the Government.

Court Structure

Chapter Nine of the Constitution which deals with the structure and the powers of the Courts declares that the judiciary is independent. The supreme federal judicial authority is vested in the Federal Supreme Court which has the power of cassation over any final court decision containing a basic error of law. States may establish their own high and first-instance courts.

After the Federal Supreme Court, there is the Federal High Court, with three criminal, one labour and two civil benches in Addis Ababa and one civil and criminal bench in Dire Dawa. Each bench is constituted by a panel of three judges. The Federal First Instance Court, with six benches in Addis Ababa and one in Dire Dawa, is composed of one president and 20 other judges. Each bench is comprised of three judges. Among the Addis Ababa benches, one hears exclusively labour cases, one civil and one criminal cases, while the remaining three benches hear both civil and criminal proceedings.

The Constitution creates a Council of Constitutional Inquiry, the function of which is to decide cases of constitutional interpretation. The Council, however, must submit its decisions to the Federal Council, a government body, for final determination. It is composed of eleven members: the Chief Justice and the Vice-Chief Justice of the Federal Supreme Court, six experts appointed by the President of the Republic and three members of the Federal Council.

The transition from unitary to federal state required higher and supreme courts to be established in each state. In addition to state matters, State Supreme Courts have the jurisdiction of the Federal High Courts and First Instance Courts when dealing with cases involving federal laws. Benches of three judges are required when the State Supreme Courts deal with federal matters, the death penalty or imprisonment of 15 years or more. At the lower level, there are *Woreda* (District) Courts, a bench being composed of one judge only.

Article 78(5) of the Constitution provides legal standing to religious and customary courts which "had government recognition and functioned prior to the ratification of the Constitution". Shari'a courts have jurisdiction to deal with religious and family matters involving Muslims so long as both parties accept the traditional or religious court's jurisdiction. In rural areas, the majority of citizens accept the jurisdiction of these courts.

Appointment of Judges

In accordance with the Constitution, the Chief and the Vice-Chief Justices of the Federal Supreme Court are appointed by the Council of Peoples' Representatives, from those nominated by the Prime Minister. All other federal judges are appointed by the Council of People's Representatives on nomination by the Prime Minister, who selects the candidates from selections made by the FJAC. Proclamation N° 24/1996 confirmed previous Proclamation N° 40 which allowed any Ethiopian over 25, loyal to the Constitution, with a legal training or adequate legal skill through experience, a good reputation for his diligence, sense of justice and good conduct to be appointed as federal judge.

The same appointment system is set out for State Supreme Court Chief and Vice-Chief Justices, who are appointed by the State Councils on the basis of nominations submitted to them by State heads of the executive branch. The remaining judges of the State Supreme Courts are appointed by the State Councils after the State Commission of Judicial Administration has obtained the views of the FJAC. The judges of the State First Instance Courts are to be appointed by State Councils on the basis of nominations submitted by State Commissions of Judicial Administration.

Resources

Under Article 79(5), the Constitution establishes that the administrative budget of the Federal Courts is to be drafted by the Federal Supreme Court and submitted to the Council of Peoples' Representatives for approval. In previous years, the judiciary has not been allocated sufficient resources to ensure the proper administration of justice. It is noted, however, that in recent years, the Ethiopian economic situation has been critical. In response to the chapter on Ethiopia in the 1995 edition of *Attacks of Justice,* the Ethiopian Government indicated that the judiciary had been allocated its

fair share of the meagre resources available. However, to ensure the share is not arbitrary, the amount of resources allocated to the judiciary should be estabhshed as a percentage of the entire federal budget. In this way the Government cannot influence the judiciary by withdrawing approval of its budget.

In addition to the removal of judges, the powers and duties of the FJAC also include the transfer, salary, allowance, promotion, medical benefits and placement of federal judges. It also supervises the examination of judges and decides on matters concerning the termination of tenure of federal judges. The FJAC has the power to suspend judges until the Council of People's Representatives approves its decision on matters concerning the termination of tenure.

CASES

Mesfin Adise {High Court Judge}

Teshome Admassu {District Court Judge}

Tadele Afnafu {Central High court Judge}

Tirufat Agegnehu {High Court Judge}

Haliu Agizew {High Court Judge}

Abebe Alemu {High Court Judge}

Abdela Ali {Central Supreme Court Judge}

Belachew Antoin {Central High Court Judges}

Berhane Araya {Central Supreme Court Judge}

Ashenafi {High Court Judge}

Fanta Ayele {High Court Judge}

Nesibu Chako {High Court Judge}

Million Cherinet {Central High Court Judge}

Dagnanesh Dessalegn {District Court Judge}

Asmelash Gebremedhin {Central High Court Judge}

Berhanu Gebremichael {Central High Court Judge}

Kelil Gebru {High Court Judge}

Tesfaye Hagos {High Court Judge}

Hailemicael {High Court Judge}

Bisrat Hamelmal {Central Supreme Court Judge}

Girma Kassaye (High Court Judge)

Shimelis Kemal (High Court Judge)

Taddesse Kiros (Central Supreme Court Judge)

Jiregna Lemessa (High Court Judge)

Mibretaeab Leul (High Court Judge)

Belayneh Mammo (Central High Court Judge)

Wuhib Mammo (Central High Court Judge)

Tesfaye Mebrate (Central Supreme Court Judge)

Mekbib (High Court Judge)

Kalayu Mehari (Central High Court Judge)

Bisrat Mekonnen (High Court Presiding Judge)

Hailemariam Melka (High Court Judge)

Tibebu Mihrete (Central High Court Judge)

Habte Moissa (High Court Judge)

Maria Munir (High Court Judge)

Wonduante Negash (High Court Judge)

Mahdere Paulos (High Court Judge)

Kifle Tadesse (High Court Judge)

Aberra Tassew (High Court Judge)

Beqalu Tilahun (High Court Judge)

Yihun Tsehay (High Court Judge)

Worku Wobe (Region 14 Supreme Court Judge)

Lulu Wolde (High Court Judge)

Desta Woldesadiq (District Court Judge)

Solomon Woldestsadiq (High Court Judge)

Abate Yimer (Central Supreme Court Judge)

Girma Zeleqe (High Court Judge)

The above noted judges were dismissed in March and June 1996 from Addis Ababa Regional State, reportedly as a result of court restructuring and corruption. None of the judges were reportedly charged with misconduct nor were they given an opportunity to be heard.

Moges Aemero (High Court Judge)

Alemayehu (High Court Judge)

Mekonnen Alemu (High Court Judge)

Tilahun Bayih (High Court Judge)

Mesfin Bayou (High Court Judge)

Elfinesh Besufeqad (High Court Judge)

Assefa Bezabih (High Court Judge)

Chrinet (High Court Judge)

Admassu Ergete (High Court Judge)

Marshal Fikremaqos (High Court Judge)

Getnet (High Court Judge)

Endalkachew Mengist (High Court Judge)

Sahleworq (High Court Judge)

Demeqe Samuel (High Court Judge)

Aweque Sisay (High Court Judge)

Fasil Tadesse (High Court Judge)

Yohannes Teshome (High Court Judge)

Yesgat (High Court Judge)

The above noted High Court Judges were dismissed in March and June 1996 from Amhara National State Region, reportedly due to court restructuring and corruption. None of the judges were reportedly charged with misconduct nor were they given an opportunity to be heard.

Ato Abayneh Ali (East Wollega Pub. Prosecutor Office)

Ato Mohammed Abametcha (Gimbo Woreda Court Judge)

Ato Kebede Desta (East Harerghe Pub. Prosecutor Office)

Ato Gebeyehu Gizaw (Gimbo Woreda Court Public Prosecutor)

Ato Habtamu Haile (Menjiwo Woreda Court Judge)

Ato Tessema Rase (East Hareghe High Court Judge)

Ato Shatchachew Sheno (Shekacho Zone High Court Judge)

Ato Mekonnen Terrefe (East Wollega Pub. Prosecutor Office)

Ato Ifa Wakjira (East Wollega Pub. Prosecutor Office)

Ato Tamiru Woyessa (Menjiwo Woreda Court Judge)

Ato Ashebir W/Tsadik (Gimbo Woreda Court Judge)

The above noted judges and public prosecutors were dismissed reportedly due to court restructuring and corruption. None of the judges were reportedly charged with misconduct nor were they given an opportunity to be heard.

Zegeye Asfaw {Lawyer, head of a local development NGO and former Government minister and prominent member of the Oromo ethnic group}: On 9 June 1996, Mr Asfaw was arrested. He was not charged with any offence or taken to court but was detained in Chancho police station. It is believed that the local Oromya regional authorities accused him of involvement with the armed opposition, the Oromo Liberation Front; an accusation which he denied. He was released without charge after few days.

Olana Bati {Lawyer and prominent Oromo elder}: Mr Bati was arrested on 18 February 1996, and detained in Nekemte. This was his seventh detention without charge or trial since 1992. He was arrested in the continuing wave of arrests of people supporting the Oromo Liberation Front. He was provisionally released in July 1996, because he had been seriously ill in prison. As of the end of 1996, he was under visited house arrest in Nekemte.

Quassim Hussein {Central High Court Judge}: Judge Hussein was dismissed in 1996 while he was detained in connection with the Anwar Mosqe incident (see also *Attacks on Justice 1995*).

Government Response to CIJL

On 2 July 1997, the Government of Ethiopia responded to the CIJL's request for comments. The Government stated:

> "The Draft of the article on Ethiopia for the 1996 edition of Attacks on Justice: The *Harassment and Persecution of Judges and Lawyers* is essentially focused on what it terms "the massive dismissal of Judges" which it alleges is unfair because the said judges were not given a full hearing nor allegations of misbehaviour or incapacity on their part proven. This allegation touches upon one of the attributes of judicial independence - security of tenure, and as such our response will focus on it too.
>
> The act of reconstituting the judiciary took place at the transition period which culminated in the adoption of a new constitution- the constitution of the Federal Democratic Republic of Ethiopia. The hallmark of this constitution is the enshrinement through federalism of the equality of all the nations and nationalities of Ethiopia. Another of its important features is its incorporation of a Bill of Rights; and the formal guarantee of an independent judiciary to, as it were, underwrite these rights. The new phase of the democratic transformation ushe-

red in by the new constitution cannot but impact on all state institutions including the judiciary.

As far as the judiciary was concerned the paramount task was to ensure the setting up of a judiciary envisaged by the constitution, and appoint judges that are representative of the mosaic of nations and nationalities of Ethiopia, that also meet the criteria set up by subsequent legislation (Procl. N° 24/1996), especially with regard to probity and competence. Hence, clearing the deck was not a politically motivated juggling act as is insinuated by the article but rather a constitutional as it is at the institution of the judiciary as a whole with a view to making it reflect the new democratic reality.

At this point, it may be useful to digress a bit and add parenthetically that it is because of the unequal development engendered by the oppressive policies of past regime that judges were predominantly members of a few hegemonistic nationalities and so the raison d'être of the Civil Service College is to correct this injustice through the affirmative action of training an all inclusive student body drawn mainly from the corridors of power.

To come back to our main preoccupation which is the criticism occasioned by the legitimate exercise of reconstituting the judiciary, one needs to underline the fact that this criticism is misguided as it fails to see the forest for the trees in that in focusing on the apparent discomfiture of individual judges whose tenure had to end at the close of an era, it misses the point that such a global move at the institutional level is necessitated by the very logic of the democratic transformation itself to pave the way for a change of guard so that a fresh start could be made for the realisation of an independent judiciary committed to the constitution. It is only then that we can meaningfully speak of guarantees of tenure for individual judges and other formal and structural safeguards that go with it.

In sum, getting rid of a hastily assembled corps of judges, who as a class were notoriously corrupt and manifestly inept, without further ado is a commendable job that would certainly go a long way towards establishing a credible judiciary.

As for the rest of the article, we feel that it is no more than pure nit-picking manifested by insidious assertions permeating the whole report, such as the absurd claim of judges being forced to literally burn the midnight oil; or that of the one bordering on paranoia that has to do with the possibility of the Judicial Administration Council and the Council of People's Representatives colluding to dismiss judges."

THE GAMBIA

On 22 July 1994 Captain Yahya Jammeh and the Armed Forces Provisional Ruling Council (AFPRC) seized power in a bloodless coup. One week later, most of the provisions of the 1970 Constitution of the Republic of Gambia were suspended by Decree N° 1 1994, the Constitution of the Republic of the Gambia (Suspension and Modification). A series of decrees followed, including Decree N° 4, the Political Activities (Suspension) Decree and Decree N° 57 of 1995, the National Security (Detention of Persons) Decree. The latter decree permits security forces to arrest and detain for three months without charge, anyone whose arrest and detention the Minister of the Interior considers to be necessary for the security, peace and stability of The Gambia. On 21 January 1996, Decree N° 66 was issued which allows the Minister of the Interior to extend the period of detention without charge for an additional 90 day period.

After the coup, Captain Jammeh announced that elections would not be held until 1998. Only after protests from the Gambian Bar Association and international organisations did he agree to establish a National Consultative Committee to recommend a new schedule for a return to civilian rule. On 31 December 1995, Captain Jammeh agreed to hold presidential and legislative elections in June 1996. However, Captain Jammeh postponed the presidential elections until September and the legislative elections until November, despite objections from the National Consultative Committee.

At the same time, Captain Jammeh announced that the ban on all political parties would be lifted after a constitutional referendum on 7 August 1996. The proposed Constitution had been drafted by a Constitutional Review Commission and submitted for public consultation in April 1996. The final version to be voted on, however, was not published until a week before the referendum. It contained some alarming provisions, including, for example, the following:

- Article 69 provides the President with immunity for crimes committed, even in his personal capacity. Criminal proceedings may only be brought against a former President for crimes committed in office on a two-third majority vote of the National Assembly.
- Articles 13 and 14 of Schedule 2 of the draft constitution removed jurisdiction from the courts to hear allegations against members of the AFPRC or its appointees or to hear complaints regarding the confiscation of property or penalties imposed by the AFPRC.
- Article 18 reintroduced the death penalty although the House of Representatives had abolished it two years previously.
- Article 18(4) permits lethal force in defence of person or property and to effect an arrest, prevent escape, suppress riots, insurrection or mutiny or to simply prevent the commission of a criminal offence.

- Article 34 provides for significant restrictions of rights when a state of public emergency is declared. The calling of a state of emergency permits detentions to be reviewed by a tribunal after 30 days and every 90 days thereafter, up to a maximum of 180 days. Although previous decrees concerning detention required reviews, those requirements were ignored and it was believed that the constitutional provisions requiring reviews would also be ignored.

On 8 August 1996, the people of The Gambia endorsed the draft Constitution, reportedly, by a majority of 70.4 percent of voters. The Constitution came into effect in January 1997. It did not repeal the security decrees which remained in force at the time of publishing.

Although Captain Jammeh lifted the ban on all political activities on 14 August 1996 as promised, he frustrated any true hope of returning to civilian rule and democracy when, on 16 August he banned the country's three main political parties. On 26 September, presidential elections were held, with the ban in place and Captain Jammeh was elected President. Incidents of violence, including three deaths and 33 injuries were reported on 22 September and dozens of persons were arrested and held in prison without charge. The results of the elections were disputed by Ousainou Darboe, Captain Jammeh's nearest rival. Mr Darboe, a lawyer representing the United Democratic Party, took refuge with his family in the Senegalese embassy at the close of the polls. (for more on Ousainou Darboe, see *Attacks on Justice, 1995).* On 29 September, Commonwealth electoral observers expressed "serious doubts" about the fairness of the elections.

In early November, the legislative elections, eventually scheduled to be held on 11 December 1996, were postponed by the government until 2 January 1997. The government also issued a ban on all political rallies, in response to the weekly anti-government rallies promoted by Ousainou Darboe.

The Judiciary

In 1996, three legal systems were in force in the Gambia. Customary law regulated family matters for non-Muslims, inheritance, land tenure, tribal and clan leadership and all other relevant traditional and social relations. In family matters, Muslims were governed by Shari'a law. Civil and criminal law in the urban areas were based on the British Common Law system.

None of the judges of the Supreme Court or the Court of Appeal are from Gambia and they all serve under contract with the Government. It was suggested that the low number of Gambian judges was due to an undersized bar (63 members) and low salaries.

The CIJL objects to judicial contract positions because they undermine the guarantees of the security of tenure as provided for in the 1985 United

Nations Basic Principles on the Independence of the Judiciary. In particular if the contracts are renewable, judges are left at the mercy of those who appoint them, usually the government. It was reported by the Irish Section of the ICJ, that the non-Gambian judges believe that in fact, the contract positions enhance their independence, because they can leave if "they did not like the treatment they were getting".

CASES

Justice Adio {Supreme Court Judge}: In January 1996, the newspapers reported that Justice Adio was retiring and returning to the country of his origins because of a heart condition. The reasons for his decision to retire may have been influenced by other considerations. He had recently submitted a report on the embezzlement of funds from the proceeds of the sale of crude oil. In his report, Justice Adio named the civil servants whom he recommended should be dismissed.

Although the Government denied that there was tension over the crude oil report, it published its own, contrary report. The members of the Irish Section of the ICJ, who visited The Gambia in January 1996, were "reasonably sure" he was convinced to retire.

Borry S. Touray {Magistrate of the Banjul Courts}: Magistrate Touray was dismissed from the service on 11 April 1996, after having acquitted the former Inspector General of Police, his Vice Inspector General and another police officer, charged with ten counts of stealing and conspiracy. Allegedly, Magistrate Touray received his dismissal letter from the Prime Minister's Office, without any explanation for the dismissal.

GUATEMALA

The Republic of Guatemala is headed by a President, who holds the executive power. The president is directly elected for a period of four years, and cannot be re-elected for another term. The presidential post was held by Alvaro Arzú Irigoyen, who won the run off elections on 7 January 1996 with 51.22 percent of the vote. Legislative power is vested in the Congress, comprising 80 deputies.

The peace accords reached between the Government and the Guatemalan National Revolutionary Unity, URNG, which is the co-ordinating body for the four main guerrilla groups, was the most significant event in Guatemala in 1996. The slow process toward peace began in the mid-1980s when the first dialogues between the government and the guerrilla groups were held. In 1994, a human rights agreement was reached between the parties, the implementation of which was to be verified by the United Nations Mission for the Verification of Human Rights in Guatemala (MINUGUA). Talks proceeded between the parties throughout the year, with a brief suspension when the URNG was accused of kidnapping a woman from a prominent business family. A permanent cease-fire and a final agreement was signed on 29 December 1996. The peace agreement required *inter alia* that the URNG, comprising some 3000 persons, would be demobilised and disarmed within a month. The demobilisation was officially initiated on 3 March 1997.

Unfortunately, the peace talks also resulted in the Government and the URNG signing an amnesty accord on 12 December 1996. It provided for the establishment of a Law on National Reconciliation which excludes penal responsibility for several crimes committed since the beginning of the conflict until the date of passage of the law on 28 December 1996. The enactment of such a law appears to contradict the March 1994 agreement between the Government and the URNG, in which the Government vowed not to promote the adoption of any measures, legislative or other, which would impede the trial and punishment of those responsible for human rights violations. This was interpreted as precluding any amnesty.

The Law on National Reconciliation applies to several crimes, including political crimes, related common crimes and "common crimes perpetrated both by the Government's armed forces and the guerrillas with the objective of preventing, impeding or pursuing political or related common crimes". Although the law does exclude genocide, torture and forced disappearances from its purview, the definition of those crimes in the Law may allow them to be accorded amnesty in many cases.

The speed of the procedure to be followed also gives rise to concern. After the case is transferred to the court by the prosecutor, the court is entitled to make its decision without a hearing within ten days. It is only if the court decides it requires more information that a hearing will be held, on three days notice to the parties. Once amnesty is provided, the means to

appeal are limited; the Supreme Court is to review the file without a hearing within five days. A large number of investigations into human rights abuses are thus likely to be dismissed, including the well publicised cases of the 1990 killings of U.S. citizen Michael DeVine and the anthropologist Myrna Mack, and the 1995 Xamán massacre of returned refugees (see *Attacks on Justice, 1995*). Many national and international NGOs, as well as many sectors of the Guatemalan society have opposed the amnesty law, fearing that it would not have a reconciling effect, but rather create more bitterness. In protest, the former President (1993-1996) and now Human Rights Ombudsman Ramiro de León Carpio asked the Congress to exempt his administration from the amnesty.

THE JUDICIARY

STRUCTURE OF THE COURTS

The Guatemalan Constitution guarantees functional as well as financial independence of the judiciary and clearly establishes that no authority shall interfere with the administration of justice. The Supreme Court of Justice (*Corte Suprema de Justicia*) is at the apex of the judicial order, followed by a Court of Appeals (*Corte de Apelaciones*) and Courts of First Instance (Juzgado de Primera Instancia). There are also a Constitutional Court (*Corte de Constitucionalidad*), special courts for minors (*Juzgados de Menores*), justices of the Peace and a military judicial system. In June 1996, Congress adopted a law establishing that cases involving members of the armed forces accused of common crimes would be dealt with by civilian courts. As a result, 347 cases were transferred from military to civilian jurisdiction.

The Supreme Court is composed of 13 magistrates, elected by the Congress from a list including 26 candidates nominated by a commission comprised of a representative of the university rectors, a dean representing the law faculties of the universities and an equal number of representatives of the Guatemalan Bar Association and of representatives elected by the Court of Appeals. All magistrates and other judges are elected for a period of five years, during which, according to the Constitution, they cannot be removed or suspended other than for reasons established by the law. After their term has expired, they can be re-elected or nominated again, leaving them susceptible to government influence. Judges in lower courts are appointed by the Supreme Court.

The mandate of the Constitutional Court involves mainly the protection of the constitutional order. The court is made up of five magistrates, out of which one is elected directly by the President and one by the Congress, notwithstanding that the Constitution establishes the Constitutional Court's independence from the other branches of the state.

The supervision of the courts lies in the hands of the President of the Supreme Court, who, together with the "General Supervision of Tribunals" has broad powers to investigate any act or omission of the judiciary. It has been reported by officials working at the courts that the General Supervision of Tribunals effectively serves as recourse for litigation lawyers who want to exercise pressure on judges when they are not satisfied with the conduct of their case. It is also reported that this organ acts as a mechanism of institutionalised harassment to intimidate judges.

Disregard for the administration of justice, relating mainly to the armed forces, whose members are protected by amnesty decrees and military jurisdiction represents a significant attack on the judiciary (e.g. see Law on National Reconciliation, above). The inability of the judiciary to apply the law derives from political influence, corruption and lack of belief in justice. It must be recognised that threats and attacks on judges and lawyers affect the proper functioning of the law. One example is the 1982 massacre in Dos Erres, which had not been judicially investigated by the end of 1996 because no lawyer within the Public Prosecutors office wanted to assume responsibility for it. The Secretary General of the Supreme Court stated that 40 judges had reported receiving threats connected to their cases in early 1996. The Ministry of the Interior (*Ministerio de Gobernación*) placed 25 judges and attorneys under protection because of threats on their lives.

Resources

Although the Supreme Court of Justice formulates the judicial budget, which according to the Constitution should be no less than two percent of the ordinary income of the state, judges remained affected by low salaries and poor working conditions, making them susceptible to corruption. According to Decree 91-95, the budget for the judiciary would be 249,654,566 quetzales (approximately $US 41,500,000.00) which actually represented more than the constitutionally required two percent. The Supreme Court however, still expressed that the 1996 budget was insufficient.

Cases

Edgar Rolando Cuyu [Lawyer and assistant in the Prosecutor's Office for Human Rights (Procuraduría de Derechos Humanos)]: Mr. Cuyu was shot at by unknown persons on 25 October 1996 in La Cuesta de San Pedro Pinula.

Edgar Epaminondas Gonzáles Dubón [President of the Constitutional Court]: As reported in *Attacks on Justice 1993-1994,* Judge González Dubón was assassinated on 1 April 1994. On 6 March 1996, the two persons charged with his assassination, Marlon and Marion René Salazar, who had

been sentenced to twelve years in prison, were absolved by the Court of Appeals because of a lack of sufficient evidence. A deputy of the New Guatemalan Democratic Front, FDNG, accused the Public Ministry of being incompetent and inefficient in their investigations and gathering of evidence.

Julio Ixmata {Attorney at the Maya Ombudsman office (Procurador de la Defensoría Maya)}: On 2 April 1996, Mr. Ixmata was attacked in the village of Guineales, Santa Catarina Ixtahuacán, by several individuals who tried to burn him alive. As a result of the injuries suffered from the assault, he was hospitalised. MINUGUA and other human rights organisations offered protection to Mr. Ixmata and initiated investigations.

Julio René Lemus Flores {Lawyer}: This lawyer and journalist was shot and killed on 23 April 1996 in Guatemala City. He had received death threats prior to his assassination.

Abraham Méndez García {Special Prosecutor in the Public Ministry}: As reported in *Attacks on Justice 1995,* Mr. Méndez Garcia was assigned to the case regarding the 1993 murder of Jorge Carpio Nicolle, the cousin of former President Ramiro de León Carpio. During 1995, Mr. Méndez García repeatedly received threats and even suffered an attempt on his life. Death threats continued in 1996, reportedly as a result of Mr. Méndez's investigation into the 1993 killing, which possibly involved the armed forces. In November 1996, Mr. Méndez went into exile.

Erwin Ruano Martínez {District Attorney (Fiscal Distrital) in Cobán, Alta Verapaz}: On 18 April, Mr. Ruano Martínez's residence outside Cobán was shot at by unknown persons in two cars. Only material damage was done.

Government Response to CIJL

On 22 July 1997, the Government of Guatemala responded to the CIJL's request for comments. Below is a translation into English of the government's comments which were provided in Spanish:

> *"I. Reconciliation Law*
>
> The National Reconciliation Law was created to promote a culture of harmony and mutual respect that would eliminate all forms of revenge and at the same time preserve the fundamental rights of victims, conditions which are indispensable for a firm and lasting peace.
>
> Accordingly, this law should not be interpreted as offering protection to perpetrators of human rights violations. The law clearly provides "criminal liability shall be excluded" for any "political crimes committed during the armed internal conflict"

just as for "common crimes related to these." The law must be strictly confined to these terms. Indeed, the law expressly provides that it shall not apply to crimes of genocide, torture or forced disappearance, just as with crimes that have no statute of limitations or crimes in which criminal liability may not be lifted under domestic law or under international treaties ratified by Guatemala.

The examination of the Reconciliation Law undertaken by the United Nations Mission for the Verification of Human Rights in Guatemala (MINUGUA) made several important points. The complete elimination of criminal liability, as regards crimes that affect the rights of persons, shall not apply to crimes committed by the Guatemalan National Revolutionary Unity (Unidad Revolucionaria Nacional Guatemalteca - UNRG), by the State or by any other force established by law.

Additionally, MINUGUA noted that the law is clear about the framework within which it applies. It shall not apply to human rights violations that take place outside the strict framework of the armed internal conflict, and that constitute legally unjustifiable excesses.

MINUGUA also stated that in carrying out its mandate, it will rigorously verify that due process is followed in all cases in which the National Reconciliation Law is invoked. This measure ensures, both to the Government and to the persons who invoke it, that the Law will be interpreted appropriately so that it does not stray from the purpose for which it was created.

II. Judiciary

In the context of the peace accords, the subject of administration of justice was fully examined. The accords were able to outline important steps to strengthen domestic structures to protect human rights, especially regarding the administration of justice. To this end, the Government of Guatemala promised to take steps to improve the justice system by training judges, prosecutors, magistrates, etc. To support this task, a 50% increase in funds for the year 2000 compared to expenditures allotted in 1995 (relative to the Gross Domestic Product) is proposed for the Judiciary (Organismo Judicial) and the Public Ministry (Ministerio Público). The Government is also making provisions for the resources needed for the Public Defenders Service (Servicio Público de Defensa Penal) so that it may be established and begin operating in 1998. In addition, the Government plans to institute an effective plan to protect witnesses, prosecutors and persons working with the justice system.

The proposed Modernisation has the following principal objectives:

- To adequately separate administrative work within the Judiciary and the Public Ministry to relieve judges and prosecutors from work which is not appropriate for them.

- To properly distribute available financial resources to work toward strengthening the system, while bearing in mind the need to utilise resources better.

- To develop the basic contents of a project for a Judicial Civil Service Law (Ley de Servicio Civil del Organismo Judicial).

An important result of the peace accords is the creation of a Judicial Career Law (Ley de la Carrera Judicial), which would include: rights and responsibilities of judges; the functions of the office and adequate compensation; a system for appointing and promoting judges based on public competitions that look for professional excellence; rights and responsibilities regarding training and professional development; disciplinary scheme with guarantees, procedures, instances, and pre-established penalties, such as the principle that a judge/magistrate shall not be investigated or punished except by a person with judicial competency.

The accords also determined the establishment of the Commission on Strengthening the Judiciary (Comisión de Fortalecimiento de la Justicia) and delineated its functions. The Commission has already been set up and its objective is to produce a report within the year, after a full debate, and to offer recommendations that can be put into practice in the judicial system, especially regarding modernisation, access to justice, streamlining of judicial procedures and professionalisation of magistrates. In addition, the accords have also resulted in the strengthening of the School for Judicial Studies (Escuela de Estudios Judiciales) and the Public Prosecutor Training Unit (Unidad de Capacitación del Ministerio Público).

The changes and measures that will be taken have been set out with the understanding that the foundation of a democratic state must be firmly rooted in an appropriate and efficient justice system, which not only guarantees the personal integrity of its citizens, but also protects the rights established for them by the Constitution of the Republic.

III. Peace Process

The strengthening of civil power through the process of democratisation in which the country is now immersed, is a sensible

step as it allows the active participation of civil sectors organised in the political, social and economic life of the country. The exercise of democratic power has allowed the country to overcome, on a national level, features characteristic of societies in which the military or other specific power groups are highly influential. Guatemala has taken a big step forward in this sense. The end, at the close of the century, of the armed internal conflict that lasted 36 years, marks the beginning of a stage of renewal for all aspects of Guatemalan society.

Currently, a democratically elected government is in power. The army is respectfully subordinate and engages in no deliberations of its own. This step, unlike in the past, has allowed the President of the Republic, in his capacity as Commander in Chief of the Army (Comandante General del Ejercito), to carry out changes in the structure of the military in the way that is best for the country and these changes have been carried out without any difficulties. On the other hand, submitting soldiers and high civil servants accused of human rights violations to prosecution under the domestic justice system, without favouritism or consideration for the high public or political duties that they performed, has allowed the present government to put affairs in order, through the free exercise of its powers, with the aim of eradicating problems strongly entrenched in our society, such as impunity and corruption."

HAITI

Following three years of exile, Jean-Bertrand Aristide, elected President in December 1990, returned to Haiti in October 1994 and restored civil law. Under the 1987 Constitution of the Republic of Haiti, legislative power is vested in a bicameral Parliament, composed of a House of Deputies and a Senate. Executive power is exercised by the President of the Republic, who is the head of the State, and by the Government, led by the Prime Minister. The President of the Republic is directly elected for a five year term, not immediately renewable. He appoints the Prime Minister from among the members of the party which holds the majority of the seats in Parliament. On agreement with the President and on a vote of confidence from both the two houses of Parliament, the President chooses the Ministers of his or her Cabinet. The Cabinet is responsible to the Parliament.

René Préval was democratically elected President on 17 November 1995 with 87,9% of the vote and was proclaimed President on 7 February 1996. It was the first time since the country's independence in 1804 that an elected president transferred power to an elected successor. On 4 March, the new Prime Minister Rosny Smarth announced the composition of his new Cabinet.

On 5 January 1996, President-elect René Préval announced that he formally had asked the United Nations Secretary-General to extend the mandate of the UN Mission in Haiti (MINUHA), six months past its scheduled withdrawal on 29 February 1996. The MINUHA, consisting of 6000 soldiers and 900 police from 27 countries, had in March 1995, replaced the Multinational Force led by the United States, which had been present in the country since 18 September 1994 and enabled the return of President Aristide. On 29 February 1996, the UN Security Council unanimously prolonged the MINUHA mandate by six months. On 1 March, a force of 1,200 soldiers, under Canadian command, and 300 international civilian police replaced the previous contingent. On 28 June, the Security Council decided to extend MINUHA's mandate until 30 November but in a concession to China, reduced the UN personnel of the Mission from 1200 troops to 600; China had opposed Haiti's diplomatic relations with Taiwan.

NATIONAL COMMISSION OF TRUTH AND JUSTICE (NCTJ)

The NCTJ was established on President Aristide's return. It completed its mandate and submitted its report to the President in January 1996. Although the United Nations Independent Expert on Haiti had recommended that the NCTJ report should be distributed widely, only the chapter in which the NCTJ's recommendations were set out was published.

At the end of 1997, Haitians continued to call for the prosecution of those responsible for human rights violations committed during the *de facto* regime established after the coup in 1991. A Ministry of Justice document referred to the delay as "...having all the makings of a time bomb; large-scale

explosive violence is possible due to frustration and the desire for revenge". Exasperating the already tense situation was the 24 July 1996 acquittal of two defendants accused of killing the former Justice Minister, Guy Malary in 1993. It was reported that the United States had seized documents concerning the case and had agreed to return them only on the conditions that they were kept secret and the names of all U.S. citizens be removed from the documents.

The UN Independent Expert suggested giving priority to the recommendations to create a special commission on compensation for injury suffered during the *de facto* regime and the creation of a special office to prosecute those responsible for human rights violations.

The Judiciary

The independence of the judiciary is formally guaranteed by Article 60 of the Constitution of Haiti, which states that each power shall be independent and shall exercise its functions separately. Article 2 of the Decree of 22 August 1995 organising the judiciary confirms this principle. The reality however, is not supported by these guarantees.

Chapter IV of the Constitution establishes the judiciary and creates the *Cour de Cassation* (Court of Cassation), the *Cours d'Appel* (Courts of Appeal), the *Tribunaux de Première Instance* (First Instance Tribunals), *Tribunaux de Paix* (Peace Tribunals) and *Tribunaux Spéciaux* (Special Tribunals). The number, composition, organisation, functioning and jurisdiction of these courts are established by the law. At the lowest level, justices of the peace issue warrants, hear minor infractions, file depositions and refer cases to higher tribunals. First Instance Tribunals deal with more serious cases and appeals against their decisions are heard by the Courts of Appeal. The Supreme Court hears questions of procedure and constitutionality.

Appointment and Removal Procedures

According to the Constitution, judges do not have life tenure: judges of the Court of Cassation and of the Courts of Appeals are appointed for a ten year term, whereas those of First Instance Tribunals serve on a seven year term of appointment. The judges of the Court of Cassation are appointed by the President of the Republic on a list submitted by the Senate, whereas the judges of the Courts of Appeal and of First Instance Tribunals, also appointed by the President, are chosen from a list presented by the *Assemblée Départementale* of the concerned Department. The Judges of Peace are appointed on the basis of a list prepared by the *Assemblées Communales*.

There is no effective system of promotion within the judicial system. The result has been that judges remain in the same region for extended periods of time and they themselves become influential figures in the area. It

was believed that this type of recognition itself undermines the independence of the judiciary.

Article 177 of the Constitution provides for the irremovability of judges of the Court of Cassation, of the Court of Appeal and of First Instance Tribunals. These judges cannot be dismissed save for a breach of duty legally declared or for a proven permanent physical or mental disability. The Constitution does not interpret "breach of duty", inviting potential for abuse. Article 9 of the 22 August 1995 Decree confirms that the dismissal of judges can only take place in accordance with the provisions of the Constitution and the laws. Moreover, it provides that judges cannot be transferred without their consent, even if the transfer is a promotion. Despite these protections, judges were arbitrarily dismissed in 1996 (see section on *On-going dismissal of judges*, below). Further, neither the Constitution nor the Decree protects justices of the peace from dismissal.

Disciplinary sanctions against judges are determined by law. Judges of the Court of Cassation, however, can be tried on the unspecified allegation of breach of duty, by the *Haute Cour de Justice* (High Court of Justice), composed by the members of the Senate and headed by the President of the Senate.

On-going dismissal of judges

During the military rule, neither the Senate nor the local assemblies were elected and the majority of the judges in office in 1996 were not appointed in conformity with the constitutional provisions. In addition, although most judges and prosecutors of First Instance Tribunals and superior courts have a proven legal education, the level of education of the Justices of the Peace has been very unequal. Some of the Justices of the Peace were appointed from the position of court clerk. The unconstitutional appointment of inadequately trained judges created a dangerous climate of uncertainty surrounding the tenure of those judges, which, in turn, contributed to seriously undermine the independence of the judiciary.

In 1995, a total number of 37 judicial dismissals was reported by the UN Civil Mission in Haiti. In the region of Port-au-Prince, 16 judges were dismissed, in Petit-Goave, 8 of the 16 judges in the region were dismissed and in Anse-à-Veau 13 of the 23 judges were dismissed. It was reported that the judges were dismissed by a simple letter of the Minister of Justice, without giving any reason for the removal, although the Constitution, as indicated above, permits their removal only in the event of breach of duty or physical or mental incapacity. Article 17 of the United Nations Principles on the Independence of the Judiciary requires any charge or complaint made against a judge to be processed "expeditiously and fairly under an appropriate procedure". Under that procedure, the judge is to have a fair hearing which itself should be subject to a review.

Resources

Extremely poor wages have also contributed to undermine the independence of the judiciary. Despite promises of wage increases by the Minister of Justice in April 1995, in 1996, a judge earned approximately 5,000 gourdes a month (approximately 275 $US) and a justice of the peace earned not more than 3,500 gourdes (approximately 195 $US). Meanwhile, a junior police officer also earned 5,000 gourdes a months. Under such conditions, allegations of corruption were frequent in 1996. It was reported that several judges, especially the justices of the peace, asked for fees before issuing warrants. In addition, the desperate conditions of the court clerks, who earned a monthly wage from 650 to 900 gourdes, exposed them to corruption. In one incident, it was reported that a court clerk issued a decision materially altered from that of the judge, presumably for payment.

In 1996, the enforcement of judgments was given to the parties to execute themselves, due to the lack of police officers who are authorised and presumably trained to enforce judgments. In certain districts, bailiffs were recruited to fulfil that service, conditional on additional payment.

All of the above-noted factors influencing the independence of the judiciary were exasperated if one considers the historical context in which the judiciary operates. Judges have been asked to decide numerous cases alleging corruption and human rights violations. Given that the return to democracy was still continuing in 1996, some judges continued to fear they might suffer reprisals if they were too harsh with the perpetrators of these crimes. It was reported that when one judge did issue warrants of arrest for 10 alleged gunmen, the novice police force encountered practical problems in arresting the accused, who were well-armed.

Attacks against the courts

The *tribunal de paix* of Vialet remained closed from 30 December 1996 to 8 January 1997 because of a demonstration against the release of a defendant by a justice of the peace. The demonstrators asked for the dismissal of the judges. It was reported that the court began to operate again on 8 January 1997.

On 3 January 1997, the *tribunal de paix* of Gressier closed in protest against the refusal of the local police to execute a court order providing for the arrest of a group of off-duty police officers involved in clashes on the New Year's Day. The tribunal reopened on 13 January, after the police confirmed the accused police officers had been arrested in Port-au Prince.

On 15 January 1997, it was reported that a local popular organisation forced the closure of the *parquet* in Mirebalais. The group was protesting a rumour that a *substitut de commissaire* (deputy prosecutor) supported by the Mouvement des Paysans de Papaye, from Hinche would be appointed rather than the local candidate.

Judicial Reform

At the end of 1996, a bill reforming the judiciary was drafted and scheduled to be adopted by the Haitian Parliament in its first session of 1997. The bill would give the Government six months from the date of publication of the law to implement the most urgent reforms, seen as important to guarantee that the administration of justice is independent, impartial effective, competent and accessible to all persons. The reforms included:

- the determination of the needs concerning the education and training of judges (Article 12 of the Decree of 22 August 1995 has already required Justices of the Peace to hold a law degree and to pass an exam organised by the Ministry of Justice or to graduate from l'*Ecole de la Magistrature*);
- the elaboration of the Statute of the *Ecole de la Magistrature*;
- the creation of the *Ecole de la Magistrature* and its programme of studies;
- the drafting of the Statute of the Magistracy; and
- the dismissal and the appointment of judges and of judicial officers of the courts, civil tribunals, *Parquets* and of the *Tribunaux de la Paix* .

The CIJL welcomes most of these reforms. However, while it recognises that the present judges and judicial officers may not be adequately trained, the CIJL is hopeful that the Government will not arbitrarily dismiss these judges. Instead, it would respectfully request the Government to provide these judges with adequate training. Alternatively, if the Government is convinced that some judges must be removed from the bench for corruption or breach of duty, the CIJL asks that those judges be given a fair hearing, the decision of which can be appealed, in accordance with the United Nations Principles on the Independence of the Judiciary.

Cases

M. Louis Rounet Michel {Justice of the peace in Cité Soleil}, **M. Louis Jean Zacharie** {Justice of the peace in Croix des Bouquets} and **M. Dominique Espérant** {Justice of the peace in Cayes}: In 1996, a wave of removals of justices of the peace affected several departments. The majority of the justices of the peace were dismissed by a simple letter from the Ministry of Justice. Neither the Constitution, nor the Decree of 22 August 1995 organising the judiciary, as underlined above, guarantee the tenure of the justices of the peace. As a result, none of them were able to appeal against their dismissal. Again, such a procedure is contrary to the United Nations Principles on the Independence of the Judiciary which requires judges to be removed only after a full hearing from which the decision may be appealed.

The three named justices of the peace are just three of the many who were dismissed in 1996. M. Louis Rounet Michel was dismissed on 17 May 1996 under charges of corruption. M. Dominique Espérant and M. Louis Jean Zacharie were dismissed on 18 April and 1 October 1996 respectively on allegations of exceeding their powers.

HONDURAS

The President of the Republic of Honduras holds executive power and governs with the assistance of a Cabinet, appointed by him or her. The President is elected to a four year term. Legislative power belongs to the National Congress, to which the 148 members are elected for four year terms.

Carlos Roberto Reina Idiáquez won the Presidential elections held in 1993 and the new Government took office in January 1994. The President's Liberal Party obtained the majority in the simultaneously held Congressional elections.

Although Honduras returned to civilian rule in 1982, the armed forces continued to hold and exercise excessive power. Upon taking office, President Reina, a former President of the Inter-American Court on Human Rights, declared that he would undertake a "moral revolution" in all aspects of government and end impunity for human rights violations. Efforts to reinforce the civil institutions were initiated in recent years with the creation of the National Commissioner for the Protection of Human Rights (*Comisionado Nacional de Protección de los Derechos Humanos*). In 1994, the Directorate of National Investigations (DNI), a section of the police known as the Public Security Forces, (FUSEP) and under the control of the armed forces was replaced with the new Directorate of Criminal Investigations (DIC). The DIC in turn, was placed under the Public Ministry making it the country's first civilian police. Although it began to function in January 1995, at the end of 1996, it was not fully staffed or equipped. Additional efforts included the creation of a Special Prosecutor's Office for Human Rights (*Fiscalía Especial de Derechos Humanos*) within the Public Ministry and the President's proposal for constitutional reform. His proposal included making the defence minister the effective and titular head of the armed forces; in February 1996, the President rejected military advice and appointed a new defence minister.

With the dissolution of the DNI, which was reportedly involved in extra judicial killings and disappearances during the 1980's and early 1990's, human rights violations reportedly decreased. Yet, there were reports of at least 73 extra judicial killings in 1996.

Another problem in 1996 was the numerous bombings targeting the President, the Congress, various Ministries, human rights organisations and court buildings. The bombings were also presumed to be carried out in the context of increased crime. Self-named delinquent groups claimed responsibility for some of the bombings. Human rights organisations suggested however that the military lay behind the attacks. In November 1996, 3,000 army, navy and air force troops were deployed to patrol the capital of Tegucigalpa and the city of San Pedro Sula, as part of an anti-crime drive.

COMBATING IMPUNITY

The 1991 Amnesty Law 87/91 granted a "broad and unconditional amnesty". It applied to those who, prior to the law entering into effect, had been sentenced, to those against whom legal proceedings had been initiated or to those who could be liable to prosecution for certain political crimes or common crimes linked to them. The relevant crimes included killings, torture and unlawful arrests committed by members of the police and military.

The enforced disappearance of persons in the hands of security forces and the police during the 1980's was finally recognised by the Government in 1993, when the report of the National Commissioner for Human Rights, "The Facts Speak for Themselves", was published. It described the cases of 184 disappeared persons which continued to be investigated by the Attorney-General in 1996.

The fight against impunity was facilitated when it became possible in 1993 to try military officers in civil courts. Congress passed a resolution that the Constitution would be interpreted to give civil courts jurisdiction over military courts in cases were there is a jurisdictional conflict. Previously, the military invariably claimed to have their cases heard before military courts, which upheld impunity.

In July 1995, the Special Prosecutor for Human Rights charged ten military officers with the attempted murder and unlawful detention of six students in 1982 who had temporarily disappeared. This was the first time that the Government had initiated criminal proceedings against members of the armed forces for human rights violations. Proceedings filed in the 1980's by relatives of disappeared persons had been defended on the grounds of the Amnesty Laws of 1987, 1990 and 1991 which led, without exception to the acquittal of those charged.

Then, in December 1995, President Reina reportedly stated that the amnesty laws applied to everyone. He was also reported to have supported a January 1996 decision of the Court of Appeals which allowed the amnesty law to be applied to 10 accused military officers. On 19 January 1996 however, the Supreme Court of Justice unanimously returned the case to the lower court. The Supreme Court decision was seen to confirm that the amnesty laws could not simply be applied without considering the merits of each case.

In other cases however, the Supreme Court was reportedly accused of favouring certain public officials, including members of the armed forces and the police, due to an instruction it had issued allowing such officials charged with criminal acts to be detained in police or military facilities instead of regular detention centres. In the beginning of 1997, the Supreme Court, through a specially appointed commission, investigated allegations of a judge of the Second Criminal Court that his own court was corrupt and biased in favour of the military and the police. The commission reported in March

1997 that it had found no such evidence. The commission also recommended that the judge who made the denunciation should be transferred to another court and be fined.

THE JUDICIARY

The Constitution provides for the separation of the powers and the independence of the judges. The factual independence is however undermined by the fact that Supreme Court judges are appointed by the Congress for a term of four years which coincides with the Presidential, as well as the Congressional, terms.

The court structure comprises a Supreme Court of Justice, ten Courts of Appeal, 67 Courts of First Instance and 325 Justice of the Peace Courts with limited jurisdiction. There is also a system of military courts.

APPOINTMENT PROCEDURE

The nine judges of the Supreme Court are appointed by the National Congress, which also elects the President of the Supreme Court. Their term of office is four years with possible re-election. Lower court judges are appointed by the Supreme Court. As a result of the Supreme Court Judges' term coinciding with that of the President and the Congress, the Executive has great possibilities to influence the judiciary by appointing the judges of its choice.

The Constitution establishes that judges cannot be removed for reasons other that those established by law.

RESOURCES

The Supreme Court is in charge of elaborating the budget proposal for the judiciary, which is submitted to the Executive and included in the general budget. The judiciary suffers from lack of funding, which affects its proper functioning. Due to inefficient procedures (pre-trial hearings and trials are entirely written), the backlog of cases is significant, resulting in extensive pre-trial detentions. Detention pending trial lasts an average time period of two years, which often is longer than the maximum penalty for a conviction. Government statistics from June 1996 showed that 89 percent of the prison population was awaiting trial or sentencing.

In 1996, reforms were discussed to remedy inefficient proceedings and the backlog, including amendments to the Penal Code and the Code of Criminal Procedure. In the meantime, the Supreme Court issued an instruction, under its authority to adopt measures to improve the administration of justice. The instruction made judges personally responsible to reduce the backlog. It further separated judges into two groups: those in charge of

investigating a case and those hearing the case and sentencing the defendant. Prior to the instruction, the same judge was responsible for investigating as well as hearing the case.

CASES

Mildred Castillo, Rafael Castro Avila, María Antonieta Mendoza de Castro, María Dolores Rastel {Judges}, **Cristian Castro** {Public Defender}, **Carlos Armando Bonilla Anamorado, Oscar Manuel Castellón, José Francisco Cerpa, Arnulfo Deras, Ivis Discua, Oscar Leberón** and **Marco Tulio Trejo** {Lawyers}: On 7 November 1996, a bomb was thrown at the First and Second Criminal Court in Comayagüela. The attack led to the death of a watchman and the injury of 24 persons, including the lawyers and the public defender listed above.

The following day, the self-named group "Justa C" who claimed responsibility for the bombing made death threats against the above-named judges in a press release. The release further stated the bombing of the court was not the first nor the last, and that the group planned to "eliminate" some six judges and several public prosecutors that were dealing with cases concerning corruption and car robberies.

The judges mentioned above were also involved in cases concerning corruption in the government of former President Callejas, human rights abuses by the military and military links with Battalion 3-16, a death squad responsible for torture, killings and disappearances in the 1980's. After the November bombing, the President condemned the attacks against courts, which he said were meant to obstruct the Government's fight against corruption and impunity. He promised that there would be investigations into the attacks and more security measures for judges and prosecutors.

Earlier in the year, on 12 June, a bomb exploded in the Supreme Court. Security had been reinforced for Judges Rafael Castro Avila and Roy Edmundo Medina (see separate case below), after having received repeated death threats. Since there were no attacks, security measures had been reduced.

Ana Lourdes Coello {Judge in the First Criminal Court}: In May 1996, Judge Coello notified the police that armed persons had fired shots at her house.

Yadira Deras and **Edwin Noel Ramos Ventura** {Lawyers with the Public Ministry}: On 18 March 1996, when travelling from La Lima to El Progreso, these lawyers were followed, reportedly by a captain of the Public Security Forces (FSP) who was driving a car with tinted windows. One day later, Ms. Deras was threatened by the same captain, who told her that "if he wanted to kill her he would have done it and nothing would happened to him".

Abencio Pineda Fernández {Lawyer}: On 27 March 1996, the house of Mr. Pineda, a lawyer working with the Legal Services of *El Comité para la Defensa de los Derechos Humanos en Honduras*, was broken into by unidentified persons. Some of his belongings were stolen. He had been receiving death threats over the telephone and was reportedly under surveillance by persons presumed to be members of the Public Security Forces. Mr. Pineda sent a petition to the Inter-American Commission on Human Rights requesting protection.

Roy Edmundo Medina {Judge}: Judge Medina was seized with the case involving military officers accused of torture and attempted murder in relation to the temporary disappearance of six students in 1982 (see above under *Combating Impunity*). In November 1995, Judge Medina announced that he had received death threats since he issued warrants of arrest for three military officers in October 1995. In February 1996, the person assigned to protect Judge Medina was killed by an unidentified man.

Judge Medina's name appeared on the list of judges threatened with death by the group "Justa C", which claimed responsibility for the bombing of a court on 7 November 1996 (see first case above).

Reyna Isabel Najera {Judge}: On 11 December 1996, men wearing masks tried to set fire to Judge Najera's house in El Progreso.

Edmundo Orellana {Prosecutor General}: Reportedly due to his involvement in the investigations of persons who disappeared in the 1980's, the Prosecutor General and his family received threats during 1996.

Leo Valladares {Lawyer and National Commissioner for the protection of human rights (*Comisionado Nacional de Protección de los Derechos Humanos*}: The Commissioner for Human Rights and members of his family received threats since he presented the 1993 report on forced disappearances carried out by the armed forces and the police during the 1980's (see *Attacks on Justice* 1993-1994). In 1996, threats continued by means of numerous anonymous telephone calls.

Marlen Zepeda {Public Defender}: Ms. Zepeda was assassinated on 17 June 1996, in a restaurant in San Pedro Sula. The attack was carried out by an unidentified person who fled on a motorbike.

The assassination was reportedly linked to her work as legal counsel in cases involving persons suspected of bank robberies, including a former employee of the Commissioner of the Armed Forces. Prior to the killing, Ms. Zepeda had received threats, and on 13 June she met with the regional Chief of the Public Security Forces, who reportedly told her that her life was in danger.

HONG KONG

The 1984 Sino-British Joint Declaration guaranteed that on the return of Hong Kong to the People's Republic of China on 1 July 1997, the region, to be known as the Hong Kong Special Administrative Region (HKSAR), would enjoy a high degree of autonomy. The Declaration provides that HKSAR will be vested with executive, legislative and independent judicial power (including that of final adjudication). The Basic Law for the HKSAR was promulgated by the National People's Congress in April 1990 and is to take effect on 1 July 1997.

Pursuant to the Basic Law, the Chief Executive shall be the head of the HKSAR and be accountable to the Central People's Government and the HKSAR. The Chief Executive is to be selected by election or through consultations held locally and be appointed by the Central People's Government. In December, Tung Chee-hwa, a shipping magnate was elected Chief Executive of HKSAR by the Selection Committee established by China.

According to the Joint Declaration, the current laws, and the social and economic systems are to remain essentially unchanged for 50 years. In June 1991, the Hong Kong legislature enacted a Bill of Rights Ordinance, incorporating the provisions of the International Covenant on Civil and Political Rights (ICCPR) into domestic law. Despite this attempt to guarantee the civil and political rights of the people of Hong Kong, early signs have indicated that they may not be effective.

An initial indication was China's denunciation of the legislation enacted in 1995 which determined the makeup of the first legislature to be fully elected. The Hong Kong Government proceeded with the elections despite the denunciation and a Legislative Council was formed with pro-democracy parties and independent members forming the largest single group. On 24 March 1996, the Preparatory Committee, appointed by the Chinese Government to monitor the transition, voted to replace the elected Legislative Council with a Provisional Council after 30 June 1997. The Preparatory Committee also voted to prohibit all members of the Democratic Party from the Provisional Legislative Council. On 1 June 1996, however, the *South China Morning Post* reported that Lu Ping, Director of China's Hong Kong and Macao Affairs Office, had agreed to allow all parties to participate in the 1998 elections for the new Legislative Council.

A second significant concern was the proposal on 17 October 1995 by the Preliminary Working Committee (PWC), appointed by the Chinese Government, to repeal the provisions in the Bill of Rights which provided for the incorporation into the laws of Hong Kong the provisions of the ICCPR, alleging they were in conflict with the Basic Law. The PWC also proposed that powers which had been abolished for inconsistency with the Bill of Rights were necessary for the maintenance of "administrative authority and social stability". On 15 November 1996, the Legislative Council, in a

non-binding vote, rejected the proposals of the PWC (for judicial reaction, see under *Judiciary* below).

In February 1996, China announced it will exclude from the list of international treaties it will apply to Hong Kong after 30 June 1997, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. This announcement came a week after a meeting of the Sino-British Joint Liaison Group wherein Britain and China had agreed to ensure nearly 200 multilateral treaties currently applied to Hong Kong would remain in force after 30 June 1997, even though China is not a signatory to all of those treaties. A Chinese official was reported to have said that, as provided for in the Basic Law of the HKSAR which will take effect on 1 July 1997, the provisions of the two Covenants would be implemented in Hong Kong through the laws of the special administrative region.

In June 1996, the Director of China's Hong Kong and Macao Affairs Office told journalists that, as provided for in the Basic Law, the post 30 June 1997 HKSAR Government would enact laws to prohibit subversion, sedition and incitement against China. He noted that although the Basic Law provided for freedom of speech, expression, religion and the press, the Government would require the media to report views "objectively" and restrict the press from advocating "two Chinas". In October 1996, the Chinese Foreign Minister warned that in the future, "Hong Kong should not hold activities which directly interfered in the affairs of the mainland".

Finally, in January 1997, it was reported that a panel of Chinese officials and pro-China Hong Kong residents recommended sweeping changes to the Bill of Rights Ordinance and other civil liberties legislation. The recommendations included repealing or amending 25 laws, among them those which protected the democratic system and which made the Bill of Rights supreme over all other legislation.

The Judiciary

Based on Article 85 of the Basic Law, the courts of the HKSAR are to "exercise judicial power independently, free from any interference". The Basic Law provides for Magistrates' Courts, District Courts, a High Court and the Court of Final Appeal to be established in the HKSAR.

Pursuant to Article 158 of the Basic Law, the courts of the HKSAR will have jurisdiction to interpret the Basic Law concerning matters which are within the limits of the autonomy of HKSAR. However, if the interpretation concerns affairs which are the responsibility of the Central People's Government or affect the relationship between the central authorities and the HKSAR, the courts must seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress. Any such interpretation is binding.

Based on the English system, common law precedents are cited and decisions of the highest court of appeal in England, the Judicial Committee of the Privy Council, have been effectively binding in Hong Kong. Under the Basic Law, all laws shall remain in force except for those that contravene the Basic Law. The Basic Law specifically provides for the right to a fair trial and the presumption of innocence. The courts may also continue to refer to precedents from other common law jurisdictions.

Under British rule, judges were appointed by the Governor who made his appointments upon the recommendation of a Judicial Service Commission (JSC). The JSC is an appointed body consisting of the Chief Justice, judges, the Attorney-General, lawyers and members of the public. The Basic Law will allow a similar system, with the Chief Executive to appoint judges on the recommendation of an "independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors".

Judges will only be able to be removed for inability or misbehaviour and then only on recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges.

Concerns continued in 1996 that instead of rallying together to ensure the strength of their independence, the judiciary was weakening in the face of the transfer of sovereignty. Of considerable concern were comments made by the judiciary concerning the Bill of Rights and judicial conduct which could not be considered to be independent. On 23 October 1995 the Chief Justice, Sir Ti Liang Yang, declined to comment on the PWC proposals to repeal the core provisions of the Bill of Rights, saying the "controversy had become too emotional and political" and that judicial officers should not get involved in such political debates. On 29 December 1995, it was disclosed that the Chief Justice had, in fact, in October 1995, met with a member of the PWC itself who asked for his position in writing. The Chief Justice then discussed the Bill of Rights with other judges and six of them drafted a statement of their views. The document was given to the PWC member prior to their meeting and it was thought that the PWC recommendations to repeal core provisions of the Bill of Rights were actually proposed as a result of this statement. The Chief Justice again showed his failure to remain independent from the Executive Branch when, on 31 August 1996, he announced his candidature for the position of Chief Executive. On 6 September 1996, he resigned after succumbing to protests that his candidature for the position of Chief Executive was in conflict with his position as Chief Justice.

Other judges had already revealed their bias against the Bill of Rights when it was enacted in June 1991. Mr. Justice Henry Litton's comment that the Bill of Rights ought not be used "to test the legality of an administrative act by the Government" was reported as threatening to "emasculate what little will be left of the ordinance after the handover". Justice Litton also was quoted as stating the Bill of Rights was an "odd document" with "some bizar-

re provisions". He predicted that the Bill of Rights would become "a port of first asylum for every lawyer whenever a client has a grievance to ventilate". Mr. Justice Liu of the Court of Appeal stated the Bill of Rights "has also exerted fundamental impact on judicial reasoning, judicial process and law enforcement agencies in such a way that it directly weakens the effectiveness of law enforcement agencies in the maintenance of public order". In February 1996, Justice, the Hong Kong Section of the ICJ called for systematic, intensive training to ensure the Bill of Rights was implemented.

Cases

Judge Brian Caird {Judge of the District Court and citizen of New Zealand}: On 22 August 1996, a Chinese language newspaper reported that Judge Caird had complained to two Senior Crown Counsel that he had been pressured by two other District Judges concerning the trial of an immigration consultant. Each of Judge Caird, the other two District Judges and the defendant were from New Zealand and it was thought that the New Zealand Commission in Hong Kong was interested in the outcome of the trial.

On 3 September 1996, Acting Chief Justice Power announced that Judge Caird had not been pressured. He explained that Judge Caird had, in fact, felt pressure only because he had been suffering from insomnia as a result of the complexity of the trial and accordingly, he had exaggerated the significance of the "social conversations" he had with the other judges. On the same day, Judge Caird removed himself from the trial on the grounds of ill-health.

On 24 September 1996, the Governor, on the advice of Acting Chief Justice Power announced his intention to appoint a tribunal to investigate if Judge Caird should be removed for misconduct. This announcement was followed by a statement from the Governor's private secretary that under the Letter Patent, a District Judge, "may at any time resign his office." Given the combination of this statement and the fact that the Governor only announced his intention to appoint a tribunal and did not actually do so, it was thought that the Governor was pressuring Judge Caird to resign. In fact, on 11 October, and before a tribunal was ever appointed, Judge Caird announced his intention to apply for early retirement on the ground of ill-health.

Government Response to CIJL

On 8 July 1997, the Government of the United Kingdom responded to the CIJL's request for comments. The Government stated:

> "The 1984 Sino-British Joint Declaration on the Question of Hong Kong provides that the laws in force in Hong Kong will

remain basically unchanged and that the Hong Kong Special Administrative Region (HKSAR) Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong. The British Government would like to comment on the following aspects of the CIJL's analysis of whether these commitments will be honoured by the Chinese after 1 July 1997.

Provisional Legislature

The 60 members of the Provisional Legislature (PL) were selected in December 1996 by a Selection Committee composed of 400 Hong Kong permanent residents chosen by the Peking-appointed Preparatory Committee. The British Government has never accepted that there was any need for a Provisional Legislature and has called upon the Chinese to return to full compliance with the Joint Declaration by ensuring that the HKSAR Government takes steps as soon as possible after the handover to replace the PL with a substantive legislature constituted by genuine elections.

The Bill of Rights Ordinance (BORO)

In March 1997, the Standing Committee of the National People's Congress of the People's Republic of China approved the proposal made by the Preparatory Committee that three provisions of the BORO should not be adopted as laws of the HKSAR. The Chinese allege that the provisions are unacceptable because they give the BORO a status superior to the Basic Law. In fact, the three provisions simply state common law principles of interpretation:

Section 2. Interpretation

(3) In interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of the ICCPR as applied to Hong Kong, and for ancillary and connected matters.

This expresses a general principle of the common law that applied to all legislation which implements treaties.

Section 3. Effect on pre-existing legislation

(1) All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction.

(2) All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed.

This states expressly the common law principle that, where two pieces of legislation are inconsistent, the later one impliedly repeals the earlier one to the extent of the inconsistency.

Section 4. Interpretation of subsequent legislation

All legislation on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the ICCPR as applied to Hong Kong.

This reflects the common law rule of interpretation that legislation should, if possible, be construed in accordance with relevant international obligations.

The United Kingdom and Hong Kong Governments have made clear that they consider the proposal to remove these three clauses to be unnecessary and unjustifiable. But the substantive provisions of the BORO remain, with the effect that the ICCPR is justiciable in the courts of the HKSAR. We believe that judges will continue to apply common law principles in interpreting the BORO.

Continued Application of UN Human Rights Covenants

Britain and China completed an exercise in June 1997 to deposit diplomatic Notes with the depositories of all multilateral agreements which apply to Hong Kong, and to issue a Note to the UN Secretary-General advising him of the action taken and providing a complete list of the treaties involved. The Chinese Note to the UN Secretary-General repeated the Joint Declaration commitment that "the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as applied to Hong Kong shall remain in force". A further 200 treaties which had not been specifically covered in the Joint Declaration were listed in Annexes to the Chinese Note.

The British Government firmly believes that the commitment made in the Joint Declaration includes reporting to the respective treaty monitoring bodies. We continue to press China to clarify how it will ensure that this is achieved.

Freedom of Expression

The Basic Law provides that the HKSAR should enact laws on its own to prohibit treason, secession, sedition, subversion, and the theft of state secrets. The Hong Kong Legislative Council passed a Bill localising the United Kingdom Official Secrets Acts on 4 June 1997. The Legislative Council also passed a Bill which modified the existing provision on sedition to

reflect the common law and removed treasonable offences. The Chief Executive has made clear that he sees legislation on treason and sedition to be a matter for the first elected Legislative Council of the HKSAR (as opposed to the Provisional Legislature). The amendments may therefore be replaced after 1 July, but any new legislation would have to be consistent with the Joint Declaration and with the ICCPR) and is unlikely to be passed until after elections to the new Legislature.

The Judiciary

The British Government does not accept that the independence of the Judiciary in Hong Kong has been weakened in the period to the transfer of sovereignty. The British Government is not in a position to comment on remarks made by individual judges. The Joint Declaration and Basic Law provide important guarantees for the continuing independence of the judiciary in the HKSAR.

Training in the implementation of the BORO is the responsibility of the Judicial Studies Board, which exists to provide education and training to judges in order to assist them in the performance of their independent judicial function. The Board has held various seminars on the BORO. In addition, bulletins on the BORO are regularly circulated to members of the Judiciary.

Judge Brian Caird

The Judiciary Administrator of the Hong Kong Government has provided the following comments on this section of the report:

"The Report did not mention the Judge's own statement (extracted below) in open court made on 22 August 1996 when this matter became public:

"There's a few matters which have been raised. I wish to state there's been no pressure, political or otherwise, exerted on me other than length and complexity of the hearing and Mr Nattrass' state of health. I do not consider that any statement in the nature of gossip, when I was seized of the case, warrants any action."

"The Acting Chief Justice's announcement on 3 September 1996 was made after he had conducted a comprehensive inquiry into the judge's complaint. He was satisfied that no judge or judges had ever brought any pressure to bear on Judge Caird in relation to the Nattrass case or any other matter.

"Before the formal appointment of the Judicial Tribunal, Judge Caird applied for retirement on medical grounds. In accordance with established government practice, a Medical Board was set up to consider the medical condition of the Judge. To prevent allegations of partiality, the government specifically asked that the Board include at least one non-government doctor.

"The Medical Board, after exhaustive investigation, was satisfied that there was a real likelihood that Judge Caird's behaviour could be explained by an acute confusional state. The board therefore felt that under such circumstances Judge Caird should not, on medical grounds, be held responsible for his behaviour at the time of the incident. In the circumstances, the Governor decided that no purpose would be served by proceeding with the appointment of a judicial tribunal to consider whether Judge Caird should be removed from office for misbehaviour."

INDIA

The Republic of India, which obtained its independence from Britain in 1947, is a federal state, composed of 25 states and seven union territories. The executive power is vested in the President, elected for a renewable term of five years by an electoral college consisting of the members of the two houses of Parliament and the members of the state Legislative Assemblies. The President appoints the Prime Minister and on his or her advice, the other Ministers composing the Council of Ministers. The Council of Ministers is collectively responsible to the House of People, the lower of one of two legislative houses. Legislative power is vested in the Parliament, consisting of the President and the two houses, the upper house, the Council of States (*Rajya Sabha*), whose members are the representatives of the states and the lower house, the House of People (*Lok Sabha*), whose members are elected by universal adult suffrage.

Each State enjoys executive and legislative powers over the matters enumerated in List II of the Seventh Schedule of the Constitution. State executive power is vested in a Governor, appointed by the President for a term fixed by the President, and in a Council of Ministers, with a Chief Minister as head, appointed by the Governor. The legislature of each State consists of the Governor and, depending on the State, one or both of a Legislative Assembly and a Legislative Council.

In April and May 1996, the ruling Congress (*Indira*) suffered its worst defeat since independence in the general elections to the House of the People and to the State Assemblies. The loss was attributed to allegations of corruption which involved up to 10 members of the Government, the Prime Minister himself, and a significant number of other public officials (see below). No one party gained a clear majority; the Bharatiya Janata Party (BJP) formed a Government only to resign within weeks. In late May, the National Front-Left Front Alliance formed the coalition Government under the name of the United Front. On 1 June, the President appointed Mr. Deve Gowda as Prime Minister. On 28 June, Prime Minister Gowda reshuffled and expanded his Cabinet to include members of the Communist Party of India, for the first time since its independence.

For the first time in six years, state elections were held in September and October in Jammu and Kashmir.

CORRUPTION SCANDALS

Throughout 1996, India was shaken by serious corruption scandals affecting almost the entire upper echelon of the political system in India. The scandal erupted on 16 January 1996, when it became known that the Central Bureau of Investigation (CBI) had evidence to prosecute 10 prominent ministers based on the confession of businessman Surinder Jain, who was alleged to have paid several politicians and civil servants thousands of dollars to secure contracts between 1988 and 1991. Although there were attempts by

the Prime Minister to conceal the reports, several senior ministers, including former Prime Minister Narasimha Rao, were eventually charged by the CBI with receiving or giving bribes.

On 17 January, three ministers, all belonging to the Congress (Indira) party, resigned and, on 23 January, they were formally charged by the CBI after the State President removed their immunity. Also indicted were the President of the main opposition party, Mr Lal Krishan Advani, the Working President of the breakaway Congress faction, Mr Arjun Singh, the former Janata Dal Deputy Prime Minister, Mr Devi Lal, and former ministers Mr Kalpnath Rai, Mr. Arif Mohammed Khan and Mr. Yashwant Sinha. As many as 67 officials (of whom 35 were elected politicians) were eventually accused of corruption. The 10 ministers resigned.

On 1 March, the Supreme Court (see below) removed the authority from the Prime Minister's Office to control the CBI investigation, in order "to eliminate any impression of bias and avoid erosion of credibility of the investigation". This show of independence by the Supreme Court in the face of high-level corruption enjoyed public support throughout 1996. It was reported that public opinion polls ranked the judiciary as the most trusted institution in India, although some critics accused the Supreme Court of assuming the supervision of the CBI.

Former Prime Minister Rao was eventually charged with bribery, fraud and forgery. After months of legal wrangling, he was granted bail on each charge in November and at the end of 1996, the charges against him had not been heard.

The Judiciary

Structure of the Courts

The Supreme Court is the highest judicial authority at both the federal and state levels. It consists of the Chief Justice and no more than 25 other judges, appointed by the President, upon consultation with the Chief Justice and as many "of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose". The opinion of the Chief Justice is binding. Every judge of the Supreme Court holds office until the age of 65. The Supreme Court hears appeals from any High Court in the territory of India, but also enjoys original and exclusive jurisdiction over any dispute between the federal government and one or more States and between the States themselves.

At the State level, the High Courts are composed of a Chief Justice and "such others judges as the President may from time to time deem it necessary to appoint". High Court Judges are appointed by the President on the advice of the Chief Justice of India, the Governor of the State and the Chief

Justice of the High Court. The High Courts' Chief Justices are appointed by the President, acting in consultation with the Chief Justice of India and the Governors of the States. High Courts Judges serve until the age of 62. Every High Court has the power to supervise courts and tribunals throughout the territories in which it exercises jurisdiction.

At the sub-district and district levels, there are courts of first instance. District judges are appointed by the Governor of the State in consultation with the High Court exercising jurisdiction in the territory.

Judges of the Supreme Court can be dismissed only on the grounds of proved misbehaviour or incapacity "by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of no less than two-thirds of the members of that House present". The procedure of the address, the investigation and the proof of the misbehaviour and incapacity of a judge must be regulated by Parliamentary law. The same procedure is provided for judges of the State High Courts.

State of the Judiciary

Country-wide, the judiciary was in 1996, as during previous years, overwhelmed by cases. In July, Parliament heard that there had been an estimated backlog of 2.9 million criminal and civil cases pending before High Courts in 1995. Often, defendants spend more time in severely overcrowded preventive detention than they would if convicted and released in accordance with a sentence. It was reported that Chief Justice A. M. Ahmadi heard 73 cases in a day, although it was more common for judges to hear approximately 30 cases a day.

While the judiciary was able to address violations perpetrated while in police custody in some states (see below under "Impunity of security forces"), the administration of justice in Jammu and Kashmir continued to be seriously weakened. The judiciary tolerated and acquiesced to the Government's harsh policy on anti-militants and was compromised by the frequent refusals of the security forces to obey court orders. As a result, threats against judges, witnesses and their family members were common. In such conditions, the judiciary hardly functioned and often courts refused to hear cases involving militants or *habeas corpus* applications. As a result, since 1994, there were no convictions of those accused of terrorist crimes, although there were militants in detention who had been waiting for trial for years.

In some regions, including Bihar, Orissa and West Bengal, the control of the Maoist Revolutionary Naxalites was so powerful, the group effectively assumed the role of the judiciary. It established "People's Courts" and passed sentences, including the death sentence on suspected police informants, village headmen and others they classified as class enemies or caste oppressors. On 13 November, 13 policemen were killed, reportedly in a

Naxalite attack on a police station. In another incident, also in November, Naxalites dragged a teacher from his home near Visakhapatnam, Andhra Pradesh and slit his throat.

IMPUNITY OF SECURITY FORCES

In 1996, the Indian Government's record of human rights violations and abuses remained high. The general elections contributed to the increase in human rights violations during the pre and post-electoral period. Human rights defenders and journalists were particularly exposed to attacks from both government and guerrilla, as evidenced by the assassination of **Jalil Andrabi**, civil rights lawyer and chairman of the Kashmir Commission of Jurists (see below).

The Government allegedly supported counter-militants which used tactics such as abductions and murders in their fight against "insurgents". Impunity of the security forces also remained a significant concern in 1996. In the State of Manipur alone, 55 cases of extra judicial executions by the armed forces since 1980 have been reported by local human rights organisations. As of February 1997, it was reported that in 48 of those 55 cases there had been no prosecution at all and six cases were still pending. It was only in one case that the perpetrators, a captain and a lieutenant of the Indian Army, were convicted.

In Jammu and Kashmir, it was reported that during 1996, 1,214 civilians, 1,271 suspected militants, and 94 members of the security forces died in insurgency-related clashes. Moreover, according to local human rights organisations, *incommunicado* detention of rebels continued throughout 1996.

Despite the fact that the Terrorist and Disruptive Practices (Prevention) Act, known as TADA, was not renewed by Parliament in May 1995, it was reported that 3,785 persons arrested under the act were still in detention at the end of 1996. A small number of persons even continued to be arrested under TADA for crimes allegedly committed before the law lapsed. These arrests contributed to the enormous backlog facing the courts (see above under The Judiciary). In February 1996, the Supreme Court, in considering the large number of cases pending before the courts hearing TADA offences, recommended the easing of bail conditions for those accused under TADA (see also *Attacks on Justice 1993-1994* and *1995*).

The UN Special Rapporteur on Torture reported that victims of torture and their relatives were prevented from filing First Information Reports (FIR) in Kashmir without permission from higher authorities. In instances where the FIR was filed, security forces often invoked Article 197 of the Code of Criminal Procedure which prevented courts from inquiring into crimes allegedly committed by public servants and members of the army while exercising their duties without authorisation from the central or state

government. Moreover, Section 7 of the Armed Forces Special Powers Act allows the security forces to act with almost complete impunity in the states in which it has been enacted. The Act provides that, "[n]o prosecution, suit, or other legal proceeding shall be instituted [...] against any person in respect of anything done or purported to be done in exercise of the powers of the Act" without prior approval from the central Government.

The National Human Rights Commission has acknowledged that Section 197 of the Code of Criminal Procedure and Section 7 of the Armed Forces (Special Powers) Act prevent full redress for violations of human rights. It has also agreed that these sections encourage impunity and has recommended that Section 197 be amended to delete the requirement for authorisation from the state before courts can inquire into crimes allegedly committed by public servants or members of the army. Further, since 1980, petitions concerning the constitutionality of the Armed Forces (Special Powers) Act have been pending in front of the Supreme Court. In a significant decision by the Supreme Court on 6 February 1997, the Government of Manipur was ordered to pay approximately 3000 $US in compensation to the relatives of two men who were suspected of being members of an armed opposition group and had been killed in a contrived encounter with the Manipur police in April 1991.

Throughout 1996, other steps in favour of the protection and enforcement of human rights were taken. The National Human Rights Commission (NHRC), appointed by the Government in October 1993, continued to expand its presence in the field of human rights abuses. Although the Commission does not have the power to directly investigate allegations of abuse carried out by the army and paramilitary forces, it directed district magistrates to report all deaths in police and judicial custody. It is reported that, despite the lack of direct authority of the NHRC, magistrates generally seemed to comply with its directive.

In January 1996, the Supreme Court ordered the CBI to prosecute 27 policemen in Punjab on allegations of conspiracy to murder four suspected militants in January 1994. Moreover, the Supreme Court found *prima facie* evidence supporting charges of abduction and illegal confinement against some of the officers. In July, the Supreme Court required the Punjab State Government to allow the prosecution of a superintendent and another eight policemen for the abduction of a human rights activist, Jaswant Singh Khalra, in September 1995. It also ordered that compensation be paid to his wife.

In January 1997, the state cabinet approved the creation of a permanent Jammu and Kashmir Human Rights Commission, to be composed of a retired High Court Judge, as chair, a serving district judge and a person working in the field of human rights. As with the National Human Rights Commission, this Commission will not have the power to investigate into violations and abuses committed by the armed and paramilitary forces.

It was also reported that in January 1997, the Jammu and Kashmir Bar Association lodged criminal charges against the Jammu and Kashmir Government and the Indian armed forces for the deaths of 218 people while in custody during 1996.

CASES

Jalil Andrabi {lawyer, chairman of the Kashmir Commission of Jurists}: Mr. Andrabi was an advocate for improved prison conditions in Jammu and Kashmir and had documented cases of custodial killings, arbitrary detention and "disappearances". He was scheduled to represent the Kashmir Commission of Jurists before the United Nations Human Rights Commission on 18 March 1996.

On 30 January 1996, Mr. Andrabi told journalists that two unidentified men had attempted to abduct him the day before. On 8 March, Mr. Andrabi was taken from his car, allegedly by members of the Rashtriya Rifles, a paramilitary force. His wife witnessed the abduction but when she tried to file a First Information Report with the Sadar police station, she was told that her husband was "with them" and that he would be released after investigations were completed.

On 9 March, the Kashmir Bar Association lodged a *habeas corpus* petition before the High Court. On 11 March, junior army officers in a responding affidavit denied the Rashtriya Rifles had arrested Mr Andrabi. The High Court, not persuaded by the evidence, ordered the Secretaries of the Defence and Home Department to file affidavits and ordered the Deputy Inspector General of Police to institute a special inquiry into Mr Andrabi's whereabouts. On 27 March, the body of Jalil Andrabi was found, with hands tied and face mutilated, in the Jhelum river, in a residential area of Srinagar. The body showed evidence of torture and the autopsy revealed that he had been killed approximately 14 days earlier.

An investigation team was created pursuant to a High Court Order to inquire into the disappearance and the death of Mr Andrabi. It was authorised only to accept instructions from and report only to the court. In April 1996, the National Human Rights Commission (see above) asked to be allowed to participate in the inquiry and in May, the NHRC instructed the state authorities to guarantee the safety of the Andrabi family and of the witnesses. On 5 June, the investigation team was replaced by another team appointed by the General Inspector of Police, and was required to report to him daily. Mr Andrabi's family lodged a petition against those changes. In addition, the inquiry was allegedly obstructed by the Rashtriya Rifles' refusal to assist and because of lack of access to the witnesses.

As late as March 1997, local and international non-governmental organisations reported that the investigation had not progressed and it was

feared the authorities did not intend to pursue the investigation. On 16 April, it was suddenly reported that the Jammu and Kashmir High Court had held that Major Otar Singh, of the Rashtriya Rifles, had been involved in the kidnapping and killing of Mr Andrabi. Senior police officers had allegedly told the High Court that it was Major Otar Singh who led the group which abducted Mr. Andrabi. However, the Major could not be located and while announcing the disappearance of Major Otar Singh, the Indian army denied its involvement in Mr Andrabi's death. The Court directed Major Singh to be produced before the Court and the confiscation of his property.

Bashir Ahmed Dar {Lawyer, Srinagar}: On 20 January 1997, the house of Mr. Ahmed was blown up and he and his wife received burns to 25 percent of their bodies. Police suspected separatists had targeted Mr. Ahmed as he was being considered for the post of Additional Advocate General in Jammu and Kashmir.

Anil Mangorta {Lawyer, Jammu}: Mr. Mangorta was reportedly beaten by masked armed gunmen in Jammu on 7 January 1997. His attackers were thought to be members of the Jammu and Kashmir police. On 8 January, lawyers of the Jammu Bar Association boycotted the courts to protest alleged police harassment. The Inspector General of the Jammu Police announced that action would be taken but the lawyers announced they would continue their boycott for the balance of the week.

Mr. Subbaraman {Lawyer, Madras}: On 20 September 1996, Mr. Subbaraman was reportedly assaulted by a police officer after he entered the court without identifying himself to the police officer. The Advocates' Association reported that the police officer told Mr. Subbaraman that he could report the incident to anyone he liked.

INDONESIA & EAST TIMOR

The 1945 Constitution contains five principles, known as the *Pancasila.* The principles are: Belief in the One Supreme God; Just and Civilised Humanity; Unity of Indonesia; 'Deliberative' Democracy; and Social Justice. These principles form the framework of the political life and at the same time, the of state ideology, which is used as a means of control. This state ideology emphasises rule by consensus and is used to restrict opposition. Criticism of the *Pancasila* is an offence under the Anti-Subversion Law and may justify arrest and imprisonment for subversion.

The President is head of the executive and elected for five year terms by the People's Consultative Assembly, which is the representative of the Indonesian population of 197,600,000 people. In 1996, General Suharto was in his sixth term as President, a post he has held since 1968. According to the Constitution, the People's Consultative Assembly holds the supreme state power as the institutional embodiment of the people and the President is answerable to it. Its 1000 members include 500 members of the House of Representatives and 500 Government appointees and representatives from groups and parties. Principle legislative power is vested in the House of Representatives, where one-fifth of the members are appointed by the President and the remaining four-fifths are directly elected. The President however has the power to issue presidential decrees, which in fact are used to a large extent to regulate areas where legislation normally prevails.

In practice, the Indonesian political system is highly authoritarian. Executive power lies in the hands of President General Suharto, his associates and the military. The Government is fortified by the restricted political life and the military power, which is given special powers under its political and social role in "developing the nation", in addition to seats in the House of Representatives. The military which is responsible for matters of internal security, stability and unity, has vast powers making Indonesia a militarised society.

With legislative elections scheduled for May 1997 and the People's Consultative Assembly scheduled to meet in March 1998 to name a president for the next term, it was feared that political repression would grow in 1996. The capital of Jakarta, East Timor (now an annexed province of Indonesia after the Indonesian invasion on 7 December 1975 upon the withdrawal of the Portuguese colonial power) and Irian Jaya (a part of the New Guinea island which was incorporated into Indonesia in 1963) experienced disturbances and riots caused by Government and police crackdowns on political, labour, independence and human rights activists.

In June, Megawati Sukarnoputri, daughter of former President Sukarno, was removed from her position as Chair of the opposition Indonesian Democratic Party (PDI) during a government sponsored party congress. The congress was denounced by Megawati Sukarnoputri as illegitimate and by the *Far Eastern Economic Review* as "a crass exercise in state-organised political engineering". It was reported that when pro-Megawati

demonstrations were held in Jakarta in response to her removal, at least 75 people were injured when police and security forces intervened.

Daily demonstrations continued until 27 July 1996 when the police and security forces surrounded the PDI headquarters, which was occupied by Megawati supporters. The police reportedly arrested more than 170 pro-Megawati supporters and rioting broke out throughout the city. Lawyer and labour union leader **Muchtar Pakpahan** (see below) and fourteen other activists from the Democratic People's Party were arrested on 30 July and charged under the Anti-Subversion Law (see below). On 12 October 1996, the National Human Rights Commission (*Komnas HAM*) which investigated these events stated in a report that as a result of the violence, at least five persons were killed, 149 injured, 23 persons missing and 136 were detained (although at the time of the report, the number of detainees had not been forwarded to the Commission by the investigating authorities). The report cited Government intervention as a main factor instigating the violence and recommended that "the violent action by the 200 Congress PDI Central Leadership Task Force (SATGAS *DPP PDI Kongres Medan*) should be investigated and [the case] brought to court in accordance with prevailing legal provisions, in the same way that action is being taken against other perpetrators of the disturbances". The Government did not take any measures to hold the military or the police accountable for the violations.

Megawati's PDI is one of three political groups that are allowed to exist and contest elections. After the congress purported to depose her as its leader, Megawati launched several lawsuits against Government officials and persons who had attended the congress without authorisation from the local party branches. She also commenced an action against the General Elections Institute for refusing to accept her and her supporters' candidatures for the 1997 elections. Although the facts were different in each case, as of March 1997, not one of the challenges had been accepted by a court. Reliable sources claimed that the judges had met with Government officials on two occasions and had received a directive to dismiss the lawsuits on technical grounds. On 11 March 1997, approximately 40 lawyers from the Team for the Defence of Indonesian Democracy called on the Supreme Court to provide an explanation. Supreme Court Secretary-General Mangatas Nasution confirmed that there had been a meeting between Government officials and judges in Yopgyakarta but refused to reveal the content of that meeting.

Anti-Subversive Law

The Criminal Procedures Code establishes guarantees against arbitrary arrest and detention and allows judicial review of detention orders and compensation in the event a detention proves to be wrongful. In reality however, the provisions are seldom adhered to and both civilian and military courts are reluctant to accept and act upon such claims. Moreover,

special procedures under the 1963 Anti-Subversion Law, which permits the prosecution of persons considered to be contrary to public order or critical of the Government, allow for detention of a suspect for up to one year which period the Attorney-General may extend indefinitely. Furthermore, in cases tried under this law, trials *in absentia* are allowed and approval from the military must be obtained for the public to have access to these trial.

The Anti-Subversion Law applies to acts that could distort, undermine or deviate from the state ideology or the state policy, or acts that could spread a feeling of hostility, disturbances or anxiety amongst the population. The sweeping language of the law does not fulfil the legal principle requiring a clear and exact description of a criminal offence. Despite these already pervasive powers, in September, the armed forces publicly expressed the need for a new internal security act, which would confer even greater power on the Government to suppress opposition.

Indonesian security forces continued to carry out arbitrary arrests, torture and mistreat detainees and commit extra-judicial killings, in particular on Irian Jaya and East Timor. Although it was reported that the authorities punished a number of police and military personnel, they were often punished only for infractions of the law. In the event they were disciplined, the severity of the penalty rarely accorded with that of the act committed.

The Judiciary

In law, the Indonesian judiciary is independent, but the reality falls short of the constitutional provisions.

The formal structure of the judiciary comprises courts of general jurisdiction and courts of special jurisdiction for military, religious and administrative matters. Law N° 14/1985 specifically refers to the Supreme Court's independence from the Government when performing its task. Nevertheless, the President appoints its justices. The Basic Law on the Judiciary gives some authority to the Supreme Court to control and guide its own work, but the Ministry of Justice controls all matters regarding administration, budget, appointments and transfers. The Supreme Court holds the power to review ministerial decrees and regulations, but has never exercised this right.

Furthermore, all judges are civil servants, and as such they automatically become members of the Corps of Civil Servants (KOPRI). On 27 February 1997, the chair of KOPRI announced that all public servants, including judges must vote for the GOLKAR, the ruling party, in the elections scheduled for May 1997.

In addition to the institutional subordination to the executive, the judiciary is pressured by the Government and the military both directly and indirectly. An example of executive interference in the administration of justice is the MUSPIDA, a co-ordinating body composed of the Head of the

local government, the Commander of the Military District, the Chief of Police, the Chief Prosecutor and the Chairman of the District Court, who meet regularly to discuss matters concerning the region, including important pending legal cases (especially when controversial or having political implications). Under these circumstances, an independent administration of justice becomes difficult to achieve.

The Indonesian legal system itself has a hierarchical and patronising structure. Article 32(4) of the Law on the Supreme Court N° 14, 1985, permits the Supreme Court to provide any direction, summon or warning deemed necessary to the lower courts. While Article 32(5) of the same law states that the independence of the judiciary in trying their power and making decisions on cases should not be affected, the Supreme Court has taken to distributing "inviolable memos" (*surat sakti*) to the lower courts. It is reported that in some cases, the Supreme Court has advised a lower court not to render a specific decision. The memos have most often been used in land cases involving claimants that have been awarded a decision against the state.

Corruption is another serious interference with the judiciary's independence and integrity, which is facilitated by judges' low salaries. Corruption is so widespread that one source estimated that more than 90 percent of the Indonesian judges are corrupt.

The case of Dr. Sri Bintang Pamungkas was reported in the 1995 edition of *Attacks on Justice* as an example of the questionable guarantees of judicial independence in Indonesia. Dr. Bintang Pamungkas, a university professor and member of Parliament known for his critical views of the Government was arrested for defaming the President while giving a lecture in Germany in April 1995. In October 1995, he accused President Suharto of corruption and challenged him to call general elections. In 1996, he was expelled from Parliament after raising questions concerning Government corruption. On 8 May 1996 he was sentenced to 34 months imprisonment. Although the trial procedurally followed internationally recognised rules concerning fair trial, the verdict gave rise to serious suspicions that there was political interference, since the evidence at trial largely confirmed Dr. Bintang Pamungkas version of the events. The trial was accompanied by intimidation and attacks on Dr. Bintang Pamungkas and his lawyers. The Jakarta High Court rejected Dr. Bintang Pamungkas' appeal and upheld the sentence on 30 December 1996.

Lack of Independence of the Supreme Court

The considerable influence the executive has and exerts over the judiciary has led to the inevitable conclusion for many, that the judiciary is simply an extension of the executive power. The conclusion was confirmed in 1996 when the Supreme Court reversed two decisions which had briefly given the country hope that the judiciary was finally trying to shed itself of

Government influence. One of the cases concerned a decision of the Supreme Court itself in favour of peasants that had been driven from their land by the World Bank funded Kedung Ombo dam in Java. The decision would have entitled the peasants to significant compensation. However, the Supreme Court, on an application by the Attorney-General for judicial review, reversed its own decision, allegedly after pressure from the executive or Government officials. The Supreme Court relied on Article 67 of Law N° 14/1985 on the Supreme Court. Article 67 allows the Attorney-General to apply for Judicial Review, although some legal experts questioned if the Attorney-General had met the requirements stipulated by Article 67.

A second case whereby the Supreme Court apparently cowed to the executive was in the case concerning *Tempo* magazine (see *Attacks on Justice, 1995*). In that case, the editors of *Tempo* had challenged a ban imposed on it by Minister of Information in 1995. Judge Benyamin Mangkudilaga of the Jakarta Administrative Court ruled the ban was unconstitutional. On 13 June 1996, however, the Supreme Court, with Chief Justice Soerjono sitting (see under the case of **Justice Andjojo** below) upheld the Information Minister's ban, although the 1980 Press Law prohibits press bans. Academics cited "non-legal factors" as influencing the court. Judge Mangkudilaga was transferred to Medan in North Sumatra shortly after his decision was reversed.

The Supreme Court was itself accused of corruption and collusion in April 1996 by one of its own. It was discovered that Supreme Court Deputy Chief Justice Adi Andojo had, in an internal memo, alleged corruption existed among the members of the Supreme Court. In his December 1995 memo to the Attorney General's Department, Justice Andojo alleged that a panel of Supreme Court Judges, in the "Ghandi Memorial School case", had acquitted a businessman after receiving Rp 1.4 billion (approximately US $600,000) in bribes. Judge Andojo, who had the responsibility to allocate cases, said the panel of judges was formed to hear the cases without his consent. The case was also processed with abnormal speed. After pressure from Judge Andojo and the public, the Chief Justice appointed a committee of inquiry. The committee, led by Supreme Court Judge Sarwata, concluded in June that there was no evidence of collusion in the case, though it conceded the procedure followed had been incorrect. Justice Andojo asserted there had been a cover up and as proof, pointed to the committee's failure to attend a hearing with Parliament and its refusal to ask Justice Andojo for his evidence until the judge threatened to tell the press in mid-May. Judge Andojo's actions resulted in attempts by the Chief Justice to curtail his powers and dismiss him (see further case of Justice Adi Andojo, below).

Another Supreme Court Judge, Muhammed Djaelani, who retired on 1 September 1996, issued a report and in it stated, "[i]f we were able to look down on the Supreme Court from above, we would not see a single thing that was right". He agreed with Justice Andojo that areas of concern within the Supreme Court included the bureau in charge of allocating cases to

certain judges and the bureau in charge of disciplining corrupt judges. He specifically criticised Chief Justice Soerjono's failure to act on a proposal to dismiss approximately 400 judges for corruption.

LAWYERS

The Code of Criminal Procedure gives the defendant the right to an attorney, from the moment of formal arrest, but not during prior investigation. The result is often prolonged pre-trial detention. In many cases, the defendant is discouraged from hiring a lawyer or the lawyer is not permitted to assist his or her client under the pretext that the defendant does not need legal representation or has declined this right.

It was reported that defence lawyers were subjected to pressure from the military, warning them against carrying out too strong a defence, and preventing them from carrying out their professional duties. Lawyers were also subjected to harassment in the form of being summoned and questioned in relation to the activities of the clients that they represented, which often involved alleged participation in or organisation of riots and demonstrations. One lawyer and member of the Legal Aid Institute (LBH) reportedly went into hiding in order to escape further harassment by the authorities. In October 1996, the Denpasar Legal Aid Institute, after it wrote to the Denpasar High Court concerning a summons its client received from the local police, was accused of not being registered in the Denpasar High Court. The Denpasar Legal Aid Institute wrote to the High Court on 22 October and explained that it was registered as N° 150/Skep/YLBHI/III/1994.

CASES

Adi Andojo {Supreme Court Judge}: After accusing the Supreme Court of corruption and collusion in relation to the so called Ghandi Memorial School case (see above) Justice Andojo began to receive death threats by telephone. He also became the target of harassment by Chief Justice Soerjono himself and other members of the Supreme Court. The Chief Justice relieved Justice Andojo from his responsibilities to allocate cases in the Court. The Chief Justice and all the senior members of the Supreme Court, save for Justice Djaelani (see above) wrote to President Suharto and asked him to dismiss Justice Andojo for breaking Court discipline. In fact, the President was obliged to dismiss Justice Andojo on such a request, but hesitated to do so, likely due to the public's support for Justice Andojo. By the end of 1996, no order of removal had been issued, perhaps due to the fear of public protests, which already became widespread when the dismissal request became known. In fact, the Indonesian Bar Association called for Chief Justice Soerjono's dismissal and Justice Andojo's appointment in

his place. In what appeared to be a response, Chief Justice Soerjono issued numerous "inviolable memos", vacating decisions favourable to land claimants.

Justice Andojo was scheduled to retire on 1 May 1997.

Yudi Taqdir Burhan {Lawyer with the Surabaya Legal Aid Institute}: Mr. Burhan was questioned by the police when he went to the police station to represent a client.

Alamsyah Hamdani {Lawyer and Director of the Legal Aid Institute in Medan}: Mr. Hamdani was called in for questioning at least once since 27 July 1996, in relation to student activism in Medan.

Mulyana Kusumah {Lawyer and Secretary General of the independent election monitoring group, KIPP}: Mr. Kusumah was summoned for questioning, apparently in connection to human rights cases on which he was acting.

Riswan Lapagu {Lawyer with the Legal Aid Institute}: Mr. Lapagu is an advocate in human rights cases in the North Sulawesi Province and was active in forming the local Election Monitoring Committee. He was interrogated in 1996, reportedly because of these activities, by the local military.

Muchtar Pakpahan {Lawyer and trade union leader}: Mr. Pakpahan has been a democracy and labour rights activists for years. He is the founder and chairperson of the Indonesian Prosperity Labour Union (SBSI) and has challenged the Government's policy of permitting only one, Government-controlled labour union to operate. On 30 July 1996, Mr. Pakpahan was arrested in his home by officers from the Special Crime-Subversive Division. At least 14 others were also charged, all in connection with the events on 27 July 1996 (see above). The maximum penalty for subversion is death. For several months, Mr. Pakpahan was not provided with details of the reasons for his arrest. On 12 August, he applied to the Central Jakarta District Court to obtain the details but was refused.

Indictments in the subversion cases were read on 12 and 16 December 1996. It was reported that all the charges were in relation to matter of free speech and thought. Although the charges were originally laid in connection with the 27 July riots, the indictments only briefly referred to the events which occurred on 27 July. It was reported that the presiding judge in the case of Mr. Pakpahan refused direct examination of witnesses. Instead, the judge relied on a provision of the Criminal Code of Procedure which had fallen into disuse but which permitted the questions to be put to the witness only through the judge.

In January 1997, when the trial continued, prosecution witnesses recanted their original statements given to the authorities and testified that they were intimidated during pre-trial interrogation. When one of the witnesses insisted that she had been coerced during interrogation, the presiding judge accused her of committing perjury and ordered her to be held in custody to

give her time to reflect before giving any further evidence. When the witness returned to the court room and attempted to explain the intimidation she had suffered, the same judge reportedly called her claim to be a fabrication and prevented her from giving further evidence. On 30 January, the defence team made an application requesting the judge to remove himself from the panel of judges hearing the case. At the time of writing, the application had not been decided.

Throughout the first three months of 1997, Mr. Pakpahan made several requests for medical attention. It was only on 3 March when it was clear that Mr. Pakpahan was unable to proceed with his trial that he was treated by both a government and private doctor. Both insisted on his hospitalisation. Mr. Pakpahan was diagnosed with cancer and all further court proceedings were adjourned.

Since founding the SBSI in 1992, Mr. Pakpahan has been subjected to ongoing harassment. In 1995, he was sentenced to four years in prison for inciting workers to strike and riot in 1994. The decision was reversed by Justice Adi Andojo of the Supreme Court (see case of Justice Andojo above) at the end of September 1995 and Mr. Pakpahan was acquitted of all charges in relation to the 1994 strike.

After the Supreme Court decision, the Attorney-General applied to the Supreme Court for judicial review of the decision to free Mr. Pakpahan under Article 263 of the Code of Criminal Procedure. Article 263 only provides that "regarding a judicial judgment that has already been made, except one that exonerates an accused of all liability, *the person convicted or his beneficiaries* may apply for a review of the judgment to the Supreme Court" (unofficial translation, emphasis added). Nevertheless, on 25 October 1996, the Supreme Court, sitting with Chief Justice Soerjono (see above under the case of Justice Andojo) overruled the acquittal. This was reportedly the first time in Indonesian judicial history that judicial review had ever been invoked by a prosecutor under this article.

The decision was not served on Mr. Pakpahan or his legal counsel until one month after it had been rendered. When it was, Mr. Pakpahan attempted to file his own application for judicial review but the Registrar of the High Court refused to register it. The Supreme Court, which has a supervisory role over the lower courts, refused to instruct the Registrar to accept Mr. Pakpahan's application for judicial review. His application was ultimately accepted for filing on 18 February 1997.

Nasiruddin Pasigai {Lawyer and Director of the Legal Aid Institute, LBH, in Ujung Pandang}: Mr. Pasigai was summoned twice by the police for questioning on 9 and 10 September after meeting on 30 August with an American professor of political science and discussing the political and legal climate in Indonesia, The police reportedly were considering charging Mr. Pasigai of violating Articles 111 and 154 of the Criminal Code. Article 111 provides for a maximum sentence of six years imprisonment for collusion

with a foreign body or person outside the country to bring about a revolution in Indonesia. Article 154 of the Criminal Code prohibits "expressing hatred towards the Government".

Reportedly, unidentified individuals were seen outside Mr. Pasigai's house, which was interpreted as an attempt to intimidate him. Furthermore, three other lawyers from the Legal Aid Institute were summoned for questioning in relation to possible charges being laid against Mr. Pasigai.

Johannes Princen (Lawyer and member of the League for Defence of Human Rights, LPHAM): Mr. Princen was summoned for questioning and on 17 September 1996, the Jakarta office of LPHAM was searched by officials from the Attorney General's office, together with police and military officials. Documents belonging to LPHAM, KIPP, a trade union and other NGOs were seized.

RO Tambunan (Principal lawyer for Megawati Sukarnoputri): Due to Government and military accusations that Mr. Tambunan's actions were "too political", the Justice Minister announced that his activities were being investigated to decide whether they conformed with lawyer's ethics. His license to practise law may be cancelled, depending on the result of the investigation.

Bambang Widjojanto (Lawyer and President of the Indonesian Legal Aid Foundation, YLBHI): Mr Widjojanto is a member of the legal team representing Muchtar Pakpahan and others who were arrested on charges of subversion. He received five summonses to appear at the Attorney General's Office to be questioned concerning his own clients. The Attorney-General also reportedly threatened to call him as a witness against his own clients.

Mr. Widjojanto refused to comply with the summonses on technical grounds and asked for clarification as to why he had been summoned. On one occasion, police and military officials came to the YLBHI office in Jakarta to compel Mr. Widjojanto to appear for the questioning. Even before he received his third summons, a spokesman for the Attorney General's office expressed to the Indonesian media that "[i]f Widjojanto fails to comply with our third summons...we will send officers to fetch him". Because of his refusal, he may face arrest and criminal prosecution. Article 224 of the Criminal Code provides for a punishment of six to nine months imprisonment for refusal to respond to a summons. It is believed that the summonses were issued to intimidate Mr. Widjojanto from defending controversial cases.

The issuance of the summonses violates the Code of Criminal Procedure, which establishes that persons in positions of trust have an obligation to hold confidences and can request an exemption from disclosure of the confidences. It also violates Principle 22 of the UN Basic Principles on the Role of Lawyers, which establishes that "Governments shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential".

IRELAND

The President of Ireland is elected by the direct vote of the people of Ireland to serve a seven year term, renewable once only. Legislative power rests with the National Parliament (*Oireachtas*) which consists of the President, the House of Representatives (*Dáil Eireann*) and the Senate (*Seanad Eireann*). The 166 member House of Representatives is elected to a term not longer than seven years.

Of the 60 Senate members, 11 are nominated by the Prime Minister and the balance are elected. Three of the elected members are elected by the National University of Ireland, three by the University of Dublin and 43 in a general election. The 43 who are elected in a general election are chosen from panels of persons having knowledge in National Language and Culture, Literature, Education; Agriculture and Fisheries; Labour; Industry and Commerce; and Public Administration and Social Services. On nomination of the House of Representatives, the President appoints the Prime Minister (*Taoiseach*). The House of Representatives may be dissolved by the President on the advice of the Prime Minister, although the President may refuse to do so if the Prime Minister has lost the support of the majority of Parliament.

In 1996, the coalition Government formed by the United Fine Gael, the Labour Party and the Democratic Left governed.

It was a year of proposed reform for both the administration of the courts and the 1937 Constitution of Ireland in 1996. In April, the Working Party on the Courts Commission ("Working Party) submitted its report to the Government. The Working Party called for significant reforms, the most important of which was the recommendation to remove the administration of the courts from the Department of Justice - Equality and Law Reform and to establish a state agency to be known as the "Courts Service".

The second set of recommendations came from the report of the Constitution Review Group ("Review Group"), established as a result of the Government's Coalition Agreement in April 1995. Its mandate was to "establish those areas where constitutional change may be desirable or necessary, with a view to assisting the all-Party Committee on the Constitution, to be established by the *Oireachtas*". The Review Group's mandate did however, prohibit it from recommending the Constitution be replaced and from examining specific Articles, including numbers 2 and 3 which deal with the situation in Northern Ireland. The Review Group submitted its report to the *Oireachtas* Committee in May and published its report in July.

For a discussion of the recommendations of both the Working Party and the Review Group, see below under "The Judiciary".

Finally, in the wake of the murder of an investigative journalist on 26 June 1996, a committee was appointed to advise the Minister of Justice on changes to the criminal law and procedure. At the end of 1996, its report had not been submitted.

THE JUDICIARY

COURT STRUCTURE

The Constitution establishes Courts of First Instance and a Court of Final Appeal, known as the Supreme Court. The Supreme Court has appellate jurisdiction from all decisions of the High Court and of all other courts as may be prescribed by law. Decisions of the Supreme Court are in all cases, final and decisive. The Chief Justice serves as the President of the Supreme Court and sits with not more than seven judges.

The Courts of First Instance shall include a High Court and local Courts of limited jurisdiction. The High Court is vested with full original jurisdiction in civil or criminal matters and to decide the constitutionality of laws, unless that law in question has already been referred to the Supreme Court by the President pursuant to the provisions of the Constitution. The Courts and Courts Officers Act, 1995 provided for an increase the number of judges so the backlog of cases could be addressed. The Act provides that not more than 19 judges shall sit on the High Court, 24 on the Circuit Court and 50 on the District Court, in addition to its President. In 1996, an additional 3 judges were added to the Circuit Courts, making a total of 27. Judges also sat three weeks early, from mid-September and 22 rape cases which had been on the trial list for up to two years were heard. It was reported that lawyers actually noticed an upswing in the turnover cases in the Circuit Court and the Central Criminal Court.

The Special Criminal Court was created in 1972 and allows for non-jury courts to try cases when the Government proclaims the ordinary courts to be inadequate to secure the administration of justice in times of emergency. Generally, scheduled offences are tried in the Special Criminal Court, but the Director of Public Prosecutions can transfer other offences to the court on his or her own discretion. In 1996, the Supreme Court dismissed a challenge to the continued existence of the Special Criminal Court. The Supreme Court held that the decision of whether the ordinary courts were inadequate to secure the effective administration of justice and preservation of public peace was a political matter and must be left to the legislature and executive.

APPOINTMENT PROCEDURE

Article 35(2) of the Constitution guarantees that all judges are to be independent in the discharge of their judicial functions, subject only to the Constitution and the law. Judges are appointed pursuant to the Constitution. The Courts and Courts Officers Act, 1996 created a Judicial Appointment Board consisting of the Chief Justice, the President of each of the High Court, Circuit Court and District Court, the Attorney-General, a practising barrister and solicitor and three nominees of the Minister of Justice. The Board is authorised to "adopt such procedures as it thinks fit to

carry out its functions...". Without prejudice to this general authority, the Board is authorised to specifically advertise for judicial applicants, consult persons concerning the applicants suitability and arrange for interviews of the applicants. The Board screens all applicants and submits a list of seven names to the Minister of Justice for appointment. Article 16(6) of the Courts and Courts Officers Act only requires the Government to "firstly consider for appointment those persons whose names have been recommended to the section" by the Board. It does not require the Minister of Justice to actually recommend a candidate from the Board's list to the President.

The Review Group, which submitted its report in April, recommended that the Judicial Appointments Advisory Board be given time before the issue of judicial appointments be considered. In considering whether the power to appoint judges should be taken out of the government's hands, the Review Group stated it was "desirable that judges continue to be appointed by the Government, the authority directly responsible to the *Oireachtas* and the people."

All judges appointed must make a declaration "[i]n the presence of Almighty God, I do solemnly and sincerely promise and declare that I will ... uphold the Constitution and the laws. May God direct and sustain me." Judges who decline or neglect to make this declaration are deemed to have vacated office. The Review Group recommended that reference to "God" should be deleted.

Discipline Procedures

The Review Group raised concern over the current procedure established to remove judges. As the Constitution is currently drafted, judges of the Supreme and High Courts can be removed for "stated misbehaviour or incapacity, and then only upon resolutions passed by the House of Representatives and the Senate. The Review Group suggested that the same procedure set out for the impeachment of the President be followed, which requires:

i) a two-thirds majority before a judge could be removed;

ii) where one House prefers a charge, the other House is required either to investigate the charge or cause it to be investigated: and

iii) the judge or other constitutional officer be given the right to appear and be represented.

The Review Group expressed concerns over the phrase "stated misbehaviour" which justifies the removal of a judge. It suggested the words "prejudicial to the office of judge" be used to qualify "stated misbehaviour" to more "clearly identify the elements of what should give rise to" removal.

The Review Group also considered if these new guarantees should be extended to judges of the District and Circuit Courts. Presently and

pursuant to the 1946 Courts of Justice (District Court) Act, an inquiry can be initiated into the conduct or ability of a District Court Judge by each of the Chief Justice, the President of the District Court or the Minister for Justice. Pursuant to the 1924 Courts of Justice (Circuit Court) Act however, there is no provision which governs the removal of Circuit Court Judges. While some constitutional court experts were of the opinion that the proper procedure for removal is whatever is "fair", the prevailing view in the legal community was that if a circuit court judge is to face removal, he or she should be accorded the same removal procedures which apply to judges of the Supreme and High Courts.

Despite this lack of protection, in particular for Circuit Court judges, the Review Group recommended against extending these proposed Constitutional guarantees to the District and Circuit Court Judges, stating that such a change "would be inconsistent with the establishment of the District and Circuit Courts by Act of the *Oireachtas* as provided in Article 34.3.4 of the Constitution and the policy of the Review Group to give the *Oireachtas* discretion as to the type of courts which it may establish". Instead, it recommended that Article 35.2 of the Constitution be amended to "allow for regulation by the judges themselves of judicial conduct, in accordance with the doctrine of the separation of powers".

Recommended creation of the Courts Service

In November 1995, the Working Party on the Courts Commission was established. In its report, released in May 1996, the Working Party cited significant problems in the functioning of the court system in Ireland. Among them were:

- no clear reporting structure with regular channels of communication between the various constituencies;
- an apparent remoteness of the administrative system from the judiciary; and
- a lack of structures to enable responsiveness to the views of users.

Although it occurred after the report was first released, the need for reform was evidenced when Mr. Justice Dominic Lynch a Circuit Court Judge who had been appointed a member of years previously to the Special Criminal Court informed the Minister for Justice that he wished to be removed from the Special Criminal Court. The Government removed Judge Lynch from the Special Criminal Court but the Department of Justice failed to inform Mr. Justice Lynch that it had done so. It was only over three months later that he learned his office had been terminated, leaving the validity of his orders made over the past several months in question, since he had not been, at the time, properly appointed. Several people who had been remanded in custody pending trial had to be released and re-arrested.

In its report, the Working Group cited delays as a critical flaw and refer-

red to the fact that the period of time between the High Court and the Supreme Court hearing the first 20 cases listed before the Supreme Court in February 1996 ranged from a minimum of two and a half years to a maximum of eight years.

The Working Party recommended that an independent and permanent body entitled a Courts Service should be set up by statute to manage the daily operations of the court, which in 1996 were still administered by the Department of Justice and the Office of Public Works. The Courts Service would remain accountable to the National Parliament through the Minister for Justice for finance and administration matters. It will not be accountable to the National Parliament for judicial decisions, which presumably would strengthen judicial independence. The creation of specialised courts, such as a Commercial Court Division in the High Court and a Family Court System were also suggested.

The Working Party also recommended that the Court Service be created with a majority of senior judicial members with a chief executive officer and staff. The Government immediately accepted this recommendation and announced the Board's creation in May 1996. Prior to announcing its decision to the Board, however, the Government failed to consult or even advise the judiciary of its decision. Prime Minister Bruton was quoted as saying that in hindsight, it would have been better "if we had discussed all of that with the judiciary before making the announcement." Further, after the Lynch affair (see above) was discovered, the Government proposed to immediately establish the Board on a non-statutory basis. The Courts Commission objected, along with others, and the Government accepted that the Board would have to be established pursuant to legislation in order to ensure its independence.

The eight judicial members of the Board are to be the Chief Justice and the Presidents of the High, Circuit and District Courts or judges of these courts nominated by the Chief Justice of presidents. Four other judges from each of the courts are also to be included. The seven non-judicial members will be a representative from each of the Bar Council, Law Society, the ICTU, the Department of Justice, the court staff, "court users" and from a business and management body.

On receipt of the report in May 1996, the Government added a Chief Executive to the Board to serve as a 16th member, although the judiciary would lose its majority membership on the board. In November 1996, the Government conceded and approved the addition of another judicial member to be nominated by the Chief Justice to ensure judicial independence.

Although the recommendations of the Working Group were generally met favourably by the Law Society. It reaffirmed its position, which was jointly stated in a submission with the Bar Council in 1993, that the management of the courts should not be the responsibility of judges, but "of senior executive personnel — trained administrators".

LAWYERS

In the wake of the murder of the investigative journalist mentioned above, lawyers were subjected to criticism from the press. On 7 July, the *Sunday Independent*, the paper for which the journalist worked, published an article headlined "Symbiotic soul mates reap the profits of crime." The article asserted that the people who really know what's going on are criminals and lawyers". These statements, together with the suggestion that lawyers help criminals to launder money, collectively identified lawyers with the crimes allegedly committed by their clients. The right of every person to a defence was overlooked.

Identifying a lawyer with his or her client or the client's causes violates Principle 18 of the United Nations Basic Principles on the Role of Lawyers. The Chair of the Bar Council, James Nugent SC, replied to the article in the *Sunday Independent* in an article published in the *Irish Times* on 9 July 1996. He noted,

> It is a worrying reflection of the tone of the present debate that it appears necessary to point out that the fact that a barrister acts to defend an accused person must not be interpreted as any indication that the barrister condones, approves, aids or abets anything that the client is accused of doing. Those who claim barristers should be dissuaded from acting for certain persons ignore the fundamental legal principle that all accused are innocent until proven guilty in a court of law....Defence counsel who provide such legal advice and assistance do so, not from collusion or agreement with the actions of the accused, but from respect for the legal system founded upon the rule of law.....It would appear that comments which claim that barristers 'reap the profits of crime' are designed to intimidate counsel into refusing to act for certain accused persons....it is a fundamental right in a democratic society that an accused person be fully appraised of all charges made against them and that they have the choice of legal representation....this right is embodied in Article 6 of the European Convention of Human Rights...any statement which would seek to remove that protection from the accused is a much more insidious and powerful threat to our democracy than any action of the individual accused.

In July 1996, the same themes were discussed on the Pat Kenny Radio Show. On 11 August 1996, the *Sunday Independent* wrote that lawyers were collaborating in secret enterprises funded by dirty money. Again, lawyers were associated with the crimes allegedly committed by their clients.

GOVERNMENT RESPONSE TO CIJL

On 12 August 1997, the Government of Ireland responded to the CIJL's request for comments. Some of the Government's comments were incorporated into the text. The Government also stated:

> "The Constitution of Ireland provides that the a shorter period may be fixed by law. Current Irish electoral law does stipulate a shorter period, and provides that parliamentary elections be held at least every five years.
>
> ...[S]ignificant amendments to the criminal law were made during 1996 and 1997.
>
> ... [The Court and Court Officers Act, 1995] also introduced a number of administrative and procedural reforms which simplify and speed up the process of cases through the courts which enhance the efficiency of the Courts system.
>
> ...Re: Special Criminal Court. Extract from Ireland's First report to the Human Rights Committee under the International Covenant on Civil and Political Rights, 1992:
>
> 'In addition provisions for the establishment of special criminal courts is made in the Constitution which states "Special Courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure effective administration of justice, and the preservation of public peace and order'. Accordingly Part V of the Offences Against the State Act, 1939 authorises the establishment of Special Criminal Courts following a proclamation by the Government, in the terms required by the constitution "that the ordinary courts are in adequate to secure the administration of justice and the preservation of public peace and order' and ordering that Part V of the Act is to be in force. Arising out of the crisis in Northern Ireland and the incidence of violent terrorism, a proclamation was made in 1972, which is still in force, authorising the establishment of a Special Criminal Court. The Court has always sat as a Court of three serving or dormer judges, one from each of the High, Circuit and District Courts, sitting without a jury. The Court can act be majority decision but only one decision is pronounced. There is a full right of appeal to the Court of Criminal Appeal.'
>
> Furthermore, a 1995 High Court case challenged some of the key provisions underpinning the existence and operation of the Special Criminal Court. It was held, *inter alia,* that the court could only interfere with the exercise by the government

of its executive functions where the circumstances are such as to amount to a clear disregard by the government of the powers and duties conferred upon it by the Constitution. As no evidence was adduced to suggest that the government had disregarded the mandates of the Constitution it was held that the applicant had accordingly failed to establish that the proclamation of 1972 (authorising the establishment of the court) should be quashed. The Supreme Court upheld the findings of the High Court.

...The Court and court Officers Act, 1995 establishes a system whereby names can be put before the government by the Board. This is a system of recommendation only.

...The Constitution Review Group was established by the Government in April 1997 to review the Constitution and establish those areas where constitutional change might be desirable or necessary. An All-Party Committee on the Constitution was subsequently established by Parliament to undertake a full review of the Constitution, having regard *inter alia,* to the report of the Constitution Review Group. The All-Party Committee published two progress reports within its first year. It has decided that the most effective and realistic means of achieving progress will be to draw up a programme of constitutional amendments to be implemented over a reasonable period.

...Re: the Constitutional declaration to betaken by the judiciary:

The Attorney-General, who was a member of the Constitution Review Group is currently reviewing the issue. To date, however, no judicial appointee has ever raised any difficulty in relation to the Constitutional declaration. Any change to the declaration would require a referendum to amend the Constitution.

[With regard to the accountability of the Courts Service to the National Parliament through the Minister for Justice, the Government said] the independence of the judiciary guaranteed by the Constitution would not be interfered with in any way.

...In May, 1996 the Government accepted in principle the recommendation of the Working Group than an Independent Courts Service be established and added a Chief Executive to the Board to Serve as a 16th member. The Government also requested the Working Group to submit a further Report on how the establishment of the Courts Service be progressed.

In November 1996, following the Lynch affair (see above) the Government proposed to immediately establish the Board on a

non-statutory basis. Following discussions with the Chief Justice and the Chairperson of the Working Group the Government reconsidered and decided that the Courts Service would be best served by being established from the beginning pursuant to legislation. This legislation is being drafted as a matter of urgency and priority. The Government also approved the addition of another judicial member to the Board to be nominated by the Chief Justice in respect of his or her expertise in a specific area."

ITALY

Italy is a parliamentary republic, with legislative power vested in a bicameral Parliament. The members of the Chamber of Deputies and of the Senate are elected for a renewable term of five years. Executive power is vested in the Government, composed of the Prime Minister, appointed by the President of the Republic, and the Ministers, appointed by the President on the advice of the Prime Minister. The Government comes into force on a vote of confidence of Parliament and is responsible to it. The President of the Republic, elected by an electoral college comprising the two houses is the head of State.

On 11 January 1996, the interim Prime Minister Lamberto Dini and his Government resigned. He had been appointed in January 1995 following the downfall of Mr. Berlusconi's cabinet as a result of judicial investigation into corruption charges against him. On 16 February, the President of the Republic dissolved Parliament. On 21 April, general elections were held and a centre-left coalition won; the "Olive Tree" alliance, in co-operation with the Communist Refoundation Party, defeated the right-wing coalition "Freedom Alliance". The North League campaigned for and presented its own separate list. On May 1996, the new centre-left coalition Government and designated Prime Minister Romano Prodi received a vote of confidence by Parliament.

"CLEAN HANDS" (MANI PULITE) INVESTIGATIONS

In 1996, public prosecutors continued to conduct sweeping investigations into high level corruption and proceed with the trials of those accused (see *Attacks on Justice, 1995*). Since 1992, investigations were being conducted throughout the country and touched almost every sector of political and economic society. Critics alleged the rights of the suspects were not protected, in part due to the excessive use of preventive detention and the violation of the suspects' privacy as a result of information leaks. However, almost all the appeals of preventive detention orders before the Liberty Tribunal and the Court of Cassation were rejected (see below for a description of these courts).

The wide-spread corruption has also affected the judiciary. Between 1993 and 1996, more than 200 magistrates were investigated on charges of corruption, collusion or mafia-related crimes; at least 15 were arrested and several others were committed to trial. In March 1996, serious accusations led to the arrest of **Judge Renato Squillante**, Chief of the examining judges in Rome. He was accused of receiving large bribes in the late 1980s in connection with the struggle for control of the Mondadori publishing group. Judge Squillante resigned from his office and his case was still pending in early 1997.

In the second half of 1996, attempts to discredit anti-corruption investigations heightened. Allegations were made against the judiciary and particularly Attorneys-General **Judge Francesco Borrelli** of Milan and **Judge Giancarlo Caselli** of Palermo, and their pools. Specifically, it was claimed that their investigations were politically oriented, that they had exceeded their authority, abused preventive detention provisions and that they had too many contacts with the media. On 2 December 1996, Mrs. Tiziana Maiolo, one of the best-known deputies of *Forza Italia,* the political party led by Mr. Berlusconi, maintained that "most of the inquiries and trials of the last four years must now be reviewed and rewritten from the beginning".[1] Attacks were also leveled at former prosecutor **Antonio Di Pietro**, who had come to represent the *Mani Pulite* investigations themselves and had resigned in 1994 after citing exploitation (see *Attacks on Justice, 1995* and below). In 1996, Mr. Di Pietro, was subjected to approximately 180 accusations.

At the same time, claims for a general amnesty for the crimes connected with *Mani Pulite* and especially for the crimes of illicit funding to political parties were advocated by different political parties and especially by those most affected by the investigations. A bill presented in 1995 by Mr. Biondi, Minister of Justice in President Berlusconi 's cabinet, had provided for such amnesty but it was withdrawn under public pressure.

Particular interest centred on the trial of Mr. Silvio Berlusconi, former Prime Minister and media magnate. On 17 January 1996, the trial of Mr. Berlusconi, his brother Paolo and four executives of Fininvest, a conglomeration owned by Mr. Berlusconi, opened in Milan. Mr. Berlusconi was accused of having paid members of the Fraud Investigations Office between 1989 and 1992 to ignore any potential wrongdoing. Five members of the Fraud Investigations Office were implicated in the trial. On 29 January, the District Attorney of Milan commenced proceedings against Mr. Berlusconi on allegations of illegal contributions to the former Italian Socialist Party in the early 1990s. In July, the judge for the preliminary inquiry confirmed that Mr. Berlusconi should be tried on those charges in Milan at the end of November 1996.

The Fight against Mafia

On 23 May 1993, **Judge Giovanni Falcone** was killed and two months later, on 19 July 1993, **Judge Paolo Borsellino** was murdered (See also *Attacks on Justice 1992-1993*). Both judges had prosecuted the first *maxiprocesso* (maxi-trial) in 1987 which resulted in the conviction of hundreds of mafia figures. The convictions had been confirmed by the Court of Cassation on 30 January 1992 and hundreds of mafia convicts were transferred to the

1 Unofficial translation.

maximum security prisons of Pianosa in August 1992. The Government established exceptions for those who wanted to collaborate with the Government in its fight against the mafia.

On 20 May 1996, Giovanni Brusca, a mafia boss accused of having triggered the explosion which killed Judge Giovanni Falcone, was arrested. On 27 January 1996, the Court of Assizes of Caltanissetta, Sicily, convicted the first accused in the murder of Judge Paolo Borsellino.

The Priebke Case

In May 1994, Erich Priebke was arrested. He was the second-in-command at the *"strage delle Fosse Ardeatine"* massacre where 335 Italian civilians were killed in retaliation for an attack on the Nazi headquarters in via Rastella, Rome in 1944. Most of those killed were Jewish. On 2 November 1995, the Argentina Supreme Court conceded Priebke's extradition in Italy. In December 1995, the trial opened before a military court. According to Article 103 of the Constitution, during peace-time, military tribunals continue to have jurisdiction over military crimes committed by military officers.

For the first time in a military trial, the relatives of the victims and Jewish associations were allowed to take part in the trial as *parte civile*. The Military Court of Appeal was composed of two judges, President Quistelli and Judge Rocchi, and a military officer with a higher rank than Mr. Priebke. The Public Prosecutor and *parte civile* appealed to the Military Court of Appeal two times, claiming the President of the Tribunal, Judge Quistelli, was biased, as the Tribunal had reportedly indicated its intention to acquit Mr. Priebke. Twice the Military Court of Appeal refused the request.

On 1 August 1996, the Military Tribunal found Mr. Priebke guilty, but because of his good behaviour after the war and because he claimed that he had obeyed an order, the court did not sentence him to imprisonment. An international and national outcry ensued.

The same night, the Minister of Justice, Mr. Flick, issued a warrant of arrest for Mr. Priebke under Article 716 of the Italian Code of Criminal Procedure to ensure he could not flee the jurisdiction. Article 716 provides for the temporary arrest of every person against whom an extradition order has been issued. As the German Interpol had requested the extradition of Mr. Priebke to Germany, Article 716 could be invoked.

On 5 August, the *parte civile* appealed to the Court of Cassation from the decisions of the Military Court of Appeal which had found no perception of bias had existed on the part of the Military Tribunal. The *parte civile* also questioned the jurisdiction of the military courts, on the grounds that the Nazi SS had not belonged to the proper army. On 15 October 1996, the

Court of Cassation, part of the civil branch of the judiciary, declared the decision of the Court of Appeal to be null and void and ordered a new trial. On 10 February 1997, the first Criminal Section of the Court of Cassation confirmed the Military Court's jurisdiction, maintaining that the Nazi SS had to be considered as a branch of the Nazi army. The preliminary hearing was scheduled to be held no later than by March 1997 and the trial was scheduled to start in April.

The Military Codes date back to 1941 and have never been reformed. In the wake of the Priebke case, a bill was presented in Parliament by the Democratic Left and Green Party (*Sinistra Democratica* and *Verdi*) which would abolish all military courts in time of peace, leaving ordinary courts competent to deal with military crimes. Military judges would become ordinary judges and military crimes would be judged by a specialised section of the judiciary.

The Judiciary

Court Structure

The Constitution establishes a Constitutional Court as a fundamental guarantee of the respect and enforcement of the Constitution itself. The Court is composed of 15 constitutional judges, appointed from amongst the judges of the superior courts, university teachers and lawyers with more than 20 years of experience, for a non-renewable term of nine years. Five judges are nominated by each of the President of the Republic, the two houses of Parliament sitting together and the superior ordinary and administrative courts. The Constitutional Court has exclusive jurisdiction over constitutional matters, conflicts of competence between the powers of the State, the State and the Regions and among the regions themselves and over accusations against the President of the Republic and the Ministers.

The Constitution provides that only ordinary judges have the power to administer justice and forbids the institution of special tribunals (but see the discussion on Military Courts above). Specialised sections of ordinary tribunals can be created to deal with specified subjects. The structure of the judiciary is disciplined by Royal Decree N° 12 of 1941, modified by more recent laws during the years. Lower courts for civil affairs consist of Judges of the Peace, and District First Instance Courts and Tribunals, whose respective jurisdictions depend on the nature of the proceedings. Appeals of sentences of Judges of the Peace are heard by District First Instance Courts; those of District First Instance Courts are heard by Tribunals and appeals from Tribunal sentences are heard by the Courts of Appeal.

Criminal proceedings, according to the rules established by the 1989 Code of Criminal Procedure are heard by District First Instance Courts, Tribunals and Courts of Assizes. Appeals from District First Instance Courts

are heard by the Tribunals, those from Tribunals by the Courts of Appeal and those from the Courts of Assizes by the Assizes Courts of Appeal. New trials may be ordered by the Court of Cassation, but only on consideration of a point of law.

Liberty Tribunals, composed of a panel of judges, in the Court of Appeal, are established as a safeguard against possible unjustified measures such as preventive detention and searches. These tribunals enjoy the power to review cases of persons in detention awaiting trial and to decide whether continued detention is warranted and to establish the lawfulness of searches and other investigating instruments.

Article 103 of the Constitution establishes Administrative Courts, the Council of State to decide administrative cases, the Courts of Accounts to deal with cases of public accounts and Military tribunals in peace time, with a limited jurisdiction on military crimes committed by members of the military (see under Priebke case, above).

Basic to the structure of the judiciary is the independence of judges, guaranteed by Articles 101, 104 and 105 of the Constitution. Judges enjoy both a functional independence, as they are subjected only to the law, and an organisational independence, as there is a self-governing body of the judiciary, the High Council of the Magistracy (*Consiglio Superiore della Magistratura* (CSM)). The CSM is composed of members *ex officio*, the President of the Republic as Chair, the First President, and the Public Prosecutor of the Court of Cassation and 30 other members elected for a four year term. Two-thirds of them are elected by all the judges amongst themselves, and one-third by the two houses of Parliament sitting together from among university teachers and lawyers with at least 15 years of experience. The CSM itself elects a Deputy-President amongst the members elected by Parliament. The principal functions of the CSM consist of the appointment, assignment, removal, promotion and the disciplinary measures concerning the judges (see above). Moreover, the CSM may forward the Ministry of Justice proposals on every subject concerning the administration of justice.

Appointment and Removal

Judges are appointed through a public competitive exam and they are irremovable. In fact, judges can not be dismissed, suspended from office, transferred or assigned to different offices save on decision of the CSM. The CSM ultimately makes the appointment after the exam and establishes where they will serve their office.

Under the provisions of Royal Decree No. 511 of 1946, a judge who fails in his or her duty, whose conduct makes him or her unworthy of the confidence and esteem of a judge or jeopardises the judiciary, can be subjected to disciplinary measures. These sanctions include a warning, a censure, loss of seniority, demotion or dismissal. These measures may only be executed by

the disciplinary section of the CSM. Either the Public Prosecutor and the First President of the Court of Cassation or the Minister of Justice may address the disciplinary section of the CSM and make a formal request to initiate a disciplinary proceeding. The disciplinary section of the CSM is composed of nine members of the CSM itself and is headed by the Vice-President of the CSM. The decisions of the disciplinary section can be appealed within 60 days before the Court of Cassation.

Referendum proposals affecting the judiciary

Referendum proposals may be submitted by members of the public to the Constitutional Court which in turn has the power to decide on their admissibility. On 30 January 1997, the Constitutional Court approved the admissibility of 19 referenda of the 30 proposed by the *Club Pannellai* and various other regions. Four of the referendum proposals affected the judiciary (see *Attacks on Justice 1995*) and the Constitutional Court rejected two of them. The first proposal rejected would have allowed Parliament to elect a greater proportion of the judges to the CSM. The second referendum proposal would have allowed citizens to bring civil actions for damages against judges. At present, the State is responsible for the compensation of any judicial error suitable to involve civil responsibility.

The two proposals affecting the judiciary which were approved by the Constitutional Court included one which forbids judges from holding extra judicial activities. According to the CSM, this prohibition should not prevent judges from teaching at Universities. The second proposal would abolish the promotion of judges based on seniority. Currently, all judges are considered to be equal; salaries are dependent only upon length of service, and not the court on which the judge sits.

The referenda were scheduled to take place in mid-April or May 1997. However, if the Parliament chose to draft a bill concerning the proposals, the referenda would not be necessary.

Draft Reform of Criminal Justice

Justice remained slow throughout 1996. The average waiting period for trial was approximately 18 months. In addition, a maximum of two years of preventive detention was permitted and usually the appeal process prolonged the proceedings. These problems were exasperated by a structural lack of judges. By the end of 1996, approximately 700 judicial positions were vacant. In addition, extra judicial activities, leaves of absence and other tasks reduced the number of judges effectively available. In the sole district of Naples, a district with a high crime rate, 46 more judges were needed and the Tribunal and the Court of Assize had more than 14,000 procedures waiting to be heard.

In early January 1997, the Minister of Justice presented a bill reforming criminal procedure. The bill included alternative proceedings intended to

reduce the number of criminal trials and to streamline those which proceeded. It was intended to reinforce the 1989 Criminal Code which did not make the administration of justice more efficient, as expected. The bill proposed a "negotiated sentence" between the accused, the public prosecutor and the sitting judge for the majority of the crimes punishable by a sentence not greater than three years in prison, with the exclusion of murder, kidnapping, rape, corruption of minors and armed robbery. It provided for a complex system by which penalties may be reduced so that the three year maximum is met. To benefit from these measures, a declaration of culpability is not required, but the documents and records shall be found "sufficient" by the judge. The judge must give written reasons for the reduction in the penalty. Of significant controversy is the proposal which permits a penalty to be reduced in exchange for "money reparation" to the state. Traditionally, convicted criminals have only had to compensate their victims. New forms of penalties were proposed, such as restrictions on holding public office or counselling by Social Services. For all crimes, including those that carry life sentences, procedures will be available to streamline the trial.

Cases

Giancarlo Caselli {Judge, Attorney General of Palermo}: On 28 January 1997, eight mafia-associates were arrested on the charges that they had attempted to sabotage Judge Caselli's car with explosives for several months. They had, reportedly, contacted a former driver of the Tribunal of Palermo to assist them.

Piercamillo Davigo {Judge of the pool *Mani Pulite* of Milan}: In early January 1997, Judge Davigo voluntarily asked to be transferred from the office of the Attorney-General to the sitting judiciary. It is reported that his choice was motivated by his belief that in Italy, it is not possible to carry out investigations into either the "secret society" or the most powerful sectors of society because of the climate of hostility created by the economic and political sectors in which corruption is inherent.

Antonio Di Pietro {Former Public Prosecutor of Milan}: Mr. Di Pietro resigned in November 1994 from the *Mani Pulite* investigations, after citing exploitation as the cause of this resignation. In fact, it was widely suspected that Prime Minister Berlusconi had pressured him to resign.

In May 1995, Mr. Di Pietro was himself questioned concerning allegations of abuse of office. In March 1996, Mr. Di Pietro was cleared of charges that he had received questionable loans and gifts from a local businessman in exchange for favourable treatment in the *Mani Pulite* inquiries. In May 1996, Mr. Di Pietro was appointed Minister of Public Works but the attempts to discredit him continued throughout 1996. The arrest of Mr. Pacini Battaglia in September (see above) revealed taped telephone conversations, in which Mr. Pacini Battaglia declared that "they had paid to get out

of *Mani Pulite*" and that "Di Pietro and Lucibello [lawyer of Pacini Battaglia and friend of Di Pietro] broke me". Mr. Battaglia had been released by Mr. Di Pietro in 1993. Given the legal requirement that all allegations must be investigated, new investigations of Di Pietro were commenced by the Attorney-General of Brescia. On 17 November 1996, Mr. Di Pietro resigned from his post as Minister of Public Works. In a letter to Prime Minister Prodi, Mr. Di Pietro wrote that the allegations made against him had the clear purpose of opposing the "validity of *Mani Pulite* investigations".[2]

On 6 December, the Attorney-General of Brescia ordered a search of Mr. Di Pietro's house, for evidence that Mr. Di Pietro had extorted money from Mr. Pacini Battaglia during the 1993 investigations on corruption. In late December, the Liberty Tribunal found the evidence to be "insufficient" and ordered all documents seized from Mr. Di Pietro to be returned. The Liberty Tribunal added that the criticisms of the judge's decision to release Mr. Pacini Battaglia during the 1993 inquiries were absolutely groundless. In fact, as Mr. Battaglia had started to co-operate, "that decision was definitely not abnormal".

In February 1997, the complete transcript of the taped telephone conversation of Pacini Battaglia was reconstructed by an expert nominated by the Tribunal in Perugia seized with the Battaglia case. Serious omissions were discovered and it became apparent that the Criminal Department of Fraud Investigations of Florence had intentionally omitted relevant portions of the conversation which reportedly clearly vindicated Mr. Di Pietro from any alleged extortion. Since the beginning of this case, Mr. Di Pietro, Mr. Borrelli and several other judges of the *Mani Pulite* pool have denounced the Criminal Department of Fraud Investigations of Florence for trying to discredit them. Although state organs have manipulated evidence on other occasions, Mr. Di Pietro's lawyer was reported as saying this was an institutional plot against the judiciary.

Francesco La Franca {Lawyer in Sicily}: On 4 January 1997, Mr. La Franca was reportedly killed by a mafia hired-assassin. Mr. La Franca had been trying to exercise his property rights over his family land. The day after his murder, mafia affiliates fenced in the land to show clearly that the mafia is able to dispossess anyone of his or her rights.

David Monti {Judge, public prosecutor in Aosta}: On 17 December 1996, Judge Monti reported to the CSM that he had been transferred from his inquiry into a counterfeit money operation. The judge claimed there was a conspiracy by the "secret society" to prevent him from pursuing his inquiries. Judge Monti's case highlighted the tradition of removing determined prosecutors from significant investigations.

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2 Unofficial translation.

JAPAN

Japan is a constitutional monarchy. The Constitution refers to the Emperor as the "symbol of the state". Executive power is held by the Cabinet, composed of the Ministers of State and presided by the Prime Minister. The Cabinet is responsible before the *Diet*, the bicameral parliament holding legislative authority. The *Diet* is composed of the 500 member House of Representatives and the 252 member House of Councillors. The Prime Minister is designated by the *Diet* from among its members. The Emperor has no powers related to Government, but formally appoints the Prime Minister.

On 27 September 1996, Prime Minister Ryutaro Hashimoto, of the Liberal Democratic Party (LDP), dissolved the House of Representatives (the lower house of the *Diet*) and called for a general election to be held on 20 October 1996. These were the first elections since 1993, when the LDP was ousted from power after 38 years of rule. Also, a new voting system was introduced: votes were cast for 300 single-seat constituencies and 200 proportional representation seats. The election resulted in the LDP becoming the largest single party within the House of Representatives, although it did not gain an overall majority. On 7 November, the *Diet* re-elected Ryutaro Hashimoto as Prime Minister, who then announced the formation of a new Cabinet from amongst the members of the LDP.

HUMAN RIGHTS CONCERNS

A concern of local human rights organisations which continued in 1996 was the pre-indictment procedure. The procedure permits detention for a maximum period of 23 days before the prosecutor files an indictment. It is only after the indictment has been filed that the constitutional rights to counsel and to bail become effective. A court appointed attorney is not provided for a detained person until after formal charges against him or her have been filed. As a result, local bar associations usually provide free legal service to detainees prior to indictment.

Prior to indictment, many detainees are held in facilities described as substitute prisons (*daiyo kangoku*), which are often cells attached to the police station and administered by the same police. This procedure was introduced in 1908 as a temporary means due to shortage of prisons. In 1994 however, normal detention facilities were filled to only 53 percent of its capacities. The detainee is interrogated without the means to record the entire process of the interrogation: the record will be a hand-written account of what the detainee has said.

The tradition in Japan is that an indictment should lead to a conviction, as is evidenced by the statistics: the conviction rate is 99.9 percent. This tradition has lead to significant pressure on the investigator to obtain a confession, which is secured in 95 percent of the cases resulting in conviction. Reports from bar associations and human rights organisations stated that police physically and psychologically abused detainees in 1996 to obtain

these confessions. It is also believed that confessions given by persons held in *ðaiyo kangoku*, which have lead to death sentences, later proved to be erroneous.

The Judiciary

The Constitution establishes the independence of judges in the exercise of their duties. It vests judicial power in the Supreme Court and inferior courts as established by law. The inferior courts include eight High Courts (with six additional branch courts), 50 District Courts (with 242 local branches), 50 Family Courts (also with 242 local branches) and 575 Summary Courts.

The Supreme Court has jurisdiction over appeals and those complaints specifically prescribed in the Code of Procedure. The opinion of every judge of the Supreme Court must be expressed in writing.

The High Court has jurisdiction over appeals from judgments rendered by the lower courts, complaints against ruling and orders.

Appointment Procedures

The Supreme Court consists of 15 justices, among them the Chief Justice, who is designated by the Cabinet and formally appointed by the Emperor. All other Supreme Court Justices are appointed by the Cabinet in a process that is not publicised. It is believed that the Prime Minister and the Chief Justice together determine who will be appointed. The Court Organisation Law establishes the vague criteria that Supreme Court Judges are appointed from among persons "of broad vision and extensive knowledge of law". The law also requires that at least ten of the Supreme Court Judges must have been a President of the High Court or a judge for at least ten years, or have been a judge of the Summary Court, a Public Prosecutor, a Lawyer or a Professor in Legal Science for a total of at least 20 years.

Inferior court judges are appointed by the Cabinet from a list prepared by the Supreme Court. The list is generally prepared from recruits who have passed the bar and who have completed two years at the Judicial Research and Training Institute. The recruits selected from the list by Cabinet serve as assistant judges for ten years after which time they can be appointed to full judicial positions, renewable every ten years. Judges are rarely not reappointed, however, in the event they were not, they would effectively be dismissed without any right to a hearing. It has also been reported that in some cases, judges felt compelled to withdraw their applications for re-appointment, since their placements were undesirable.

It has been suggested in recent years, that in fact, the appointment process has given the executive so much influence over the judiciary, that it no longer needs to directly interfere with it.

SECURITY OF TENURE AND IMPEACHMENT

The retirement age of Supreme Court judges is 70. However, their appointment is reviewed in a referendum at the first general election of the House of Representatives, which usually occurs one and a half years after appointment, and thereafter every ten years. A majority vote will lead to the immediate dismissal of the judge. This procedure must be recognised as having the potential to undermine the security of tenure of the judiciary.

The Constitution provides that judges should be removed only by public impeachment or when the judge has been declared mentally or physically incompetent to perform his duties.

According to the Constitution, no disciplinary action is to be administered against a judge by any executive organ or agency. When a judge has "swerved from his duty, neglected his duty or degraded himself, he shall be subjected to disciplinary punishment by decisions as provided for elsewhere by law". According to the Law of Impeachment of Judges enacted in November 1947, a judge "is liable to be removed from his post on being impeached and convicted for any of the following offences:

(1) conduct in grave contravention of official duties or grave neglect of official duties; or

(2) other misconduct seriously affecting the integrity of a judge".

An Indictment Committee of Judges consists of "ten members of the House of Representatives and the members of the House of Councillors, and that of reserve members shall be respectively five of the members of the House of Representatives and the members of the House of Councillors". The Indictment Committee is convened by the Chairman or on request of at least five members of the Committee. The Indictment Committee shall investigate the request for indictment but it may also entrust Government officials to conduct the investigation. A resolution to remove or suspend a judge requires a two-thirds majority vote of the members present. The proceedings of the Committee are not open to the public. The Committee may indict the judge.

A Court of Impeachment consisting of seven members from each of the House of Representatives and the House of Councillors considers the written indictments. Upon receiving a written indictment, the Court of Impeachment must notify the indicted judge. The indicted judge is entitled to retain a lawyer and the provisions of the laws and ordinances concerning criminal procedure apply. Oral proceedings are conducted in public and a written judgment, with reasons, is determined by a two-thirds majority of the judges participating in the hearing. Upon the pronouncement of a judgment of removal, a judge shall be removed. However, a judge may recover his or her judicial qualifications, if after five years, a justification exists or if any new evidence is found which proves the absence of cause for removal.

According to the Court Organisation Law, the courts at all levels are responsible for their own administration and supervision, by means of a Judicial Assembly at each level and the respective Chief Judge. The Judicial Assembly of the Supreme Court is ultimately responsible for the administration of the judiciary. It is comprised of all the Supreme Court Justices with the Chief Justice as its Chair. The Supreme Court itself is administered by a General Secretariat. The Judicial Assembly acts through resolutions that are implemented by the General Secretariat of the Supreme Court. The Supreme Court General Secretariat together with the Legal Training and Research Institute sponsor conferences and study sessions on various topics, including the interpretation of the law. The recommendations of these conferences are compiled by the General Secretariat and distributed to the judges to be applied when deciding cases. This presents an inappropriate means by which to influence the judges in the discharge of their profession and it is feared that this practice allows the General Secretariat to exercise *de facto* control over the Judicial Assembly and consequently the judiciary.

Judges' remuneration is constitutionally established as "adequate compensation", which shall not be decreased during their terms of office. There is an established system of wages, tied to seniority.

Prosecutors as judges

Another practice that continued to create concern is the possibility for prosecutors to work as judges and *visa versa*. The Government justifies such transfers between the Courts and the Ministry of Justice as necessary for the supply of specialists in law to the Ministry. There is a concern that this practice may allow the Government to transfer prosecutors to the judiciary to ensure the decision desired.

Lawyers

On 1 June 1996, the Japan Federation of Bar Associations (JFBA) established an "Obstructionism Counter-measures Committee" to investigate the harassment of lawyers belonging to the organisation. The objectives of the Committee are to give guidance and support to members that have been victims of obstruction, and to prevent such incidents in the future. The Committee circulated a survey, the result of which revealed that many lawyers had suffered from *inter alia* harassing telephone calls, threats, physical violence, coercion and clients refusing to leave the attorney's office. The JFBA also stated that there seemed to be an increase in applications for disciplinary measures against lawyers, apparently for the purpose of harassing them.

CASES

Kenji Nozaki: {Lawyer}: Mr. Nozaki received threatening telephone calls after he represented members of the Aum Shinrikyo sect, accused of plotting the nerve gas attack on the Tokyo subway in March 1995. On 7 May 1996, the intercom outside the door of the lawyer's office was destroyed, and the key hole was filled with adhesive cement.

Takeshi Iwahara {Lawyer of the Dai-ichi Tokyo Bar Association and member of the Committee for Countermeasures Against Violence in Civil Proceedings}: Mr. Kawada assisted in settlement negotiations involving the *Yamaguchi-gumi yakuza* organisation (reportedly similar to a local mafia organisation). On 26 December 1996, as Mr. Dai-ichi was leaving the building where the negotiations took place, he was attacked by one of the men of the organisation. His arm was hurt in the assault. After obtaining a medical report, the lawyer complained to the police. Despite investigations, no one was arrested for the attack.

Yoshihiro Mitsui {Lawyer, Shizuoka prefecture} Mr. Mitsui led a team of lawyers which brought an application to prevent a *yakuza* organisation (reportedly similar to a local Mafia organisation) from using an office. After bringing the application, Mr. Mitsui was injured.

Futaba Igarashi {Lawyer}: Ms. Igarashi, retained by a member of the Aum Shinrikyo sect, was harassed through anonymous phone calls.

Tsunehiko Kuratomi {Lawyer}: On 18 December 1996, the opposing party in a law suit in which Mr. Kuratomi was acting entered his office brandishing a knife, handcuffed Mr. Kuratomi and two other office workers and covered their eyes and mouths with tape. The perpetrator brought one of the office workers to three banks where she was forced to withdraw 4.6 million yen and then fled with the money. He was arrested on 22 December 1996 and indicted for forced confinement, robbery and causing injury.

Takashi Takano {Lawyer, member of the Saitama Bar Association and representative of the Miranda Association}: Mr. Takano, the official representative of the Miranda Association which is concerned with the protection of the rights of persons held and investigated by the police and advises detainees *inter alia* not to sign self-incriminating statements when they are refused access to a lawyer, has been the target of harassment in previous years (see *Attacks on Justice, 1995*). It was believed this harassment was the result of his involvement with the Miranda Association. In December 1995, the Chief Prosecutor of Okayama stated that "[a]nyone who follows the advice of an attorney from that association and refuses to sign a statement should be indicted, because he shows no sign of remorse".

In 1995 and 1996, Mr. Takano represented a client accused of assaulting his wife in October 1994. When the client was called to the police station to be examined, the Urawa Police advised that the presence of a lawyer was unnecessary and abandoned the request for the examination. On 31 July

1995, the client received a notice to appear from the Urawa District Prosecutor Uetomi. Mr. Takano requested a change of date which was refused and accordingly, neither Mr. Takano nor his client appeared for the examination. On 30 January 1996, the client was arrested without warning.

The client's arrest was considered to be irregular. Firstly, it was made by the prosecutor who was normally involved in more serious or political crimes. Secondly, the client was detained and four requests for bail and two appeals were denied. It was not until 27 May 1996 that bail was granted on the condition that 1.5 million yen (approximately 25,000 $US) be posted and that the client work at Mr. Takano's office and stay at the house of one of his defence lawyers during the nights. Such stringent bail conditions were, until 1996, unheard of. It required 18 volunteer lawyers on alternating nights to fulfil the conditions. On 24 May, the Saitama Bar Association passed a resolution holding that the actions of the police, prosecutor and court constituted an obstruction and the failure to allow Mr. Takano to be present at the examination of his client violated the Constitution of Japan. On 22 July, the bail conditions were removed.

Taro Takimoto {Lawyer}: As reported in *Attacks on Justice 1995,* Mr. Takimoto was attacked with sarin gas in May 1994. On 5 March 1996, four persons were indicted with the attempted murder of Mr. Takimoto. Civil litigation was initiated on 31 May 1996.

Kouan Watanabe {Lawyer}: On 2 February 1996, Mr. Watanabe was asked for legal advice in relation to a civil dispute, by a client he had assisted earlier. Following an argument during the consultation in Mr. Watanabe's office, the client stabbed Mr. Watanabe several times in the back, the neck and the eyes. Mr. Watanabe died from the assault. A suspect was arrested and indicted for murder on 22 February 1996 and on 20 December 1996, the Tokyo District Court sentenced him to 14 years imprisonment.

Government Response to CIJL

On 22 August 1997, the Government of Japan responded to the CIJL's request for comments. The Government stated:

> " I. *Human Rights Concerns*
>
> A. The Right to Counsel This reports says, "it is only after the indictment has been filed that the constitutional rights to counsel become effective." But it is not correct. In Japan, the Constitution fully protects the right of every individual not to be arrested or detained without the right to counsel. The Code of Criminal Procedure provides that the right of the accused or the suspect to retain defence counsel shall be guaranteed at any time regardless of whether they are detained or not.

Therefore, the right to counsel of the accused and the suspect is fully protected in Japan.

B. Substitute Prisons (daiyo kangoku)

The procedure, in which suspects may be detained in the police custodial facilities, was not introduced as a temporary means. The police strictly separate their investigation functions from their detention-related ones. The treatment of detainees is handled solely under the responsibility and judgment of detention officers. Investigators are prohibited from entering the custodial facilities and they cannot control or influence treatment of suspects detained in the police custodial facilities.

An arrestee can apply for the retention of a defence counsel at any time and consult with his defence counsel without attendance of an official, even on holidays and at night time whenever possible. Therefore a detainees' right of defence is fully guaranteed.

C. High Conviction rate and confession

The primary reason for the high conviction rate in Japan is that the public prosecutors, as representatives of the public interest, institute public prosecutions only when they are convinced of the guilt of the suspects based on careful examination of all the evidence gathered through investigations. There is no fact that investigators compel suspects to confess in order to maintain high conviction rate. Therefore, the allegation of the report that "this tradition has lead to significant pressure on the investigator to obtain a confession" is groundless and quite contrary to the practice.

High confession rate in convicted cases as referred to in this report, is also attributable to the judicial system of Japan which has no arraignment or bargaining. It is not caused by forced confessions.

Furthermore, the Constitution protects the right of every individual not to be compelled to testify against himself, and the Code of Criminal Procedure denies the admissibility of confession which is suspected to be obtained involuntarily. If an investigator commits an act of violence or cruelty upon the suspect, he shall be punished severely. Thus, there are ample safeguards to prevent forced confessions.

The Code of Criminal Procedure also provides the right to file an objection to detention, in addition to the strict requirements for arrest and detention.

II. Appointment Procedures Contrary to the report, the Cabinet does not exercise much influence over the judiciary as alleged in the report. The Constitution indeed vests the power to appoint the Justices of the Supreme Court in the Cabinet based on the principle of checks and balances, because the Supreme Court is the final adjudicator of constitutional questions in an entirely independent position. However, the Constitution also provides that the Cabinet must appoint judges of inferior court from a list prepared by the Supreme Court, in order to restrain the Cabinet from asserting its influence over the judiciary through the appointment of judges.

The comment in the report that "it is believed that the Prime Minister and the Chief Justice together determine who will be appointed (as Justices of the Supreme Court)", is also groundless.

Regarding the re appointment process, since the Constitution does not adopt life-employment system for judges of inferior court, it is a matter of course that they lose their positions when their tenures expire. Judges of inferior court are re appointed by the Cabinet from a list prepared by the Supreme Court in a similar way to their first appointment. The Supreme Court designates the nominees fairly and deliberately after carefully examining their qualification for the position, taking into account that the system is similar to the career-system in practice.

III. Security of tenure and impeachment

With regard to the review of appointment of the Justices of the Supreme Court by the people, it is an important system for the democratic control over the Justices.

Regarding the relation between the Judicial Assembly of the Supreme Court and the General Secretariat, the Judicial Assembly makes the decision on administration, and the General Secretariat only executes the decision. The General Secretariat is set up to assist the Justices of the Supreme Court because it is very hard for the 15 Justices to perform all the extensive duties of the Supreme Court.

Regarding conferences held by the Supreme Court, the General Secretariat handles only secretarial affairs such as planning and preparation for the conferences and compilation of the result. The chairperson is chosen by the members of the conference, and the staff of the General Secretariat only attends the conferences and makes the point of argument clear when their comment is invited by the Chairperson. Therefore,

the opinion of the staff may not be regarded more important than others. Moreover, the allegation that the General Secretariat exercises control over the judges is inconsistent with the Constitution because it provides that all judges are independent in exercise of their conscience and are bound only by the Constitution and the laws.

IV. On the Case of Mr. Takashi TAKANO

A. Misquotation

The remarks made by the Chief Prosecutor of the Okayama District Public Prosecutors Office are not accurately quoted in this report. In fact, his remarks contained no retaliatory or discriminatory implication against those suspects who followed the advice of the attorneys of the Miranda Association.

B. The assault case in Urawa

This is a serious case in which the suspect severely assaulted his wife who lived separately. The prosecutor requested the suspect to appear for an interview, but he refused it without reasonable grounds and then disappeared. The prosecutor judged that the suspect might destroy or tamper evidence, or flee from justice. Consequently the prosecutor arrested him under the warrant issued by the judge. Given the nature of the case and the unreasonable behaviour of the suspect, the arrest was a reasonable legal action. It is not unusual in Japan that the prosecutors arrest the suspect with this nature.

Considering the nature of the case, the conditions for the bail were never harsh or strict to the suspect. The condition that his defence lawyers watch him all day long was proposed by the lawyers themselves when they requested bail for the defendant, and subsequently was approved by the court."

JORDAN

The Hashemite Kingdom of Jordan is a constitutional monarchy ruled by King Hussein bin Talal. The executive authority is vested in the King and exercised by the Ministers. The King appoints and dismisses the Prime Minister who in turn selects a Council of Ministers. The latter is accountable to the bicameral Parliament which comprises an 80-member elected Chamber of Deputies and a 40-member appointed Senate. Some political opposition is legal in Jordan and the Government has licensed 26 political parties since 1992.

The legislative power is vested in both the King and the Parliament. The latter is empowered to approve, reject or amend legislation proposed by the Government. The King proposes and dismisses extraordinary sessions of Parliament and may postpone regular sessions for a maximum of 60 days.

Although the human rights situation had improved since the revocation of martial law in 1991, there was some regression in 1996. In August 1996, for example, the Government dispatched its elite army units and tanks to quell rioting and unrest which resulted when the Government, mandated by an International Monetary Fund structural adjustment scheme, reduced wheat subsidies, doubling the price of bread. At least 40 individuals were injured in the rioting. More than 300 persons, among them, lawyers (see below), journalists and opposition party members, were arrested and detained without charge and some were reportedly tortured while in custody. All the prisoners detained in relation to the "bread riots" were eventually released under an amnesty ordered by the King on 12 November 1996.

The Security Service and the police continued to have broad powers of arrest and detention. Article 195 of the Criminal Code prohibits any criticism of the King and this provision was frequently resorted to in 1996, according to reports received by the Arab Organisation for Human Rights in Jordan (AOHR). For example, Article 195 was used to try Leith Shbeilat, head of the Engineers' Association. He was sentenced to three years imprisonment in March by the State Security Court for slandering the Jordanian royal family. He was released seven months later on 8 November, by virtue of a royal amnesty.

The Press and Publications Law of 1993 also continued to restrict media coverage of certain subjects, notably the military services, the royal family, and monetary policy. Journalists faced increased pressure to engage in self-censorship when reporting on security issues and opposition to the Government, which already controlled the media through its shares in two major press operations.

People must obtain permits for public gatherings. Although the Government usually grants permits for peaceful demonstrations, such demonstrations were very restricted in 1996. Public protests that the Government deemed to be a threat to security, were systematically denied

permits. Moreover, the Government indirectly limited conferences, workshops and seminars by requiring the organisers to obtain Government approval for any such gathering.

The Judiciary

There are three types of courts in Jordan: civil, religious and special courts. The civil courts which include Magistrate Courts and Courts of First Instance, Courts of Appeal, the Court of Cassation and the High Court of Justice. These courts adjudicate all civil, criminal and administrative matters including actions brought by or against the Government. Religious Courts deal with personal status matters. Special Courts are occasionally established to deal with such concerns as land settlements. The State Security Court system mentioned below was established as a Special Court. There is no Constitutional Court in Jordan.

Most trials are public unless decided otherwise by the court for reasons of public order. Defendants are entitled to legal counsel and have the right to appeal.

Although the regular judiciary is generally independent in Jordan, several senior judges were forced to retire in the recent years. This has caused serious concern and public debate.

Appointment and disciplinary procedures

The independence of the judiciary is guaranteed by the Constitution and the Law on the Independence of the Judiciary N° 49 of 1972. Judicial affairs are administered by a Judicial Council. The Judicial Council is composed of ex-officio members named in the 1972 law. They are the President and two judges of the Court of Cassation, the President of the High Court of Justice, the Prosecutor-General before the Court of Cassation, the director of the Ministry of Justice, the Presidents of the Courts of Appeal, two inspectors from the Ministry of Justice and the President of the Court of First Instance in Amman. The Council examines matters related to the judiciary and the prosecutor's office. It then reports to the Minister of Justice with recommendations relating to improving the functioning of the courts and public prosecutions.

Judges are appointed, transferred, demoted or removed upon a decision of the Judicial Council, confirmed by the King. Article 24 of the Law on the Independence of the Judiciary states that judges may not be transferred from a judicial career to another profession without prior consent of the Judicial Council. The CIJL would suggest that for true independence to be achieved, the consent of the judge who is to be transferred should also be obtained.

Article 30 of the Law on the Independence of the Judiciary provides that disciplinary action may be undertaken by the public prosecutor upon request of the Minister of Justice. The Judicial Council is only to be informed of the Minister's request. If the public prosecutor fails to submit a case against the judge within 15 days, the Council can initiate its own disciplinary procedures. The action should state all the charges and evidence against the judge. Grounds for disciplinary action include delays in the examination of cases or in pronouncement judgments and revealing State secrets. After it makes the necessary investigations and interrogates witnesses, the Judicial Council may decide to hold a hearing which is made public only on the request of the judge. The judge may present his or her position personally or be represented by a lawyer. The decision should include the reasons on which it is based and may be appealed before the Supreme Court.

Forced retirement

According to Article 43 of the Law on the Independence of the Judiciary, the age of retirement for a high judicial office such as those of the High Court of Justice and the Court of Cassation and the presidency of the Courts of Appeal is 72. All other judges may remain in service until they reach the age of 68.

Article 14 allows however, the Judicial Council, upon the recommendation of the Minister of Justice, to require the retirement of any judge who has completed the period of service prescribed by the law on retirement. Consequently, judges may be forced to retire upon completion of 20 years of service or they may be suspended in accordance with the Law on Civil Service, with half-pay, upon completion of 15 years of service. Suspended judges are permitted to work elsewhere. This provision effectively subjects judges to the rules of the civil service.

Article 14 further states that a decision to enforce retirement is not subject to appeal before any judicial or administrative body. In the past, this provision prevented the High Court of Justice, which has the power to review administrative orders, from examining such decisions. However, according to the Law of the High Court of Justice N° 12 of 1992, any final administrative decision may be appealed before the High Court even if specific laws previously prohibited the court from doing so. The supremacy of this law was confirmed by judgment N° 310/94 issued on 17 June 1995 when **Judge Hosni Al-Jayoussi** appealed a Judicial Council's decision of 22 September 1994 to force him to retire.

The Minister of Justice has, in recent years, used Article 14 to recommend to the Council the forced retirement of senior and independent judges. In 1996, Article 14 was used to remove 14 judges from the bench (see below) and the Council concurred.

Threatened judicial resignation

In *Attacks on Justice, 1995,* the CIJL reported that 23 judges of the Court of Cassation and the High Court of Justice requested early retirement in protest against low salaries and deteriorating living conditions which they said had threatened their judicial independence. In 1996, these judges withdrew their requests after the Government promised to act on some of their demands.

State Security Court

The state of emergency and martial law, declared in 1967, were suspended in 1991. A State Security Court was established instead. The Court is comprised of three judges who may be either civilians or military officers appointed by the Prime Minister. Lawyers have challenged the appointment of military judges to the State Security Court in civilian cases as a violation of the independence of the judiciary. Partly in response to these charges, a panel of civilian judges was appointed to the court for the first time in December 1995 to try the case of Leith Shbeilat charged with slandering the King. The panel was however, dissolved in September 1996 and was replaced by military judges.

Individuals to be tried before the State Security Court are usually held in pre-trial detention without access to lawyers until shortly before trial, which is frequently held *in camera.* Confessions extracted under duress have been accepted by the State Security Court, however, the Court of Cassation has ruled that the former can not issue death sentences based on such confessions alone. Sentences issued by the State Security Court may be appealed to the Court of Cassation and death penalties are automatically referred to it for review.

In 1996, the State Security Court had jurisdiction over cases involving sedition, armed insurrection, financial crimes, drug trafficking, and slandering the royal family. On 15 February 1997, the Parliament adopted a law expanding the Court's competence to include crimes involving possession of weapons and explosives, and conspiracy against state security.

Cases

Nour Eddin Jaradat (Inspector in the Ministry of Justice), **Mashhour Koukh** (President of the Court of the District of Amman), and **nine** other senior judges, **Ali Mohamed Mutlaq Benhan, Ali Radhi Tashtoush, As'ad Mohamad Al-Gharaibeh, Musa Dakhlallah Al-Rusan, Mufleh Al-Zo'bi** (Judges), and **Saleh Khreissat** (Judge at the Magistrate Court of Irbed): On 18 April 1996, the Judicial Council met at the request of the Minister of Justice. It decided in less than two hours to force Nour Eddin Jaradat, Mashhour Koukh and nine other senior judges to take early retirement. The

Judicial Counsel also decided to suspend Ali Mohamed Mutlaq Benhan, Ali Radhi Tashtoush, As'ad Mohamad Al-Gharaibeh, Musa Dakhlallah Al-Rusan and Mufleh Al-Zo'bi. It also transferred Saleh Khreissat to the public service, as of 20 April 1996.

Most of the judges who were forced to retire were below the age of 55, although they had each served for 20 years. As indicated above, according to Article 14 of the Law on the Independence of the Judiciary and Article 15 of the Law on Civil Retirement (1959), judges who have completed 20 years of service can be required to retire. Those who have completed 15 years of service can be suspended with half their pay until they have "completed" 20 years of service, as stated in the Law on the Civil Service.

Judge Saleh Khreissat appealed against his transfer before the High Court of Justice. He won the case and was reinstated to his judicial post. The remaining retired and suspended judges, however, did not appeal against the decision of the Judicial Council. It was believed by many that they did not believe they could win any such appeal.

Omar Mohammed Abou El-Ragheb {Lawyer and board member of the Arab Organisation for Human Rights in Jordan and chair of its legal committee}: Mr. Abu El-Ragheb was arrested on 18 August and held at the Jouaidah prison for 2 months, under the charge of inciting the bread riots.

Nidal Abou Jamleh {Lawyer}: Mr. Jamleh was arrested on 5 December 1996 on the order of the Court of the District of Amman, and charged with slandering the Court. He was released after a day.

Abdel 'Aal Abou Khalaf {Lawyer}: Mr. Abou Khalaf was arrested on Order of the Labour Court on 7 October 1996, held for one day and charged with slandering the Court.

Mohammad Salamah Al-Doueik {Lawyer}: Mr. Al-Doueik was arrested on 5 September 1996 and tried by the State Security Court after neighbours accused him of making remarks that allegedly slandered the King and the Government. He was cleared of the charges and released a week later.

Zyad Al-Najdaoui {Lawyer}: Mr. Al-Najdaoui was arrested by the General Intelligence Directorate on 26 August 1996 and detained for two weeks in the Sawaqqa prison on the charge of having incited the bread riots.

Sadek Al-Ouazni {Lawyer}: Mr. Al-Ouazni was detained by an officer of the Shumeissani Police for 12 hours on 3 October 1996 for having refused to give him the key to his personal car.

Kheir Al-Rawashdeh {Lawyer}: Mr. Al-Rawashdeh was arrested by the General Intelligence Directorate on 25 August 1996 and detained for one month in the Sawaqqa prison, on the charge of having incited the bread riots.

Bashar Khalifeh {Lawyer}: Mr. Khalifeh was injured and his brother Mahmoud Khalifeh was killed by Security officers in an incident which

occurred on 2 June 1995 (see *Attacks on Justice, 1995*). At the end of 1996, the authorities had not undertaken any formal investigation to bring the perpetrators to trial. The Khalifeh brothers were wanted for allegedly shooting at police patrol cars and sending faxes critical of the Government and the King to prominent citizens.

GOVERNMENT RESPONSE TO CIJL

On 26 May 1997, the Government of Jordan responded to the CIJL's request for comments. The Government submitted a summarised response in which it stated:

> "The Independence of the Judiciary is guaranteed by the Jordanian Constitution (articles 97 & 101).
>
> According to the Special Legislation on the independence of the Judiciary, a Judicial Council is established consisting of the Chief of the Court of Cassation, the Chief of the High Court of Justice, the Attorney General, the Secretary General of the Ministry of Justice, the Chiefs of the Courts of Appeal, the two most senior judges in the Court of Cassation, the most senior Inspector of the Ministry of Justice and the Chief of Amman's Court of first Instance. The Judicial Council has the sole authority to appoint, promote, transfer or remove judges hence ensuring considerable independence for the Judiciary.
>
> Moreover, Judges can appeal to the courts for redress if they believe to have been wrongly deprived of their position.
>
> As to alleged reports of harassment of lawyers, it is important to stress that the rule of law applies to all Jordanians equally regardless of their professional backgrounds."

KENYA

In Kenya, Executive power is vested in the President, elected by universal adult suffrage for a five year term, and his Cabinet, consisting of Ministers is appointed by the President from among the members of the National Assembly. In addition to the executive power, the Constitution of Kenya grants the President additional substantial powers in ruling the country, including the employment of civil servants, selection of members of the Electoral Commission, appointment of the Public Service Commission members and the licensing of political parties and non-governmental organisations.

The legislative power of the Republic of Kenya is vested in the Parliament, which consists of the President and the National Assembly. This constitutional provision underlines the lack of separation of powers because the President who is vested with the executive authority, also plays an active role in Parliament, which is vested with the legislative authority. Moreover, the unicameral National Assembly is composed of 188 elected members and 12 nominated members, appointed by the President. This aspect, together with its partisan politics have seriously undermined the ability of the Parliament to control the Executive within the framework of checks and balances characterising multi-party democracies.

Since independence from the United Kingdom in 1963, Kenya has had just two presidents: Jomo Kenyatta, who ruled until his death in 1978, and Daniel arap Moi, who has been President since then. Both Presidents governed the country as leader of the Kenya African National Union (KANU). In 1982, the Government amended the Constitution and made Kenya a one-party state; Article 2A specifically states "there shall be only one political party, the KANU". The amendment also prohibited members of any political party other than the ruling KANU from holding political office. Between 1989 and 1991, the campaign for multi-party democracy intensified and in December 1991, faced with growing domestic and international pressure, including the suspension of aid from the World Bank and from bilateral donors, President Moi approved constitutional changes allowing the formation of other political parties. When presidential and legislative elections were held on 29 December 1992, they resulted in victories for President Moi and the KANU. However, opposition parties won almost half of the seats in Parliament. International observers reported that these first "multi-party elections" were alleged to have been marked by electoral irregularities.

Although the high level of political violence and ethnic tensions which characterised the early 1990's diminished in 1996, the political atmosphere remained inhospitable for the complete enforcement and respect of those human rights contained in Kenyan Constitution and international treaties to which Kenya is a party. Opposition political parties and the independent press operated openly, but the harassment of members of Parliament, human rights activists and journalists frequently occurred. In particular, harassment

was apparent when these groups tried to operate in rural areas, in connection with peaceful demonstrations, speeches and publications or investigations concerning human rights abuses. Moreover, according to a report of a mission by the International Commission of Jurists of September 1996, the security of people and of their properties was under constant threat, despite the assurances of Government authorities. Journalists often came under attack for writing articles critical of the Government.

The Kenyan authorities increasingly used criminal charges against political opponents to silence criticism. Mr. Kogi wa Wamwere, a former member of Parliament, was originally charged in November 1993 with robbery with violence which carries a mandatory death sentence. It was thought Mr. wa Wamwere was arrested as a result of his leadership of the Kikuyu community which the Government blamed for the violence in the Rift Valley. On 2 October 1995, Mr. wa Wamwere was found guilty of simple robbery and sentenced to four years imprisonment and corporal punishment of six strokes of a cane. The ICJ observed his trial and reported several irregularities (see *Attacks on Justice, 1995*). On 4 July 1996, the Chief Justice dismissed a petition by Mr. wa Wamwere for bail pending their appeal. On 16 December 1996, Mr Wamwere was released on bail on the grounds of ill-health. A second example of the Government's attempts to silence political opponents came in May 1996 when Njehu Gatabaki, chief editor of an independent monthly magazine and member of Parliament was arrested. Mr. Gatabaki had already been arrested on a number of occasions, and in May was accused of involvement in the murder of a policeman.

The Judiciary

Structure of the Courts

Chapter IV of the Kenyan Constitution establishes the Court of Appeal, the High Court and Magistrate Courts. The Court of Appeal is a superior court of record, with jurisdiction and powers to hear appeals from the High Court. The Chief Justice and not less than two other judges sit on the Court of Appeal. The High Court is a "superior court of record, and has unlimited original jurisdiction in civil and criminal matters"(Constitution of Kenya, Article 60(1)). It is the only court with jurisdiction to hear applications relating to human rights, under Article 84 of the Constitution. In fact, the Court of Appeal, the highest court in the country, cannot hear appeals from the High Court concerning human rights cases. The Chief Justice is the administrative head of the judiciary and he enjoys the power of allocating the cases to judges.

The Constitution establishes a number of Kadhi's Courts (Sharia Courts), to be prescribed by an Act of Parliament. The jurisdiction of the Kadhi's Courts extends to the determination of questions of Muslim law

relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion. It is composed of the Chief Justice, and no less than 11 puisine judges.

Parliament is empowered by the Constitution to establish other courts subordinate to the High Court and courts-martial. Such a court is to have the powers and jurisdiction as conferred on it by law. For example, the Land Disputes Tribunals Act of 1990 created the Land Disputes Tribunals. Article 3 of the Act provided that the Land Disputes Tribunals could hear "...all cases of a civil nature involving a dispute as to the division of land, a claim to occupy and work land or to trespass land. The value of the lands should not exceed Ksh 500,000 (approximately US$ 17,800.00) and they have to be outside urban areas, unless the Minister for Lands provides otherwise.

Appointment and Disciplinary Procedure

The Chief Justice is appointed by the President, and the 11 puisine judges of the High Court are appointed by the President acting on the advice of the Judicial Service Commission (JSC - see below). As Article 64(3) of the Constitution establishes that the provisions dealing with the High Court puisine judges apply in the respect of the Court of Appeal Judges, they are also appointed by the President on the advice of the JSC .

Judges of the High Court and Court of Appeal vacate office upon attaining such an age as is prescribed by Parliament. Judges of these courts may be removed from office only for inability arising from infirmity of body or mind or from any other cause, or misbehaviour. If the President or the Chief Justice considers that the removal of a judge should be investigated, the President shall appoint a tribunal consisting of a chair and not less than two other members selected by the President from among persons who hold or have held office as a judge of a court having unlimited jurisdiction in some part of the Commonwealth or of a court having jurisdiction in appeals from such a court. In the case of possible removal of the Chief Justice, the members of the tribunal are to be selected by the chair of the Public Service Commission. The tribunal must inquire into the issue and report and recommend to the President. If the tribunal recommends to the President that the judge ought to be removed from office for inability or misbehaviour, the President shall remove the judge from office. Given that the tribunal is appointed by the President, any true security of tenure from the executive is illusory.

The JSC is established by Article 68 of the Constitution and enjoys the power to appoint, exercise disciplinary control over and remove from office the senior resident, resident and district magistrates, Chief Kadhi and Kadhi, and any other person empowered to hold or to be a member of a subordinate court exercising criminal jurisdiction. The JSC's members are the Chief Justice, who acts as chair, the Attorney-General, who is appointed by the President, two persons appointed by the President from among the puisine

judges of the High Court and from the judges of the Court of Appeal, and the chair of the Public Service Commission, also appointed by the President. The result is that all five members of the JSC are appointed by the President. The Constitution underlines that the JSC, in the exercise of its functions, shall not be subject to the direction or control of any other authority, but its real independence is undermined by its composition, which depends completely on the choices of the President.

The failure by the JSC to ensure the independence of the judiciary has been evident in its practice of appointing judges to term contracts. In its response to the 1995 edition of *Attacks on Justice*, the Government of Kenya maintained that "the practice of appointing foreign judges on short term contract was stopped early in January 1992". However, the Kenya Section of the International Commission of Jurists, in early 1997, reported that still "many judges serve on temporary contract, which the government is free not to renew".

The problem of appointing judges on contract has affected the independence of the judiciary at all levels. The Law Society of Kenya issued a "Statement on the Appointment of the Next and Future Chief Justices". In its statement, the Law Society noted that in 1964 the power of the Governor General to appoint the Chief Justice on the advice of the Prime Minister was transferred to the President. Article 61 of the Constitution establishes, in fact, that "the Chief Justice shall be appointed by the President" and it does not mention the advice of the Judicial Service Commission. The Law Society also reviewed the history of the appointments of Chief Justices and highlighted the fact that since independence, only one Kenyan of African origin had been appointed Chief Justice. The non-Kenyan Chief Justices were all appointed on contract. The Law Society recommended that the next and all future Chief Justices be appointed by the President, but only with the approval of Parliament.

Interference from the executive

The judiciary encountered significant interference from the Government throughout 1996. On 24 May, it was reported that President Moi issued a directive to the Chief Justice to instruct magistrates "to keep off land cases and leave them to elders", whom he alleged knew more about land matters than the magistrates.

On 7 June, the President reportedly warned the judiciary "to keep off" political party matters. He claimed, in fact, that political parties had constitutions to guide them and that the judiciary would reduce its status by handling such cases. More specifically, President Moi recognised Raila Odinga as the bona fide leader of FORD-K, a major opposition party, while the issue was still under court consideration.

President Moi affirmed his position concerning the judiciary in investigating into matters related to political parties in a public rally held towards

the end of the year at Bungoma's Namanjara Stadium. He asked the Chief Justice not to hear actions against political parties, arguing that the issues involved should be resolved internally by the parties. It was thought that the President was reacting to reports that two KANU members, Mohammed Yusuf Haji and Benson Atandi Suleiman, had taken the KANU to court seeking a declaration that the current party officials, led by President Moi, were in office illegally. In fact, according to the party's constitution, offices are held for a five year term, which term had expired in 1993, when the party was supposed to hold internal elections. However the officers simply remained in office without any elections. It is reported that the Chief Justice had ordered, with no apparent reason, the case file to be removed from the Mombasa High Court registry, where it was filed, and sent to Nairobi.

On 14 March 1996 a circular on bail was issued by Chief Justice A. M. Cockar, which instructed judges to automatically deny bail to accused persons who have other criminal trials still pending. Such directives undermine the principles of the presumption of innocence and the independence and impartiality of judges. In addition, it appeared that the refusal of bail had become a substitute for detention without trial. The ICJ Mission was informed that the circular was distributed shortly after a President's declaration reproving the behaviour of some judges in bail matters. On 9 September, the Law Society of Kenya wrote to the Chief Justice to express its concerns regarding the circular on bail. It specifically requested the Chief Justice to withdraw the directive. The Law Society then filed an application in court, challenging the authority of the bail circular. At the end of 1996, that application had not yet been determined.

It was reported to the ICJ mission that there was, in Kenya, a general lack of confidence in the ability of the judiciary to guarantee and enforce human rights and to check abuse of power. There was the perception that the judiciary was subservient to the executive. The ICJ was particularly concerned with the fact that the majority of the legal profession in Kenya was convinced that the judiciary was mostly pro-Government. In addition, the slowness of trials, the denial of bail as a punishment in order to appease the executive, the lack of transparency in the judicial appointment process, the shortage of judges, the inadequacy of judicial resources and corruption seriously undermined the credibility of the judiciary.

During the annual general meeting of the Kenyan Magistrates and Judges, held in August 1996, Appeal Court Judge Mr. Richard Kwach asked for a constitutional review to give the judiciary real authority and independence from the executive. He added that 1996 would be remembered as a year when the judiciary came under sustained attacks from politicians.

The right to legal representation

Free legal aid is not provided in Magistrate courts. Defendants charged with serious crimes, such as robbery, robbery with violence or attempted

robbery with violence are moreover tried in Magistrate Courts by the Chief Magistrate or Senior Resident Magistrate sitting alone without assessors. Robbery with violence constitutes a crime punishable, in Kenya, by mandatory death. According to the reports of human rights organisations, the majority of offenders convicted of robbery with violence and sentenced to death do not have legal representation because they can not afford lawyers.

The Attorney-General

Article 26(3) of the Constitution gives the Attorney-General, who is appointed by the President, the power "in any case in which he considers it desirable so to do, to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority". Allegedly, on a number of occasions, Attorney-General Amos Wako used his authority to terminate cases against Government officials. Moreover, it was reported that in 1996, the Attorney General maintained that citizens, before initiating private prosecutions, were required to notify his office.

The case of a private action by the Law Society of Kenya against Vice-President Saitoti also put the impartiality of the Attorney-General's office into question. The Kenyan Law Society claimed that the Vice-President and others had embezzled funds from the treasury in the "Goldenberg scandal", in which billions of tax payers' shillings were reportedly stolen in a golden export scam. On 5 December 1996, Nairobi Chief Magistrate Uniter Kidula, found that the Law Society of Kenya had no legal standing to institute private prosecutions on behalf of the public and that only the Attorney-General had the power to do so. In her ruling, the Chief Magistrate defended this formal legality without taking into account the Law Society's attempt to fill a dangerous vacuum.

In its Mission report, the ICJ recommended the de-politicisation of the Office of Attorney-General.

Cases

Munga Apondi (Magistrate in Nyeri); **Kaburu Bauni** (Magistrate in Meru); **Maxwell Gicheru** (Magistrate in Nyambene); **Sheik hassan Ali** (Magistrate in garissa); **Florence Jaoko** (Magistrate in Natrubi); **J.R. Karanja** (Magistrate in Malindi); **Njeru Kerembui** (Magistrate in Nyahururu); **S.M. Kibunja** (Magistrate in Embu); **Maina Kiriba** (Magistrate in Winam); **R.O. Kwach** (judge of the Court of Appeal); **Jessi Lesiit** (Magistrate in Nairobi); **P. Moitui** (Magistrate in Kapsabei); **Aggrey Muchelue** (Magistrate in Bungoma); **Florence Muchemi** (Magistrate in Kiambu); **Robert Mutitu** (Magistrate in Kisumu); **Rosemelle Mutoka** (Magistrate in Nairobi); **J.R. Mutui** (Magistrate in Kapsabei); **Kathoka Ngomo** (Magistrate in Nyambene); **Ithiga Njeru** (Magistrate in Kiambu);

Nkuku Njuki {Magistrate in Voi}; **Kenneth Ogolla** {Magistrate in Machakos}; **E. O'Kubasu** {judge of the High Court}; **Boaz Olao** {Magistrate in Machacos}; **Emily Ominde** {Magistrate in Nakuru}; **Daniel Ondabu** {Magistrate in Webuye}; **S. Ondeyo** {Judge of the High Court}; **Hellen Owino** {Magistrate in Nakuru}; **Norah Owino** {Magistrate in Bungoma}; **A. Ringera** {judge of the High Court}; **Margaret Rintari** {Magistrate in Nanyuki}; **Olga Sewe** {Magistrate in Kisumu}; **Beatrice Thuranira** {Magistrate in Mombasa}; **F.F.Wanjiku** {Magistrate in Kerugoya}; **Teresia Wekulo** {Magistrate in Butali}.

These 34 Magistrates and Judges were unable to attend a Regional Workshop on the Omtermatopmaé Bill of Rights in Arusha, Tanzania, in January 1996. They were all members of the Kenya Magistrate and Judges Association and had been nominated from every province by the Association to attend the workshop that had drawn participants from the judiciary and legal fraternity from all of East Africa. The Chief Justice refused to fund their attendance, and as a result, they were prevented from attending the Conference.

Wang'ondu Kariuki {Lawyer}: Mr. Kariuki was arrested in September 1995, on charges that he was a member of the February Eighteen Movement which President Moi alleged planned to overthrow the government. It was reported that Mr. Kariuki was tortured before being released on bail in October 1995. (See also *Attacks on Justice 1995*) In May 1996, the Kenyan Government informed the CIJL that Mr Kariuki's trial would be heard from 23 to 26 July 1996. However, at the end of 1996, his case had not yet been determined.

Juma Kiplenge {Nakuru lawyer}: Mr. Kiplenge was arrested by a team of six Criminal Investigation Department (CID) police officers on 31 July . The next day he was taken before a Nakuru Resident magistrate, Mr. Haroun Bommet. Mr. Kiplenge was charged with being a member of an unlawful organisation, the Endorois Community Welfare Committee formed to fight against economic marginalisation they assert they have suffered. Mr. Kiplenge denied the charge and applied for bail. The magistrate ruled that the application would be heard before Principal Magistrate, Mr. William Tuiyot, the following day. On 2 August, Magistrate Tuiyot deferred his ruling until 5 August and ordered Mr. Kiplenge to be detained at Nakuru police station to enable the police to complete their investigations. Instead, and contrary to Kenyan law, Mr. Kiplenge was taken to court on 3 Saturday, August, a non-working day. His counsel was not notified of this change and, therefore, was not present in court. Mr. Kiplenge was released on bail and at the end of 1996, his case was pending.

Paul Muite {Human rights lawyer and opposition member of Parliament}: Mr. Muite was one of the defence counsel for Koigi wa Wamare (see above). In July 1996, Mr. Muite and several other members of SAFINA, one of the major opposition parties, were arrested by Nanyuki police, during the presentations of a local volleyball competition. The police took them to the Nanyuki police station and held them for two hours.

Aaron Ringera {Judge}: In December 1996, Judge Ringera was appointed by President Moi to the office of the Solicitor General. Allegedly, this appointment was suspect because the Solicitor General does not enjoy any security of tenure and is under and answerable to the Attorney-General, who is himself a political appointee.

GOVERNMENT RESPONSE TO CIJL

On 21 July 1997, the Government of Kenya responded to the CIJL's request for comments. The Government stated:

> *"Separation of Powers: (... Paragraph 2)*
>
> There is real and actual separation of powers in Kenya.
>
> The President attends parliament on two occasions; one, when opening sessions of parliament and when the annual budget speech is being delivered by the Minister of Finance. Although the President can attend sessions in parliament he has never done so, neither has he contributed on any of the debates.
>
> It should be noted that this is a convention of parliamentary practice in most, if not all Commonwealth jurisdictions.
>
> *Assemblies and Processions (Paragraph 4)*
>
> The Government has recently introduced a bill in parliament which would provide for a notification procedure rather than a licensing procedure. The bill is still being discussed both within and outside parliament.
>
> *Freedom of the Press*
>
> Kenya has one of the freest media in Africa. The proliferation of both daily and periodical magazines and newspapers attest to this. Incidents of harassment of journalists over the past year or so for criticising the Government have not arisen.
>
> *Cases - The Judiciary ... - (Paragraph 2 Last Sentence)*
>
> Kadhis court is composed of the Chief Kadhi and not less than three and not more than twelve Kadhis.
>
> *Appointments and Disciplinary Procedure... - paragraph 4*
>
> We are surprised that our comments on the issue of contract Judges has not been taken into account. We would like to reiterate the position of the 1995 edition of *Attacks on Justice* that the appointment of judges on contract terms ceased in 1992. No serving judge is on temporary contract terms. There are no foreign judges expired and the contracts are now on permanent and pensionable terms. The current Chief Justice is a

Kenyan and will serve until he reaches his retirement age. He is not on contract.

Interference from the Executive

Although the President commented on political parties disputes not being dealt with by courts, it is common knowledge that political parties continue to rush to court to resolve their disputes, a clear sign of their confidence in the courts. Clearly this demonstrates that judges and magistrates are men and women of law and cannot be so influenced. The draft report has only given instances where the President is alleged to have made remarks which could be construed as likely to interfere with due process of the law but the report has not shown that such remarks did in fact result in miscarriage of justice. The Raila Odinga example is a typical case showing the independence of the Judiciary in that the court made a decision which was not in accordance with the President's views on the matter.

Recently the Attorney General informed Parliament that the Government was committed to the subjudice rule. The case involving KANU which you have mentioned should really have been filed in Nairobi. However, it is confirmed that the case is currently being heard by the Judge in Mombasa.

The Judiciary is not subservient to the Executive. The Constitution Guarantees the independence of the Judiciary. Further and better particulars of this allegation ought to be given to enable the Government to respond. On the question of magistrates "keeping off land cases and leave them to elders" - the President simply reiterated the provisions of The Land Disputes Tribunal Act, 1990, which empowers the Lands Disputes Tribunals to hear and determine civil disputes relating to division of or determination of boundaries to land, a claim to occupy or work land on trespass to land. The Tribunal is comprised of a chairman and 2 or 4 elders. The decision of the Tribunal is filed in the magistrates' court for the latter to enter judgement. Appeal to the High Court on point of law only. Apart from entering the judgement of the Tribunal clearly magistrates are excluded from hearing land cases relating to above disputes.

The 34 magistrates and Judges could not be provided with funds to attend the Workshop in Arusha due

1. to lack of funds at the time as there was no budgetary provision for this

2. to lack of coordination between the organisers and the would-be participants. The notice was too short which would have seriously interfered with courts' schedules.

The Right to Legal Representation

The Attorney General is convening this, with the support or co-sponsorship of the Law Society of Kenya, Kituo Cha Sheria, the Public Law Institute and the International Commission of Jurists (Kenya Chapter) a seminar on how to make this right a reality in Kenya in the most cost effective manner.

The Attorney-General

In the few cases where I have used my powers to terminate criminal cases in which the public has been interested, the Attorney General has exercises his discretion properly and in accordance with the law. You mention the Law Society's attempt to fill the vacuum. There is no such vacuum. If the Attorney General has been notified of the intended private prosecution, and if there is sufficient evidence disclosed to him to prosecute and he does not, then the Court is likely to grant a person with locus standi permission to institute criminal proceedings. The Law Society of Kenya's intended prosecution in the Goldenberg sags is a case in point. Although they promised publicly and in their minutes that they will give the Attorney General sufficient evidence to prosecute and that they will give the Attorney General first opportunity to prosecute, they in bad faith breached these undertakings and filed an application to initiate private prosecution a few days before the Paris talks.

The office of the Attorney-General is not politicised. It is a few elements in society who have tried their best to politicise it by making allegations which cannot be substantiated or believed by an objective observer.

Paul Muite

The Attorney General directed the Commissioner of Police to investigate and asked Hon. Paul Muite to report the incident.

Cases: Hon. Justice Aron Ringera

Hon. Justice Ringera was appointed as Solicitor General on 5 December 1996. He However, is on assignment and/or Secondment to the Attorney General's Chambers for a period of 3 years. His security of tenure along with other privileges were not interfered with. The matter was discussed with him prior to appointment."

KYRGYZSTAN

Having declared its independence from the Soviet Union on 31 August 1991, the Government of Kyrgyzstan adopted the Constitution of the Kyrgyz Republic on 5 May 1993.

President Askar Akayev called for early elections in December 1995. The call itself was seen by many as contrary to the Constitution and the election results were marred when three candidates were deregistered just prior to the vote.

On 10 February 1996 a referendum was held which called for approximately 50 amendments to the Constitution, including new presidential powers. The proposed constitutional amendments were published only one month before the referendum was held, leaving insufficient time for the public to understand them. The amendments were approved in the referendum and the Constitution was accordingly amended, although gross irregularities in the voting process were reported. The amendments allowed the President to appoint the cabinet without parliamentary approval, except for the position of Prime Minister. He can however, dismiss the Prime Minister and dissolve the People's Assembly if it rejects his candidate for Prime Minister three times.

On 26 February 1996, the Government of Prime Minister Apas Jumagulov resigned and President Akayev appointed a new Cabinet on 4 March 1996.

In 1996, portions of the new civil and criminal codes and the criminal procedure code were passed, although several provisions remained under discussion. In March 1997, the final draft of the criminal code was approved by the parliamentary committee and was under consideration by the Assembly of People's Representatives.

THE JUDICIARY

Article 7(1) of the 1993 Constitution provided that the state power in the Kyrgyz Republic was to be based on a number of principles including the "division of state power into legislative, executive and judicial branches". Article 79(4) requires judges to "be provided with his social, material and other guarantees of his independence." In 1996, Article 7(1) was amended to require the "harmonious functioning and co-operation" of the three branches.

COURT STRUCTURE

According to the Constitution, the Supreme Court is the "highest body of judicial power in the sphere of civil, criminal and administrative court action". It supervises the Bishkek City Court and the regional and city courts and the military tribunals.

At the same time, the Constitutional Court, which was sworn in during 1995, is "the highest body of judicial power for the protection of the Constitution of the Kyrgyz Republic". It has the power to, *inter alia*, declare laws unconstitutional, decide disputes concerning the effect, application and interpretation of the Constitution and issue a judgment on the validity of the impeachment of the President and judges of the Constitutional, Supreme and Arbitration Courts. It can also give its consent for the criminal prosecution of the judges of the local courts. There is no appeal from the Constitutional Court. In November 1996, the Constitutional Court asserted its independence and held that the election of the speaker of the Assembly of People's Representatives had been unconstitutional in that parliamentary procedure had not been followed. The Assembly accepted the ruling and elected a new speaker.

The Supreme Arbitration Court decides economic disputes based on different forms of property. It supervises the regional arbitration courts.

Citizens may establish Elders Courts (*Aksakals' Courts*) and Arbitration Courts in the territory of *ails*, settlements and cities. These courts may consider minor offences, property and family disputes and "other cases envisaged by law referred to them by the arguing parties with the purpose of conciliation and reaching a just decision which does not contravene the law". Their decisions may be appealed to the corresponding Regional and City Courts. Concerns have been reported that in some instances, Elders Courts have tried serious crimes and delivered sentences, including one reported death sentence, which exceeded their authority. It was also thought that torture was used to extract confessions to be used before the Elders Courts.

According to Article 86(2) of the Constitution, the refusal to execute a judgment or the interference with the operation of courts is punishable in accordance with a procedure established by law.

The power of the Procurator

Despite the introduction of a new judicial structure in the Constitution, the judicial system continued to be influenced by the former Soviet system in 1996. In particular, the Procurator's office retained sweeping powers. It carried out investigations and had the power to decide who may be detained, arrested and prosecuted.

Detainees are entitled to access legal counsel but in practice, they may not meet with their lawyer until trial. The Procurator is entitled to hold a person in pretrial detention for a maximum of one year, although a detainee may be conditionally released prior to that time.

The Procurator tries the case before a judge and two people's assessors, who are pensioners or citizens chosen from labour collectives. The defense has access to all evidence gathered and are entitled to attend all proceedings

and question all witnesses. However, witnesses merely affirm or deny the statements already in the Procurator's files - they do not have to provide a full testimony. In addition, members of the public are entitled to question the witnesses.

As the Procurator and not the judge, supervises criminal proceedings, the role of the judiciary is largely seen as a rubber stamp. If the judge does not arrive at a verdict of innocence or guilt, but instead decides that the case is "indeterminate", the judge may return the case to the Procurator for further investigation. In this case, the accused will be returned to custody to await trial.

Examination of judges

Article 81 of the Constitution, as amended, allows judges to be removed for reasons of health, resignation, commission of a crime, "for other reasons stipulated by law" and *"on grounds of the outcome of their qualification tests"*. On 21 May 1996, President Akayev issued Decree 171 "[o]n testing of judges of the local courts of Kyrgyzstan". The Decree was published in newspapers and advised that there was a need to test the knowledge of the judiciary and to conduct a "purge." Pursuant to the Presidential Decree, regulations were drafted and enacted requiring the judges to take the "examination". An Examination Commission was established consisting of the Chairs of the Constitutional, Supreme and High Arbitrage Courts, the Minister of Justice, Heads of the Justice Department of the President's Administration, the Department of Criminal Law and Process of the Kyrgyz State National University and two judges of the Supreme Court and one of the High Arbitrage Court. It was announced that the Commission's decision would be final and not subject to appeal, although the President had the right to repeal the decision of the Commission.

A list of 642 questions on constitutional, administrative, civil, legal, housing, family labour law and procedure was compiled. The examination included a dossier on each judge which detailed the conduct of the judge over the past five years. Approximately **267** active judges and **14** acting judges from all 60 courts of the six Oblasts of Kyrgyzstan were required to take the exam; judges from the Arbitrage, Constitutional and Supreme Courts were exempted.

In the end, **50** of the judges lost their jobs, 39 because of the results of the examination; the remaining 11 voluntarily resigned. The dismissals were made on the basis of secret votes which were held on the same day as the examination. One judge failed the exam after refusing to succumb to pressure from the Government to overturn a lower court decision which was seen to be contrary to Government interest. Although this judge specifically asked why a failing grade had been given, members of the Examination Committee admitted there had been no complaints concerning the judge's competence.

Even those who passed the examination were only enrolled in the "reserve judiciary", from which new judges could be appointed. The judges who "failed the examination" were advised that they would be able to retake the exam in 1997 and there was a sense that most of the judges simply decided to act in accordance with the authorities wishes, in the hope that they will receive a passing grade when they take the test again in 1997. Most of the judges who failed the exam were given alternate although not comparable employment; for example, the CIJL was told that two members of the administrative staff of the Constitutional Court were two of the former judges.

The CIJL was told by one of the judges required to take the test that, although several of the judges believed the Decree was illegal and contrary to the law, none of the judges objected to it because they were afraid they would "fail the examination" if they did. The Human Rights Committee of Kyrgyzstan, a non-governmental organisation, did challenge the regulations before the Constitutional Court on the basis that there was no appeal procedure stipulated in the regulations, contrary to Articles 15 and 18 of the Constitution. In October 1996, the Constitutional Court rejected the application on the grounds that the right to appeal to the Constitutional Court was available only to legal and natural persons. As the Human Rights Committee was not a legal or natural person, its rights had not been infringed and it could not be regarded as a subject of appeal. Accordingly, each judge had to bring an individual application. None of the judges who failed the exam were prepared to file such an application, reportedly because they believed it would jeopardise their chances to be reappointed when they were re-examined in 1997.

However, on 9 December 1996 a group of judges was reported by a local newspaper as having declared that their civil rights had been infringed. The declaration was addressed to several members of the Legislative Assembly. The judges requested the members to apply to the Constitutional Court to declare Presidential Decree N° 171 concerning the judges examination invalid. The judges argued that as the testing of judges by the other powers is not stipulated in the Constitution, the regulations passed by the Decree were invalid.

While the CIJL acknowledges that Kyrgyzstan is in the midst of a transitional period and that judges from the Soviet era who remain on the bench may be unable or unwilling to embrace new ideologies, it views these dismissals as an attack on the independence of the judiciary which may have reverberating repercussions for years to come. The Constitution or the Law on the Status of Judges (see below) must truly provide for a mechanism by which judges who face removal are entitled to a fair hearing. Specific allegations of corruption or incompetence must be made, investigations conducted and a full hearing, with a right of appeal provided. The manner in which these judges were removed violates these standards.

Additional threats to the independence of the judiciary

On 23 October 1996, the General Prosecutor, Mr. Asanbek Sharshenaliev called for the reinstatement of two provisions which the Constitutional Court had declared unconstitutional. They included Article 28 of the Kyrgyz Republic Act on Public Prosecution and Article 381 of Part II of the Criminal Procedure Code which permitted the Public Prosecutor to object to all court sentences, judgments and declarations.

From 30 November - 17 December 1996, President Akayev signed a series of decrees which permitted the appointment of regional, city and district local judges for three year terms only. Further, decrees were passed which will permit a judge to be transferred without notice. These decrees clearly violate the most basic principles of an independent judiciary.

On 20 March 1996, an edict "on measures to increase the role and responsibilities of the heads of local authorities and local self-management" was issued. At the Second Congress of Judges in December, President Akayev admitted that local authorities had begun to instruct the judges in their districts and require the chairs of the District Courts to report to them, as a result of the edict.

Draft Appointment Procedure

At the end of 1996, the Government was considering a draft Constitutional Law of the Kyrgyz Republic on the Status of Judges (the Draft Law). The Draft Law would confirm the constitutional provision that judges of the Supreme Court and the Higher Arbitrage Court are to be elected by the Chamber of the People's Representatives upon nomination by the President for a period of ten years. It also confirms that appointments to the Local Courts of general jurisdiction, the Military Courts and Local Arbitrage Courts are to be made directly by the President for an initial term of three years which may be renewed for terms of seven years. When the Speaker of Parliament was asked by the CIJL why judges were not appointed for life terms, he indicated that those provisions were intended to address the potential for corruption within the judiciary.

Article 4 of the Draft Law requires judges of the Regional and Bishkek City District and City Courts and Arbitrage Courts to have a university degree and not less than five years of "experience in the legal field". In 1996, the regulations governing the standards of legal training, and work which qualified as part of the legal experience required was questionable.

Removal Procedure

Both the Constitution and the Draft Law provide for the removal of judges. As indicated above, Article 81 of the amended Constitution allows judges to be removed for reasons of health, resignation, commission of a crime, "for other reasons stipulated by law" and "on grounds of the outcome

of their qualification tests". Article 81(2) further provides that Judges of the Constitutional Court are removable for the above reasons upon a two-thirds vote of the total membership of both the Legislative Assembly and the Assembly of People's Representatives. Article 81(3) of the Constitution allows for the removal of Judges of the Supreme Court and the High Arbitration Court upon a two-thirds majority vote of the total membership of the Assembly of People's Representatives.

Article 9 of the Draft Law sets out a "Code of Honour" of the Judges of the Kyrgyz Republic and Article 9(2) provides that "[v]iolations of the requirements of the Code of Honour of a Judge of the Kyrgyz Republic are subject for consideration" by the Qualification Board of Courts of General Jurisdiction and the Arbitrage Courts. "Misconduct of a judge ... will entail disciplinary penalty in the form of remark, reprimand or very strict reprimand or the initiation of the process of removal". The Code of Honour contains 13 requirements, several of which are vague and therefore susceptible to abuse. For example, Article 9(1.1) requires judges to "follow the Constitution, other laws and normative acts, generally accepted norms or morality and rules of behaviour".

Article 11 of the Draft Law details the circumstances which can lead to the removal of a judge and includes a violation of the Code of Honour. Article 11(1.6) allows a judge to be removed for refusing to transfer to another court because of abolishment or reorganisation of the court.

Resources

Article 18 of the Draft Law provides judges to be paid a salary *to be determined by the President,* and additional payments for qualification class, seniority and special conditions of work. They will also receive payments for "complexity, intensity, great achievements in work and special regime of work". Of particular concern is that judges will also receive *"financial stimulation (bonuses) for the results in work for the period of a quarter or a year"*. "Results in work" is not defined and clearly open to abuse.

Although the CIJL was told that approximately US$ 200-300 are required by an average citizen each month to maintain a basic standard of living, Supreme Court Justices are only paid US$ 50.00 each month, necessarily leaving the judiciary open to corruption. It is widely acknowledged by Human Rights NGOs in Kyrgyzstan that corruption is not uncommon amongst the judiciary: from September 1994-1996, six criminal investigations against judges were undertaken, although as of the end of 1996, no judge had been convicted of an offence.

Lawyers

The overwhelming majority of lawyers in Kyrgyzstan are employed by the Government. Lawyers negotiate a fee with each client and are then

required to pay the Government approximately 60% of that fee. That payment represents taxes, pension payments and what appears to represent a "finder's fee". "Non-Government Lawyers" are not permitted to act in criminal matters, which obviously severely restricts their client base and virtually forces lawyers to work for the Government.

Currently, lawyers are not permitted to introduce evidence into court; they can only cross-examine on the evidence which has been provided by the court or the prosecutor. At the end of 1996, there were at least two draft laws on the legal profession before Parliament which has been considering various draft laws for over three years.

Cases

Yury Maksimov {Lawyer}: Mr. Maksimov has frequently acted in politically motivated cases. For example, he defended two activists and journalists against charges of defaming the President. In September 1996, Mr. Maksimov was the victim of a hit and run accident. The circumstances of the accident were reportedly not investigated by the police.

Renat Medet {President of the Association of Independent Jurists}: On 22 May 1996, Mr. Medet was physically assaulted in the building of the Bishkek Interior Affairs Department by the staff of the Department. The staff had reportedly demanded that he refuse to defend one of his clients. By the end of 1996, the Procurator's Office had not investigated the incident.

Government Response to CIJL

On 14 July 1997, the Government of Kyrgyzstan provided the CIJL with a lengthy response to the draft chapter in Russian. Unfortunately, due to space limitations, the CIJL was unable to reproduce the entire response. Below is a summary of the English translation of the response.

> "The ... Chapter on Kyrgyzstan gives a distorted conception of the process of constitutional reform carried out in the country, it is based on the superficial knowledge of the subject of the survey and incorrect information resulted from ignorance of the prevailing laws and reality of the political and legal life.
>
> 1. President Akajev did not call the elections before time in December 1995. The elections of the President of the Republic were meant to be on 24 December 1995. The elections of the President were fixed by the decree of the Legislative Assembly (Jogorku Kenesha) on ... 22 September 1995. The elections were held on the alternative basis ...

The elections were attended by lots of foreign observers, including from Europe and the USA. No significant violations in the course of voting were discovered.

As far as the referendum of 10 February 1996 is concerned, it was carried out in accordance with the Law on Referendum. The Law on making alterations and amendments to the Constitution ... ratified on 5 May 1993 was submitted to Referendum... As the new two-chamber Parliament had not been able to make the corresponding alterations caused by separation of powers between the chambers, President Akajev as a guarantor of the Constitution was obliged to submit the case to the verdict of the people.

2. In May 1996 the Legislative Assembly ratified the first part of the new Civil Code... On 10 June 1997, the new Criminal Code ...was ratified. The Criminal Code will come into force on 1 January 1998.

3. According to the Article 85 of the Constitution, Aksakals courts can be established out of aksakals (i.e. the elders) or other people hold in great respect, by decisions of citizens' assembly, keneshesí assembly or another representative agency of local self-government in the territory of auls, rural settlements or towns. Aksakals courts are not included in the judicial structure of Kirghiz Republic.

According to law, Aksakals courts cannot consider criminal cases and therefore have no right to impose sentences on them... [Also, the statement that] obtaining confessions for Aksakals courts the torture was used does not correspond to reality. As defined by item 1 of Article 18 of the Constitution, no human being can be subjected to torture or inhumane ... punishment Violation of this constitutional provision involves criminal responsibility.

4. According to Article 78 of the Constitution, Procuracy of Kyrghyz Republic supervises the exact and uniform execution of legislative acts within the frames of its competence. ...The Procurators also carry on prosecution at criminal cases and take part in judicial examination in cases and in prescribed manner provided for by the Criminal Procedure Code. The statements in Chapter are wrong.

5. The statement on the judges' examination do not correspond to reality. According to Article 81 (1) of the Constitution, judges can be relieved from their offices either at their own wish, or by health condition, or for the committed crimes when the judgement of guilt enters into legal force, or by other reasons provided for by law...

Judge's Examination is carried out on the basis of the Statute on examination of judges of local courts of Kyrghyz Republic, confirmed by the Decree of the President of the Republic on 21 May 1996. The Decree was issued in order to implement the provisions of the Constitution ... on appointment and relief of judges of local courts. No purge is mentioned in the Decree. The examination of judges of local courts is carried out in order to create real judge's corps, to fortify local courts with competent jurists, deserving the high title of judge and capable to effectuate justice skilfully. One of the reasons of the Examination of judges were numerous appeals of citizens to President Akajev, and the mass media information on improper actions of judges. The situation in the judicial system of the republic caused justified censure of the society.

To carry out the examination of judges and applicants for judge's positions the Examination Board for local courts of Kyrghyz Republic is formed; it is composed of the Chairmen of the Constitutional Court, Supreme Court, and High Arbitration, two judges from the Supreme Court and a judge of High Arbitration, one representative from each: the President and the Government and a scholar-jurist. The Examination Board renders decision according to the results of the examination, depending on the level of professional competence, working experience and quality of work, moral and professional characteristics of the examined... The Examination Board takes decisions collegially, when at least two-third board members are present and by simple majority vote. In accordance with the Statute, a failed person can repeat the examination after a year.

Between September-October 1996 all judges of local courts, i.e. 251 judges and 105 applicants for the judge's positions in local courts, had gone through the examination. 198 of judges and 73 applicants passed the examination. Those passed the examination entered on the Human Resource Reserve List to replace the vacant positions of judges of local courts. According to the results of examination 38 applicants were appointed to judge's positions in local courts in December 1996...

6. ... In accordance with the Constitution (Article 80, item 2) the President appoints judges of local courts for a 3-years period for the first time and for a 7-years period subsequently. Following the Constitution and according to the results of carried out in the examination, the President of the Republic issued Edicts of 30 November and 2 December on the appointment of the chairmen and judges of local courts. In so far as the

President was guided by the Constitution, violation of the principles of the independence of judiciary does not exist.

... On 7 December the Second Congress of Judges of the republic took place, where President Akajev made a speech. There he emphasised that independence of justice is one of the basic conditions of its legality... So it is going without saying that in no way could the President allow the local authorities to start to instruct judges, as it is said in the Chapter. Just the opposite, the President criticised local authorities that by reason of misinterpretation of the statements of the Edict of 20 March 1996 on measures to increase the role and responsibilities of the heads of local authorities and local self-management started to require the chairmen of districts courts to report to them, but it is inadmissible.

7. Advocates and persons engaged in legal activities on the grounds of granted licence are meant. In accordance with the law, advocates of Kyrghyz Republic are members of voluntary non-governmental associations engaged in advocacy practice.

Advocates represent citizens' interest in criminal and civil litigation. In accordance with Article 29 of the Criminal Proceedings Code of Kyrghyz Republic participation of defender (advocate) is admitted from the moment of filing accusation; in the event of detention of the person suspected in commission of crime or his confinement under guard before filing accusation, a defender should be admitted to the person from the moment of announcement of the protocol of detention or a summons on application of such a measure of restraint within 24 hours from the moment of detention...

In accordance with the legislation of Kyrghyz Republic, persons obtained the licence to engage legal practice do not have the right to present cases as defence counsel in criminal procedure.

At present Draft Law on Advocatura is under discussion in the Jogorku Kenesha of Kyrghyz Republic..."

LEBANON

The President of the Republic of Lebanon is elected for a six-year term by the unicameral National Assembly (the Council of Deputies). Article 49 of the Constitution was amended in October 1995 to allow President Elias Hrawi to remain in office for three more years. Previously, the President served a single six-year term and could be re-elected only six years after the end of his last term in office.

The President and the Speaker of the Council of Deputies appoint the Prime Minister. Under a "National Covenant" agreed to in 1943, power is allocated between religious groups. The President is a Maronite Christian, the Prime Minister a Sunni Muslim and the Speaker of the Council of Deputies a Shia Muslim. In September 1990, the 1926 Constitution, which was enacted when Lebanon was under the French Mandate, was amended and some powers were transferred from the President to the Prime Minister.

The Council of Deputies exercises the legislative authority and is elected by universal suffrage every four years. Under the 1989 National Reconciliation Agreement signed in Taif, Saudi Arabia, to end the civil war, deputies agreed to amend the National Covenant to create a 50/50 balance between Christian and Muslim members of Parliament. The Taif Agreement also increased the number of seats to 128. It further permitted a Syrian military and security presence in Lebanon which continued throughout 1996.

The second general elections for the Council of Deputies since the end of the civil war in 1989 were held in August and September of 1996. Many citizens complained that the new Electoral Law of July 1996, with a new district division, was tailored to favour some political groups. The Maronite Christian heartland of Mount Lebanon was divided into six electoral districts, while the other governments remained as single constituencies. The law was ruled unconstitutional by the Constitutional Council on 8 August as it created two types of electoral constituencies in the country, violating the constitutional principle of equality before the law. The government responded by introducing another bill with minor amendments. It stated that the new law would apply exclusively to the 1996 elections. As a result, the Christian Maronite political groups called for a boycott of the elections.

Nevertheless, the 45% turnout for the 1996 elections was higher than that of the 1992 elections (32%) which were also boycotted by the Maronite Christian community. The election results were considered as a success for the Prime Minister Rafiq Al-Hariri and his Syrian backers. They were, however, flawed by the continued Christian opposition's call to boycott the polls, numerous reports of irregularities in the voting process and in counting ballots, including lack of privacy for voting at some polling stations, the alleged use of forged identities, and the alleged buying of votes. Government officials acknowledged some electoral flaws and losing candidates could challenge the results through the Constitutional Council. By year's end, no decisions had been issued.

Municipal elections have not been held since 1963. Officials serving municipal positions have had their terms extended several times since then or have been appointed by the central Government. The Government announced plans to hold elections on 1 and 8 June 1997.

The human rights situation in Lebanon has not improved substantially since the end of the civil war. Although the Constitution provides for all civil liberties, they tend to be restricted by the Government. Abuses by the authorities included arbitrary arrest and detention of people opposed to it or to the Syrian Government. Security forces which comprise the Lebanese Armed Forces, the Internal Security Forces (ISF), the State Security apparatus and the Surete General used excessive force and tortured some detainees. After the rifle attack of 18 December on a Syrian bus, in Tabarja, a Christian area north of Beirut, security forces detained and interrogated scores of opposition political activists affiliated with the banned Lebanese Forces (of Samir Ja'Ja'), the National Liberal Party and supporters of the exiled former General Michel Aoun. Detentions and searches of homes took place without warrants, and detainees were not given access to lawyers. Most of them were released shortly after their arrests. A few, however, were held for 10 days or more without charge.

Although freedom of expression and the press have been traditionally guaranteed in Lebanon, these freedoms have declined significantly during the year. The Government prosecuted several newspapers for defaming the President and the Prime Minister (and for publishing materials considered provocative to one religious sect). In September 1996, a new Media Law was adopted prohibiting some 50 private television stations and 150 private radio stations to broadcast political programmes. The number of television stations were thus reduced to four, all of which were owned by or closely associated with Government officials. The number of radio stations was reduced to three stations.

Freedom of assembly has also been restricted. On 29 February the General Labour Confederation (CGTL) called a general strike demanding a 76 percent public-sector pay raise and the doubling of the monthly minimum wage. The Government refused to acquiesce and instead, ordered the Lebanese Armed Forces to take control for purposes of national security for three months. On the same day, a nation-wide curfew was imposed. Some 30 persons were arrested for violating the curfew; three of them were released after 24 hours, the others were sentenced to 5 to 10 days in prison.

The Situation in South Lebanon

Israel also continued to occupy the South of Lebanon and to operate as well through its agent, the South Lebanese Army (SLA). The cycle of violence in South Lebanon between Israeli forces and the SLA on the one hand and the Iranian-backed Hezbollah and some Palestinian guerrillas on the other, continued throughout 1996.

On 11 April, Israel launched what it called "Operation Grapes of Wrath". Its stated aim was to ensure the safety of Israeli civilians from rocket attacks by Hezbollah. The Israeli attack was of a large scale, and was directed against Southern Lebanon, the Bekaa Valley as well as southern Beirut. Hundreds of Lebanese and Palestinian civilians were killed, and hundreds of thousands of Lebanese civilians were forced to flee their villages towards Beirut. The Operation also resulted in extensive damage to property and infrastructure.

In one single attack, Israeli artillery shells hit the Fijian headquarters of the UN Interim Force in Lebanon at Qana on 18 April, killing some 110 Lebanese civilians who sought shelter in the compound and injuring four Fijian soldiers. This incident provoked international outrage. The Israeli Government responded by claiming that the United Nations compound was not targeted intentionally, and that it had targeted the Hezbollah rockets that were fired from a nearby location. The report of a mission sent by the United Nations Secretary-General to investigate the matter concluded, however, that it was unlikely that the shelling of the compound was the result of technical or procedural errors.

On 16 April 1996, the ICJ raised the Qana killings before the 52nd session of the UN Commission on Human Rights meeting in Geneva. The ICJ expressed concern over the excessive Israeli operation which was making "the entire country of Lebanon live in terror". The ICJ called upon both Israel and Hezbollah "to refrain from more attacks on Lebanese and Israeli civilians".

A cease-fire "understanding" was reached by Israel, Lebanon and Syria. The agreement created an international monitoring group, comprising France, the United States, Israel, Syria and Lebanon to supervise the cease-fire. It was often violated however throughout the remainder of 1996.

The Judiciary

The Regular Judiciary

The Constitution provides for the separation of powers and guarantees the independence of the judiciary. In practice, however, the judiciary is becoming increasingly subordinate to the executive authority.

The regular judiciary is composed of Courts of First Instance, Courts of Appeal and a Court of Cassation. There is also a Constitutional Council, which reviews the constitutionality of laws and election disputes.

The High Council of the Judiciary is responsible for the appointment, promotion and transfer of judges. The Council is presided over by the President of the Court of Cassation and composed of ten members, seven of whom are appointed for a three-year term by the Minister of Justice.

The Law of the Regular Judiciary, which was enacted during the civil war in 1983, gives the Minister of Justice substantial powers. The High Council appoints or transfers judges on joint decision with the Minister of Justice. If they fail to agree on such issues, the cabinet intervenes and decides the matter. The High Council is responsible for disciplining judges and advises on the adoption of laws related to the judiciary. The High Council only has jurisdiction over the regular courts.

The judiciary suffers from a lack of human and material resources which has impeded the adjudication of cases backlogged during the years of war. Moreover, judges are usually underpaid.

As to the defendants' right to a fair trial, it is frequently violated. In fact, public prosecutors tend to delegate many of their investigation and interrogation powers to police and military officers in violation of the Law of Criminal Procedures. These officers often interrogate suspects in the absence of a lawyer and use different means of physical and psychological ill-treatment. After being interrogated, suspects are frequently detained by the police officers without any judicial order. The public prosecutor, who is normally notified by telephone of the results of the interrogation, will then decide if an arrest is appropriate.

There are several other courts, however, which do not form part of the regular judiciary. These include the military courts (see below); religious courts of the various denominations for matters of personal status; the State Council, an administrative court which renders final decisions and provides advisory opinions to the executive authority; and the Judicial Council, which is a permanent tribunal composed of five senior judges that adjudicates matters related to national security (see below). In addition to these courts, non-official judicial bodies also exist in Lebanon.

The Israeli-backed South Lebanese Army maintains a separate and arbitrary system of justice in the area, which is independent of Lebanese central authority. Palestinian militias in refugee camps also run their own judicial system, as does Hezbollah in areas under its control.

The Military Courts

Military Courts adjudicate cases related to military personnel or matters. They are composed of four military officers with no legal background and one civil judge. In recent years, more and more civilians have been tried by these courts.

By virtue of Law N° 2/72, indictment decisions issued by the military investigating magistrate may be appealed before the regular criminal court of cassation. If an indictment is appealed, the case is suspended until the appeal is rejected. If the appeal is upheld, the case is withdrawn.

The Judicial Council

The Judicial Council, which acts as a permanent State Security Court adjudicates cases constituting threats to national security. It is headed by the Chief Justice *ex officio*, and comprises four judges from the Court of Cassation appointed by presidential decree on a case by case basis. Upon recommendation of the Minister of Justice, the Cabinet decides whether to refer a case to the Judicial Council which issues final judgments.

On 13 July 1996, the Judicial Council issued its verdict in the Al Zuq church bombing in February 1994. Samir Jaaja, former leader of the Lebanese Forces militia (see *Attacks on Justice, 1995*) was acquitted of involvement in this incident. However, he was sentenced to 10 years' imprisonment for attempting to recruit and arm militiamen after the Government banned all militias in 1991.

Cases

Wa'el Khair {Lawyer and Managing Director of the Foundation for Human and Humanitarian Rights}: Mr. Khair was arrested at his home in the early hours of 24 December 1996. The arrest was connected to the information disseminated by the Foundation of Human and Humanitarian Rights concerning the manner in which the authorities investigated the rifle attack of 18 December on a Syrian bus, in Tabarja, north of Beirut. The Foundation criticised the arrests, which it said were not conducted in accordance with Lebanese law. It also highlighted reports that those who had been arrested had not been given access to legal counsel. Mr. Khair remained in detention without any charge until his release 30 December 1996.

MALAYSIA

The Federation of Malaysia has a parliamentary system operating under the constitutional monarchy. The supreme head of the Federation, the *Yang di-Pertuan Agong*, is elected on a rotating basis by the Conference of Rulers consisting of the nine hereditary Malay rulers. The *Yang di-Pertuan Agong* is also head of the executive, the authority exercised by him together with a Cabinet of Ministers presided over by the Prime Minister. A bicameral federal Parliament holds legislative power. Members of the Senate are primarily appointed by the *Yang di-Pertuan Agong*, whereas members of the House of Representatives are elected. Multi-party elections are permitted, however, elections have been dominated by the National Front Coalition (BN), holding power since 1957.

The Internal Security Act of 1960 (ISA), adopted when there was an active communist insurgency in the country, was still in force in 1996. It permits far reaching means to prevent action, by persons both inside and outside Malaysia, "...intended to cause and to cause a substantial number of citizens to fear, organised violence against persons and property". Actions that are prejudicial to the security or economic life of Malaysia, to the maintenance of essential services, or simply considered likely to be prejudicial in the manner described above, may allow the administrative detention of a person for a period of 60 days without a warrant. With the production of a detention order signed by the Minister of Home Affairs, the detention may be extended to two years. Further, detention orders are known to be renewed even after the two year period has expired. Judicial review of a detention order is severely limited. Opposition parties and human rights organisations continued to demand the repeal of the ISA in 1996. The Deputy Home Affairs Minister announced in February that the Government had prepared proposed amendments to the ISA, which would make the ISA "less ominous".

Moreover, emergency legislation enacted in response to the violence that erupted during the 1969 elections remained in force in 1996. The Emergency (Public Order and Prevention of Crime) Ordinance permits the Minister of Home Affairs to issue a detention order for a maximum of two years if he or she deems it necessary to protect the public order or for the "suppression of violence or the prevention of crimes involving violence". Other laws, such as the Dangerous Drugs Acts as well as the immigration laws also allow the use of detention without charge or trial for an extensive period of time.

In December 1996, the Home Affairs Minister and other Government officials warned that the ISA would be applied to NGOs, which planned to hold a conference on police abuse in January 1997, if the organisers invited persons outside the NGO sphere, including the press.

THE JUDICIARY

The Malaysian judiciary consists of a Federal Court, two High Courts, the Court of Appeal and the Subordinate Courts. Justices in the Federal and

High Courts are appointed by the *Yang di-Pertuan Agong*. They enjoy life tenure until the age of 65. The remuneration of Federal Court judges is established in the Judges' Remuneration Act and shall be provided for by Parliament, although it can not be altered to the disadvantage of a judge after appointment.

In accordance with Article 125 of the Constitution, the *Yang di-Pertuan Agong* may appoint a tribunal to investigate an allegation by the Prime Minister, the Lord President of the Federal Court or the Chief Justice of a High Court that a Federal or High Court judge should be subject to removal on the ground "of misbehaviour or of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office". The tribunal, consisting of no less than five persons that are or have been judges, will then make a recommendation on which the *Yang di-Pertuan Agong* may remove the judge. Pending the report from the tribunal, the *Yang di-Pertuan Agong* may suspend a judge from the exercise of his functions after consultation with the Lord President of the Federal Court for federal judges and with the Chief Justice of the High Court for High Court judges. The conduct of a Federal or High Court judge may be discussed in any chamber of the Parliament only if a motion to that aim is given by at least one-quarter of the members of that chamber. The Constitution does not state to what aim this discussion may be held.

Beginning in the latter half of the 1980's, controversial decisions by the courts concerning state power caused the then Prime Minister to publicly criticise and question the judiciary's authority. Public allegations of impropriety among some judges then followed and a 32 page anonymous letter, allegedly authored by a judge of the High Court, was circulated. Ultimately, in 1988, six Supreme Court Judges were suspended, three of whom were ultimately removed, including the then Lord President of the Supreme Court. This created a public uproar and the Bar Association boycotted the new judges. Constitutional amendments were then adopted, giving the legislature the power to define the jurisdiction of the courts, allowing the executive to decide in which court a criminal case shall be tried and restricting the possibilities of judicial review in cases concerning the press and the internal security law (see *Attacks on Justice, 1994*). These measures which clearly undermined the independence and power of the judiciary, still existed in 1996. The removal of the Supreme Court Judges also reportedly led to the appointment of judges favoured by the Government. Since the removals and subsequent replacement appointments, reports of corruption throughout the judiciary have continued to grow. In 1996, both the United Nations Special Rapporteur on the Independence of the Judiciary and even the Prime Minister and Deputy Prime Minister of Malaysia publicly commented on the reported corruption within the judiciary (see case of **Dato' Param Cumaraswamy** below).

LAWYERS

In September, the Attorney-General proposed an amendment to the Legal Profession Act of 1976 which would open membership in the bar to law professors and Government lawyers (i.e. lawyers working for the Attorney-General, magistrates and session court judges and the legal officers in the various ministries). At a speech delivered earlier in July at the Medico-Legal Society of Malaysia, the Attorney-General opposed the view that the Bar Council should be open only to private practitioners. He asserted that the Bar Council often acted as if it was an NGO or an opposition party and that it did not understand the various sensitive issues facing the Government. The Attorney General continued to say, *inter alia*, that,

> [i]f the leaders of the Bar Council can bring themselves to talk with genuine respect for judges and officers of the Crown, instead of taking positions by public statements and open criticisms of the judiciary and the Government, then and only then can there be a truly useful forum for us to discuss the various problems that beset our profession ... I have in a previous meeting with the President and leaders of the Bar Council stated that if the Bar Council does not take medication to cure itself, then it may have to undergo surgery to cure itself of its malignant illness...They have not listened to my advice...

The remarks were taken by some, including the UN Special Rapporteur on the Independence of Judges and Lawyers, to "...indicate that the paramount motive for the proposed enlargement [of the Bar Council] is to curtail the independence of the Malaysian Bar".

The Bar Council was seriously concerned by the proposal, because if carried out, the independence of the Bar would be adversely affected. It viewed the proposal as an effort to restrain the Bar Council and subject it to Government control and regulation. External, government interference in the professional association of lawyers contravenes the UN Basic Principles on the Role of Lawyers.

On 21 September 1996, at an extraordinary general meeting, the Malaysian Bar proposed a resolution concerning the proposed amendments and resolved that:

1. The independence of the Malaysian Bar is vital to the democratic society of Malaysia, the Rule of Law and the independence of the judiciary, and is essential to the growth of Malaysia as a leading commercial and economic entity in the region; and

2. We therefore strongly oppose any measure to amend the Legal Profession Act, 1976 that would have the effect of diluting or impairing the independence of the Malaysian Bar and the Bar Council."

CASES

K. Ananthan (Lawyer), **Param Cumaraswamy** (Lawyer, United Nations Special Rapporteur on the Independence of Judges and Lawyers,), **Tommy Thomas** and **Tan Chee Yioun** (Lawyers): Dato' Cumaraswamy, a Malaysian national was interviewed by a reporter from the *International Commercial Litigation* and quoted in the November 1995 edition as saying that conduct in a specific court case involving two high profile Malaysian commercial companies looked like "a very obvious, perhaps even glaring, example of judge-choosing". The article further quoted Dato' Cumaraswamy as saying that "complaints are rife that certain high placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice". It was implicit from the article that Dato' Cumaraswamy was interviewed in his capacity as UN Special Rapporteur on the Independence of Judges and Lawyers (see *Attacks on Justice, 1995).*

On 9 December 1995, the Deputy Prime Minister reiterated these concerns in a speech delivered at the opening of an international conference in Kuala Lumpur when he addressed what he called "[t]he growing concern of the public as regards the increasing incidence of judicial indiscretions..." He stated that [n]ot only must judges display the requisite level of competence and expertise; like Caesar's wife [they must] be above suspicion". On 15 March 1996, while addressing a gathering of judges, the Prime Minister of Malaysia was reported to have advised judges not to be manipulated and used as tools by "corporate figures and businessmen".

In 1996, Dato' Cumaraswamy received notice from the two companies of their intention to commence a libel suit against him. On 6 January 1997, Dato' Cumaraswamy was served with a writ of summons alleging libel before the High Court in Kuala Lumpur. The two Malaysian commercial companies referred to the article in *International Commercial Litigation* and claimed damages of approximately $US 25 million. The two companies also asked the Court to issue an injunction to restrain Dato' Cumaraswamy from "further speaking or publishing or causing to be published words defamatory of the plaintiffs".

The legal action was brought against Dato' Cumaraswamy despite the fact that he, as UN Special Rapporteur, enjoys the privileges and immunities provided for in Section 22 of the 1946 Convention on Privileges and Immunities of the United Nations, which grants UN experts on missions, such as Special Rapporteurs, the privileges and immunities necessary for the independent exercise of their functions. The relevant Convention was acceded to by Malaysia on 28 October 1957.

The UN Secretary-General made it clear in a written certificate given under Section 23 of the 1946 Convention that Dato' Cumaraswamy, as the Special Rapporteur on the Independence of Judges and Lawyers, benefits from the immunities granted by the Convention and determined that on the facts, Dato' Cumaraswamy was immune from legal process with respect

thereto. In an Alert issued on 11 January 1997, the CIJL expressed its deep concern over the civil suit filed against Dato' Cumaraswamy. The CIJL further called upon "all those whom it may concern to extend to Dato' Cumaraswamy the privileges and immunities he is entitled to under the Convention on Privileges and Immunities of the United Nations", and called upon "the Malaysian government to take all necessary and appropriate action in this regard". The Malaysian Government responded when the Minister of Foreign Affairs submitted to the court a certificate confirming Dato' Cumaraswamy's immunity.

The authority of the U.N. Secretary General to determine the Special Rapporteur's immunity was challenged during the course of Dato' Cumaraswamy's motion to set aside the writ. The court heard submissions on the motion early in 1997 and reserved its judgment until 28 June 1997.

In addition to the writ against Dato' Cumaraswamy, 12 other writs were filed earlier by the same plaintiffs and others, including their lawyer, for defamatory statements allegedly made in the same article. The plaintiffs claimed a total of approximately US$ 260 million. Among the defendants named in these actions were **Tommy Thomas, Tan Chee Yioun** and **Datuk Ranita Nohd,** lawyers and partners in the law firm, Skrine & Co. Twelve other Skrine & Co. partners were also named as defendants. Dato' Thomas had been interviewed by the author of the article in his capacity as Secretary General of the Bar Council.

Sivarasa Rasiah {Lawyer}: On 9 November 1996, Mr. Rasiah was arrested in Kuala Lumpur together with more than 100 other participants in the Asia Pacific Conference on Human Rights on East Timor (APCET II). The conference was a peaceful gathering with the aim of discussing the human rights situation in East Timor. Mr. Rasiah was held at Dang Wangi Police Station in Kuala Lumpur and on 13 November, after having released some of the detainees, the Magistrate's Court ordered that the remaining ten detainees, amongst which Mr. Rasiah, should stay another three days in prison in order to allow the police to investigate whether to bring charges against them. However, on 14 November, the Malaysian High Court overturned the decision and ordered the immediate release of the detainees.

MEXICO

The Federal Republic of Mexico is composed of 31 states and the federal district. The Constitution establishes the separation of powers, vesting the executive power in the President of the United Mexican States. The Presidency continued to be held by Ernesto Zedillo Ponce de León of the Institutional Revolutionary Party (PRI), following his election in 1994 to a six year term, which was widely believed to include fraudulent practices. The PRI has won every presidential election since 1929. The President selects the ministers who form the Cabinet. Legislative power lies with the General Congress, composed of two chambers; one comprised of deputies, the other of senators. Both chambers were dominated by members of the PRI in 1996.

The Mexican states are autonomous with their own governments, which are established by the state constitutions. Their jurisdiction includes everything that is not expressly stated to be within the power of the federal authorities. Each state is administered by a governor and has its own legislature.

In July 1996, the four leading parties agreed on electoral reform. The reform, approved by the Congress in November, gave the PRI candidates the largest percentage of public funds for campaigns and restricted the formation of multiparty coalitions and access to the media. This was contrary to agreements negotiated during the previous 18 months.

As in previous years, Mexico continued to suffer from clashes between its army and some guerrilla groups, creating instability in the country. A major offensive attack by the armed forces of Mexico against a newly founded guerrilla organisation, the People's Revolutionary Army (EPR), took place in July in the state of Guerrero. Throughout the following months, thousands of troops were deployed in Guerrero. The conflict resulted in killings affecting both sides, but human rights groups say that the Government's pursuit of guerrilla activities led to widespread violations of human rights, including arbitrary arrests and torture.

Peace talks between the Zapatista National Liberation Army (EZLN) and the Government concerning the conflict following the 1994 revolt in the state of Chiapas were impeded on several occasions because of lack of confidence among the parties and claims that earlier agreements were not honoured. The states of Chiapas, Guerrero, and Oaxaca, experienced increased militarisation.

The Government continued to be unable to protect its citizens from human rights violations, particularly by the police. The failure and inaction fostered impunity and caused individuals to resort to private justice. Corrupt, inefficient and arbitrary law enforcement has a long tradition in Mexico and has been a particular problem in the state of Oaxaca. There, criminal investigations and arrests were reportedly used as a threat against social activists and community leaders in an effort to force them to abandon their work. At the same time, criminal investigations rarely involve powerful landowners or politically sensitive issues.

In response to these violations, the number of human rights defenders continued to grow in number in Mexico. However, in 1996, they suffered from a dramatic increase in threats and attacks. Further, the Government financed National Human Rights Commission (CNDH), created in 1990, was weakened after constitutional reform in 1992 which required each state to create their own human rights commission. The creation of the state human rights commissions limited the competence of the CNDH as it could no longer investigate cases under the jurisdiction of the respective states. The state commissions also possess fewer financial and human resources than the CNDH, do not attract the same media interest and are often influenced by the executive or powerful interests in the state. The result has been a weakened structure of human rights protection.

The Judiciary

The Constitution establishes the separation of powers. In practice however, the judiciary is subject to influence from the executive and plagued by corruption and inefficiency.

On the federal level, the judiciary comprises a Supreme Court of Justice, 32 Circuit Courts of Appeal and 98 District Courts. Judges of the Supreme Court are selected through a procedure initiated by the President who submits the names of three candidates to the Senate, which decides who shall be appointed. Since the Senate is dominated by members of the President's political party, the appointment is not free from the executive's influence. Once appointed, a judge of the Supreme Court will hold his or her office for a period of 15 years. Magistrates in Circuit Courts and Judges in District Courts are appointed by the Supreme Court of Justice and remain in office for six years. Grounds for their removal are established in the Constitution and include any act or omission to the detriment of fundamental public interests or their expeditious administration. The vague nature of this condition leaves security of tenure open to abuse.

At the state level, the state Constitutions have established their own court structure. In general, judges are appointed by the governor of the state with the approval of the state legislature. Their term of office usually coincides with the six year term of the governor, which reportedly creates a possibility for the governors to select the judges of his or her choice.

Administrative matters of the Supreme Court are in the hands of a Management and Administrative Commission (*Comisión de Gobierno y Administración*), composed of three magistrates. The administration, supervision and discipline of the judiciary, with the exception of the Supreme Court, rests with the Judicial Council (*Consejo de la Judicatura*). The Council is composed of seven members, from which four members are judges, two are appointed by the Senate and one is appointed by the President. The composition of the Council may create some concern because of the executive's

involvement in the appointment of its members. In May 1995, the representatives from the judiciary to the Council were required to resign, allegedly because they lacked the necessary requirements as established in the Organic Law of the Judiciary. In February 1996, newspapers stated that there was possible fraud within the Judicial Council.

The law requires that trials shall be open to the public. In practice however, this is ignored by the courts and even the record of the proceedings is not made available to the public. The victim may have access to the file upon a special motion.

The National Human Rights Commission (CNDH) reported that delays in the administration of justice was the most common complaint it had received. Corruption within the judiciary added to the delay or encouraged impunity.

Public Ministry

The organs in charge of prosecuting crimes are the Public Ministry and the Judicial Police. Head of the Public Ministry is the Attorney General (*Procurador General*) who is appointed and removed by the executive, as are all the officials of the Public Ministry.

In January 1996, a law on the co-ordination of public security entered into force. The law provided for a National Council composed of members of the government, the state governors, the National Defence Secretary, the Navy Secretary and the federal Attorney General. The measure was intended to streamline and improve actions within the field of public security, including the establishment of mechanisms for the effective functioning of federal and state attorney general's offices. It was claimed by Mexican NGOs, lawyers and politicians that the creation of this co-ordination infringed upon the independence of the Public Ministry, since the Ministry is supposed to be an autonomous public institution which has exclusive competence to investigate and prosecute crimes.

On 2 December 1996, Federal Attorney General Antonio Lozano Gracia was removed from his position after criticism of his failure to investigate relevant criminal cases and the general failure of his office to halt the growing number of threats and attacks against human rights defenders in the country.

Cases

Jesús Campos Linas, María Luisa Campos Aragón, José Luis Contreras and **Bárbara Zamora,** [Lawyers and members of the National Association of Democratic Lawyers (*Asociación Nacional de Abogados*

Democráticos, ANAD)}: ANAD represents clients who are involved in cases concerning indigenous rights. In December 1996, the offices of each of Mr. Campos Linas, Ms. Campos Aragón and Mr. Luis Contreras were broken into. Computers and a fax machine were stolen, together with case files, client information and contact information about members of the ANAD. Internal telephone lines were sabotaged.

Beginning in January 1997, Ms. Bárbara Zamora, began receiving a number of threats over the telephone. In one telephone call, a secretary was told to inform Ms. Zamora that she should be careful, as serious things could happen.

On 8 February 1997, the CIJL sent a letter to President Zedillo, expressing its concern for the above mentioned lawyers. The CIJL urged the Government to provide protection to all lawyers who may be in danger, and in particular, the members of ANAD and members of the Centre for Human Rights Miguel Augustín Pro Juárez (*Centro de Derechos Humanos Miguel Augustín Pro Juárez*, PRODH) who had also received threats (see *Attacks on Justice, 1995*). It further urged the Government to investigate the threats against these lawyers and bring those responsible for them to justice.

Enrique Flota, José Lavanderos Yañez, Pilar Noriega and **Digna Ochoa,** {Lawyers, *Centro de Derechos Humanos Miguel Agustín Pro Juárez*, PRODH}: On 10 August 1996, an anonymous communiqué was sent to the PRODH office in Mexico City, stating that all PRODH workers would be killed, starting with Ms. Noriega and Ms. Ochoa. The threats were most probably related to their defence work on behalf of persons detained and imprisoned for their alleged connection with the EZLN. Many of the cases involved allegations of torture and violations of due process of law in the hands of the police and prosecutors.

On 23 September, the two lawyers received more death threats. When Pilar Noriega was about to leave for Washington to attend a meeting with the Inter-American Commission on Human Rights in order to present information on three 1994 extra-judicial killings carried out in Chiapas by the Mexican armed forces, she received a message saying that she was going to "fly, but in a thousand pieces".

On 9 November, Pilar Noriega and Digna Ochoa, together with lawyers Enrique Flota and José Lavanderos Yañez and other PRODH staff members received a letter stating that its authors would now move from threats to action.

The CIJL, by letter dated 15 October 1996, expressed its concern to President Ernesto Zedillo regarding Pilar Noriega, Digna Ochoa, María Teresa Jardí, her son Julián Andrade Jardí and his assistant David Fernández Dávalos. By letter dated 8 November 1996, the President, through the Chief of the Management Control Unit (*Jefe de la Unidad de Control de Gestion*), informed the CIJL that he had received its letter and that it was now with the secretariat of the Department of the Interior. He also

informed that the letter had been forwarded to the Attorney General's Office of Justice of the Federal District (*Procuraduría General de Justicia del Distrito Federal*) and the National Commission for Human Rights. The Attorney General of Mexico City provided official protection for members of PRODH and initiated an investigation of the threats against them. By the end of the year, threats against members of PRODH had ceased.

Omar Garibay Guerra {Lawyer and representative of the FAC-MLN (*Frente Amplio para la construcción del Movimineto de Liberación Nacional,* Front for the Construction of the National Liberation Movement)}: Mr. Garibay was abducted in the state of Guerrero on 7 August 1996, allegedly by agents of the judicial police. The abduction took place as Mr. Garibay was leaving a hearing he had attended as defence counsel before the Chilpancingo penal tribunal. He was freed on 23 October 1996.

Odin Gutiérrez Rico {Prosecutor and Director of criminal trials}: Mr. Gutiérrez Rico was investigating several important drug related killings when he was killed on 3 January 1997 outside his home in Tijuana. There were at least four persons firing assault rifles at Mr. Gutiérrez and the assassins also ran over his body with a van. The state Attorney General in Baja California Norte suspected that the act was one of revenge by drug traffickers. Mr. Gutiérrez was the eighth official working on drug cases in Tijuana to be killed during the past eleven months.

María Teresa Jardí {Lawyer}: Dr. Jardí was threatened because of her work investigating politically motivated murders. On 4 April 1996, Dr. Jardí received anonymous death threats over the telephone in her home in Mexico City. One week previous to these threats, the assistant to Dr. Jardí's son had been captured and brutally beaten by unidentified men and left with threats destined for Dr. Jardí and her son. In June, Dr. Jardí was targeted in a smear campaign in a local newspaper which published threatening articles about her. After she filed a libel case, the editor of the newspaper formally apologised to her. The authorities offered protection to Dr. Jardí, but no one had been arrested in connection with the attacks by the end of 1996.

Julio Cesar Sánchez Narvaez {Judge in the state of Tabasco}: Judge Sánchez reportedly received death threats from the President of the Upper Tribunal of Tabasco. The President also discharged Judge Sánchez from his judicial offices after Judge Sánchez refused to order the imprisonment of a person that he had already ordered to be acquitted and released.

MOROCCO

Morocco is a constitutional monarchy governed in accordance with the Constitution which was amended and approved by referendum on 13 September 1996. According to the ICJ Affiliate, the Moroccan Organisation for Human Rights (OMDH), the results of the referendum which approved the amended Constitution should have been vitiated due to certain irregularities such as the listing of the same persons twice, or the listing of fictitious or deceased persons on the voter list. It was also reported that the media was manipulated to exclusively favour an affirmative vote, negative voting papers were scarce and some officials intervened to reduce the number of negative votes cast.

The King appoints the Prime Minister and his Cabinet. Legislative authority is vested in the bicameral Parliament which, according to the Constitution replaced the former Chamber of Representatives. A lower house, the House of Representatives is to be elected directly for a five-year term and an upper house, the Senate, will be composed of indirectly elected representatives from local authorities, professional organisations and the "salaried classes". One-third of its members will be elected every three years. Ultimate authority, however, rests with the King. He has the discretion to dismiss the Government and any minister, dissolve Parliament and to rule by decree. Further, the amended Constitution allows the indirectly elected Senate to censor the Government which has the confidence of the directly elected House of Representatives. The next parliamentary elections were scheduled to be held in 1997.

Morocco has in recent years made efforts to improve its legal protections of human rights (see *Attacks on Justice, 1995*). It ratified several international Human Rights Conventions, including the United Nations International Covenant on Civil and Political Rights and the Convention Against Torture. It also established several institutions, including a Ministry in charge of human rights.

A number of legislative measures and concrete actions have also been adopted. First, the period of *garde à vue* detention was reduced from 96 hours plus a possible extension of 48 hours to 48 hours plus a possible extension of 24 hours. This reduction was not applied to except for state security offences where the *garde à vue* detention period remains at 96 hours with a possible extension for the same period by written approval of the public prosecutor. Second, the period of preventive detention was reduced to a maximum of two months (which can be extended to a maximum of five two-month periods). Third, the abrogation of the Parliament *Decree* of June 1935, concerning the repression of demonstrations contrary to the Order also constituted important steps towards the respect and implementation of human rights. Finally, since 1991, the King has ordered the release of hundreds of people detained without trial, commuted 195 death sentences and granted amnesty to 424 political prisoners.

In spite of these positive changes, since the end of 1994, reform has slowed and some report that there has even been a regression with regard to the respect and implementation of human rights in general and to the functioning of the judiciary in particular. In fact, both the Ministry of Human Rights and the Consultative Council for Human Rights which were originally established in order to activate the reform process, seem to have played a minor role in the promotion and protection of human rights. The human rights portfolio was given to the Minister of Justice after the Minister of Human Rights resigned on 25 January 1996. He had criticised the Government's treatment of smugglers in its anti-contraband campaign, which he qualified as an abuse of power. The attribution of this portfolio to the Minister of Justice who is considered to be hostile to improved human rights, has undermined the role of the Ministry of Human Rights.

A number of laws restricting fundamental rights and freedoms were still in force in 1996 although they contradicted the Constitution and the international instruments which Morocco has ratified. These include the Code of Criminal Procedure, notably the transitory dispositions of September 1974, the Decree organising the judiciary and the Statute of the Judiciary, all of which impair the right to a fair trial and the independence of the judiciary.

Detention conditions remain problematic. Hunger strikes are quite frequent and prisoners have died due to negligence and poor prison conditions. *Garde à vue* periods are often prolonged beyond the extension authorised by the law. In order to conceal such a violation, police reports usually mention false dates of arrest, although they are denied by the defendants and their families. Allegations of torture, although well-established, are never investigated and the offending officials remain unpunished. The United Nations Convention Against Torture was finally published in the Official Gazette, in December 1996, a measure necessary to make it part of domestic law. The practical effect of this Convention, however, remained quite limited in practice.

The Government paid a small stipend to 28 prisoners who "disappeared" but survived the most harsh conditions, including 18-20 years of solitary confinement and lack of adequate food and health care in the notorious secret desert detention Centre of Tazmamart. However, the fate of dozens of people who disappeared in the last 30 years in connection with the Western Sahara conflict remained unknown, and the question of compensation to the families of the disappeared was still pending. The task force which was established in 1994 by the Consultative Council for Human Rights to examine the files of disappeared persons and political detainees had not reached any significant results in 1996.

THE JUDICIARY

1. ORGANISATION OF THE JUDICIARY

The Moroccan Judiciary comprises ordinary courts and special courts. The ordinary courts consist of Courts of First Instance, Courts of Appeal, and the Supreme Court. The special courts include the Permanent Court of the Armed Forces, the Special Court of Justice and the High Court.

A. The Ordinary Courts

The Supreme Court

The Supreme Court can review final judgments only by cassation or by revision. It does not have the jurisdiction to review judgments passed by the High Court (see below) in cases involving actions committed by ministers while exercising their responsibilities. According to Article 267 of the Code of Criminal Procedure, the Supreme Court on the demand of the Public Prosecutor, does however have jurisdiction over criminal cases related to some high officials, namely, a Judge of the Supreme Court, a Governor, the First President of a Court of Appeal, or the Chief Public Prosecutor of a Court of Appeal. The judge investigating the case may dismiss the case or send it to the Supreme Court with all its chambers participating.

According to some lawyers, cases brought before the Supreme Court may last several years. The law does not establish deadlines for court proceedings, including dates for hearings. This can lead to a situation where a person may serve his sentence before a judgment is rendered on appeal.

The Courts of Appeal

These courts act as Courts of Appeal only with regard to judgments issued by the Courts of First Instance, which, as mentioned below, deal with infractions and offences.

The Courts of Appeal also have first jurisdiction over crimes which are punishable by prison sentences ranging between five and 30 years, life imprisonment, house arrest or the negation of civil rights or death penalty. These courts are divided into different chambers: civil, personal status, social, "correctionnelle" and criminal. They also comprise a public prosecution apparatus led by the *procureur général du Roi*. The "correctionnelle" chamber is composed of three judges, the Public Prosecutor and a clerk, and acts as an appeal court for sentences issued by Courts of First Instance. It deals also primarily and definitively with some offences committed by judges and public officers. The criminal chamber is composed of five judges, the Public Prosecutor and a clerk, and deals with crimes primarily and definitively, except those dealt with by special courts.

Sentences issued by the Courts of Appeal can only be reviewed by cassation before the Supreme Court. Defendants are thus deprived of the right

to appeal to higher courts, which is particularly serious, since investigation by the examining magistrate is not obligatory in criminal cases other than those punished by death penalty or life imprisonment. Judgments of the Courts of Appeal are also not immediately written after the sentence has been issued, preventing defendants from fulfilling the requirement to submit a copy of the written judgment to the Supreme Court within eight days of the judgment of the Court of Appeal.

The Courts of First Instance

The Courts of First Instance are located in most Moroccan cities and towns. They have jurisdiction over penal infractions and offences except when these are dealt with by another court under special regulations. The term *infraction* under the Moroccan Penal Code refers to acts punishable by simple prison sentences of less than one month and/or a fine, while *offence* designates acts which are punishable by a prison sentence of up to two years with or without a fine (*police* offences) or by more than two years in prison with or without a fine (*correctionnel* offences).

Judgments rendered by the Courts of First Instance can be appealed to the Courts of Appeal. This right is however, seriously obstructed by administrative problems. The law provides that the accused must appeal against the sentence within ten days, and that a written judgment be attached with the appeal. As in the Court of Appeal, the writing of the judgment may be delayed beyond the ten-day period and once it is written, the transmission of files from the Courts of First Instance to the Courts of Appeal may sometimes take several months, thus depriving the accused of his or her right to appeal.

B. The Special Courts

The Special Courts are comprised of the Permanent Court of the Armed Forces (Military Court), the Special Court of Justice and the High Court. These courts deal exclusively with penal cases.

The Military Court

According to the July 1977 Law on the Military Judiciary, the Military Court has jurisdiction over the following:

- members of the armed forces including the *gendarmerie* accused of crimes, offences and related infractions;
- civilians or members of the military accused of crimes against the external security of the state;
- crimes against internal security of the state if there is alleged military participation;
- crimes against a member of the armed forces;

- the crime of possessing weapons without authorisation; and
- offences by prisoners in military prisons or by prisoners of war.

When deciding cases of infractions and "correctionnel" offences, the court is composed of a civilian judge as president and two military judges as counsellors. In criminal offences, the court is presided over by a civilian judge with four military judges acting as counsellors. Civilian judges are members of the Courts of Appeal.

Trials in military courts are often conducted *in camera*. Moreover, judgments issued by the Military Court can not be appealed but only reviewed by cassation.

The Special Court of Justice

This Court is located in Rabat and is composed of five judges, the Public Prosecutor and a clerk. Decree dated 6 October 1972 as amended by Decree dated 25 December 1980 gave the Special Court of Justice jurisdiction to try civil servants accused of corruption, abuse of authority or embezzlement of public funds of more than 25,000 dirhams (approximately US$ 2,770) on the precondition that the Minister of Justice issues a prior written order.

The Court's procedure is characterised by speedy trials and the failure to provide procedural protections. The defendant must appoint his or her lawyer within 24 hours of appearing before the investigating judge. Failing to do so, the latter may designate a lawyer. Article 11 of this Decree requires the investigation to be carried out rapidly and completed in a period not exceeding six weeks. All issues rest with the Special Court, even if the investigating judge believes the case should be dismissed or it is not within the Special Court's jurisdiction. Finally, the Special Court's sentences can not be suspended nor appealed, but reviewed only by cassation.

The High Court

This Court, which in practice has never been established, is provided for in the Constitution and organised by the Law of 8 October 1977. According to this Law, the High Court would have jurisdiction to hear accusations against Government members concerning crimes and offences allegedly committed while on official duty. The President of the Court is to be appointed by the King while the members of the court, six judges and three in reserve, are to be elected by the Parliament. The latter is competent to charge those to be tried before this court by a secret vote and a majority of two-thirds of its members. Prosecution is exercised by the Public Prosecutor of the Supreme Court with the help of his deputy and two members elected by the Parliament. The judgments of this Court are not subject to appeal or review.

C. The Constitutional Council

The Constitutional Council is an independent institution which was created with the 1992 revision of the Constitution to replace the Constitutional Chamber of the Supreme Court. This institution is to decide over the validity of legislative elections and referendums and to examine the constitutionality of laws before their adoption. Its decisions are final and binding for all the authorities.

2. Status of the Judiciary

Although the Moroccan Constitution provides for an independent judiciary, the amendments failed to empower the Constitutional Council to sufficiently guarantee the constitutionality of laws or the High Council of the Judiciary to maintain the independence of the judiciary. The set of laws constituted by the Statute of the Judiciary of 11 November 1974, the Decree on the Judicial Organisation of 15 July 1974 and the "Transitory Dispositions" of the Code of Criminal Procedure of 28 September 1974, clearly encourage the dependence of the judiciary on the executive authority.

Judges in Morocco are usually first appointed as judicial assistants by Decree of the Minister of Justice after having passed an examination open to law graduates. They spend two years in training as judicial assistants before they take another examination. They are then appointed judges by Decree upon the recommendation of the High Council of the Judiciary. Article 14 of the Statute of the Judiciary of November 1974, forbids them from forming or joining associations.

The High Council of the Judiciary is chaired by the King, with the Minister of Justice acting as his deputy. It is also composed of the first President of the Supreme Court, the Public Prosecutor and the President of the civil chamber of the same Court, all of whom are appointed by Royal Decree. The Council also includes six judges elected by the Courts of Appeal and the Courts of First Instance. The High Council of the Judiciary does not play an important role in the functioning of the judiciary. It has only consultative power in the promotion and discipline of judges, which does not guarantee the independence of the Judiciary.

Article 62 of the Statute of the Judiciary permits the Minister of Justice to immediately dismiss a judge who committed a "grave error" or who has been prosecuted. This provision does not define what constitutes a "grave error". The decision to dismiss a judge is made independent of the High Council of the Judiciary, which needs only confirm it in a subsequent meeting.

The Minister of Justice can also transfer a judge to any region in Morocco for a period of three months, which can then be renewed with the agreement of the judge. It has been reported, however, that judges may be

transferred for longer periods without being able to oppose this decision. The Law on the Organisation of the Judiciary of July 1974 grants the Presidents of Courts, who are appointed by the executive authority, the power to keep files on judges, including observations on their performance which could influence their promotions and careers.

Courts in Morocco are usually subject to extra-judicial pressures, including bribery and Government influence. Salaries for both judges and their staff are extremely modest and as a result, bribery has become a common practice in courts. Defendants and their families pay bribes to court officers and judges to secure favourable results. Another sort of corruption derives from the judiciary's relationship with the Ministry of Interior. Judges work closely with the Ministry's local officials who serve as members of the judicial police. They often question criminal detainees themselves and prepare the written summary of arrest and subsequent interrogation. The summary may be admitted in court and constitute the only evidence introduced at trial. In the serious state security cases, communications between the Ministry of Interior and the courts are more direct. Such cases may be brought anytime, at the Government's discretion, before a specially constituted military tribunal.

Due to financial constraints, trials of defendants charged with less serious offences tend to be hasty, with judges relying solely on police reports to render their judgments. In January, defendants arrested in the anti-contraband crack-down were denied access to lawyers during interrogation and were not allowed to submit evidence to counter charges against them. Later, the lawyers of nine defendants walked out of court in protest for not having been given enough time to study the case against their clients.

CASES

Abderrahim Berrada {Lawyer, member of the Bar of Casablanca and defender of political prisoners}: On 30 May 1996, Me Berrada filed a complaint on behalf of two professors of medicine and pharmaceutical studies alleging the Minister of Public Health, Mr. Ahmed Alami had defamed them in an interview with a newsmagazine, *Maroc-Hebdo*, on 30 March 1996. The Minister was to appear before the Chamber "correctionnelle" of the Court of First Instance of Ain-Sebaa/Hay Mohammadi in Casablanca, on 18 June 1996. Prior to that date, Me Berrada agreed with Judge Dahane, who was scheduled to hear the matter, to have the case heard at the end of the day so those lawyers with cases taking less time would not have to wait.

When Me Berrada appeared five minutes after the commencement of the court on 18 June 1996, he was informed by other lawyers present that the case against Mr. Alami had already been called in his absence and the Prosecutor's representative had asked that the action be dismissed The judges had already adjourned to confer.

When Me Berrada discovered that the matter had been heard, he left the courtroom to find Judge Dahane and protested the breach of their agreement that the case would be heard at the end of the day. Mr. Dahane advised Me Berrada that he would look into the matter but did not return. Me Berrada then returned to the courtroom where the judges were considering other files. When Me Berrada insisted that the matter be heard, the Prosecutor's representative and the President of the Court threatened to sue him. Me Berrada then asked that the court be suspended while he asked the *Bâtonnier* for instructions, in conformance with the rules of the profession. This request was also refused and the Court went onto other matters. At 17:45, a judgment was rendered dismissing the action.

On 16 July 1996, judges of the Court of First Instance of Ain Sebaa/Hay Mohammadi held an extraordinary general assembly, reportedly under the influence of the executive authority, and published a declaration in which they strongly demanded that an inquiry against Me Berrda be commenced, and legal measures taken. In a response dated 19 July 1996, Me Berrada stated that for 25 years he had been the victim of harassment which included: tapping and cutting of his telephone line; receiving anonymous telephone calls; police surveillance; searches of his luggage; intimidation from the authorities; and overt repression.

At the end of July 1996, Me Berrada commenced an action for defamation against the judges of the Court of First Instance. He was subsequently summoned by the police for questioning. However, he refused to appear as a lawyer may only be questioned by the public prosecutor and in presence of the *Bâtonnier*. As he was going to his office, the police tried to take him by force to the police station. Upon intervention of the OMDH and the *Bâtonnier*, the case was suspended.

MYANMAR (BURMA)

The State Law and Order Restoration Council (SLORC), led by General Than Shwe, continued to govern under martial law in 1996.

SLORC has controlled the country with an iron grip since 1988 when demonstrators en masse demanded a multi-party, democratic government and civil and political rights following the resignation of General Ne Win, who seized power in a military coup in 1962. In response, the military re-took power on 18 September 1988. The SLORC was established, which immediately suspended the 1974 Constitution, introduced martial law and abolished the state institutions. Power was centralised in SLORC and its military officers.

The SLORC declared itself to be an interim Government dedicated to protecting national security, national sovereignty and national unity. It announced that it would hold multi-party elections, transfer power to the elected representatives and create a new Constitution. The elections were held in May 1990 but Aung San Suu Kyi, leader of the main opposition party, the National League for Democracy (NLD) and later a Nobel Peace Prize laureate had been banned from participating and placed under house arrest in 1989. Despite the military's enforcement of severe restrictions on freedom of expression and peaceful assembly which led to the detention of several thousand people, the NLD won 60 percent of the votes and 81 percent of the seats for the People's Assembly. The government sponsored party obtained only 10 of the 485 seats.

Due to the victory of the NLD, the SLORC failed to honour the election results. By Declaration N° 1/90, it stated that the duty of the elected representatives was not to take over power from the SLORC, but to draft a new Constitution. Declaration N° 11/92 called for a National Convention to draft a new Constitution, which gathered for the first time in January 1993. Out of its 702 representatives, more than 600 were selected by SLORC.

The SLORC's proposal for the government structure involved a President, elected by an electoral college and a legislature composed of the House of Representatives and a House of Nationalities. One of the aims of the National Convention laid down by SLORC was "participation of the military in the leading role in national politics in the future". This would be secured by giving 25 per cent of the legislative seats to the military. The military's proposed nominee for the presidential post would automatically become Vice President, if not elected President.

On 10 July 1995, San Suu Kyi was released from house arrest and in October 1995, she was reinstated as Secretary-General of NLD. Political activism intensified in the wake of her release throughout 1995 and 1996, producing an increase in the number of arbitrary arrests and detentions, in particular involving members of the NLD. Peaceful political activities were repressed by means of personal attacks, short term detentions and

intimidation, as well as surveillance by Military Intelligence officers. Activists were characterised as "destructionists" who were "relying on external forces".

The National Convention convened again in November 1995. The NLD boycotted the Convention, protesting the lack of a democratic process in its procedure. Because of their absence had not been approved, the SLORC expelled the 86 NDL delegates from the National Convention.

In May 1996, Aung San Suu Kyi said that the NLD would establish its own committee to draft a new Constitution. This, together with the increased political activism lead to the issuing on 7 June 1996 of Law N° 5/96, which *inter alia* established that:

> [n]o person or organisation is allowed directly or indirectly to violate either of the following prohibitions: instigating, protesting, preaching, saying [things] or writing and distributing materials to disrupt and deteriorate the stability of the state, community peace and tranquillity and the prevalence of law and order.

The law also states that the drafting and distribution of a constitution without authorisation is illegal. A violation of these provisions allows for three to 20 years imprisonment.

San Suu Kyi was again placed under house arrest from 6 to 29 December 1996.

POLITICAL PRISONERS AND HUMAN RIGHTS

In 1996, there were approximately 1,000 political prisoners in Myanmar. Several vaguely worded laws, including the 1950 Emergency Provisions Act and the 1975 State Protection Law, were widely used to arrest and sentence persons for their peaceful activities (see also *Attacks on Justice, 1995*). During August 1996, 31 political activists were sentenced to long term imprisonment. Political detainees are seldom allowed legal counsel and the expeditious trials are generally held *in camera.*

The United Nations Special Rapporteur on the situation of human rights in Myanmar, who visited the country on 8-17 October 1995, stated in his report to the UN Commission on Human Rights in 1996 that

> [a]ll political leaders, including elected political representatives, students, workers, peasants and other arrested or detained under martial law after the 1988 and 1990 demonstrations as a result of the National Convention, should be tried by a properly constituted and independent civilian court in an open and internationally accessible judicial process in which all defendants could have access to counsel of their choice. If

> found guilty in such judicial proceedings, they should be given a just sentence. Alternatively, they should be immediately released and the Government should undertake to refrain from all acts of intimidation, threat or reprisal against them or their families and to take appropriate measures to compensate all those who suffered arbitrary arrest or detention.

The general human rights situation in the country can be described by words from the UN General Assembly Resolution, adopted in December 1996, in which the General Assembly expressed that it was:

> [g]ravely concerned at the continued violations of human rights in Myanmar, as reported by the Special Rapporteur, including extra-judicial summary or arbitrary executions, killings of civilians, torture, arbitrary arrest and detention, death in custody, absence of due process of law, severe restrictions on freedom of opinion, expression, assembly and association, violations of freedom of movement, forced relocation, forced labour and portering and the imposition of oppressive measures directed in particular at ethnic and religious minorities.

On 23 April 1996, the UN Human Rights Commission adopted, without a vote Resolution 1996/80 and urged the Government of Myanmar to take "all necessary measures to guarantee democracy in full accordance with the will of the people as expressed in the democratic elections held in 1990..." The Human Rights Commission also reminded the Government of Myanmar of "its obligations to put an end to the impunity of perpetrators of violations of human rights, including members of the military, and its responsibility to investigate alleged cases of human rights violations committed by its agents on its territory, to bring them to justice, prosecute them and punish those found guilty in all circumstances".

THE JUDICIARY

Prior to the creation of SLORC, under the 1974 Constitution, the Executive, composed of the Burmese Socialist Program Party (BSPP), totally controlled the judiciary. In order to be elected as a judge, one was required to be a member of the BSPP, however, no legal training or experience was necessary. Judicial elections took place contemporaneously with the legislative elections.

In September 1988, SLORC issued Law N° 2/88, the Judiciary Law, according to which there shall be a Supreme Court composed of one Chief Justice and "not more than five Judges". Lower courts, the State or Division and Township Courts, were to be formed by the Supreme Court. Military tribunals, established in 1989 with the purpose of trying martial law

offenders under special summary procedures, were abolished in September 1992.

The SLORC appoints the judges of the Supreme Court, which selects the judges to the lower courts, with the approval of the SLORC. The Supreme Court is further in charge of supervision of all courts. The Judiciary Law does not contain any provisions on security of tenure and protection from arbitrary removal, thus leaving this in the hands of the military Government.

The administration of justice is based on several judicial principles, one of which requires justice to be administered "independently, according to law". In reality however, the judiciary is far from independent. With the suspension of the Constitution and the numerous decrees that restrict freedoms, the "law" is unable to protect human rights. In addition to the military Government's unrestrained role in appointing judges to the courts, it also directly influences the administration of justice, reportedly by manipulating the courts to secure an outcome which will serve its political ends. This is particularly obvious in cases concerning persons alleged to be involved in political activities. Corruption is widespread, further undermining independence and impartiality. The Special Rapporteur in his report on the situation of human rights in Myanmar noted problems in the field of administration of justice with regard to fair trials, free access to defence lawyers, prescription of disproportionate penalties and time for careful examination of the cases by courts. Under the existing circumstances in the country, an independent judiciary is difficult, if not impossible, to achieve.

CASES

U Maung Maung Lay {Lawyer and Secretary of the Insein NLD}: U Maung Maung Lay was arrested on 27 January 1996 by officers of the Military Intelligence Unit 6, while he was attending a commemoration for a NLD colleague who had died in custody in the Insein prison. He was held at the headquarters of the Military Intelligence Unit 6 in the township of Insein, but was released on 1 February 1996.

Monywa Tin Shwe {Lawyer}: Monywa Tin Shwe was arrested in 1990 and continued to be detained in 1996 in the Insein prison in Yangon (Rangoon) (see *Attacks on Justice, 1995*). In 1996, it was reported that in November 1995, he had been placed in cells where military dogs are normally kept, and continued to be held under such circumstances. The measure was reportedly a punishment for attempting to send a letter to the UN Special Rapporteur.

Hla Than {Lawyer}: Hla Than died from internal injuries on 2 August 1996, reportedly after having been tortured in prison, where he had been held for six years.

GOVERNMENT RESPONSE TO CIJL

On 8 July 1997, the Government of Myanmar responded to the CIJL's request for comments. The Government stated:

> "The Tatmadaw (Armed Forces) was compelled to assume the responsibilities of the State Law and Order Restoration Council (SLORC) on 18 September 1988 when the whole administrative system collapsed and the country faced total disintegration.
>
> The SLORC laid down the Three Main National Causes on the assumption of the State Power:
>
> -The non-disintegration of the Union
>
> -The non-disintegration of National Solidarity
>
> - Ensuring the perpetuity of National Sovereignty
>
> The SLORC is resolute in seeing to it that there be no repetition of the total anarchic situation which the country witnessed in 1988. It resolutely holds the view that taking into consideration the objective realities prevailing in the country, measures towards the adoption of a truly democratic state should be taken methodically and systematically, one step at a time. It is of the view that the prevailing laws of the land be upheld and be enforced in order to preserve and strengthen the rule of law, and for the maintenance of public order, which in turn will protect the national interest, proclaimed in the Three Main National Causes.
>
> *Administration of Justice*
>
> The SLORC inherited more than 900 main laws when it assumed State Power. Among these are ones enacted by former colonial rulers, and by successive Governments of Myanmar. These Governments have enacted and used the laws to maintain peace and stability within the country, as well as for the fair and efficient governance of the country. Myanmar maintained the rule of law and stability in the country throughout its long history and as a result, has never posed a threat of any kind to regional peace and stability. Myanmar has always had a sound, efficient and fair judicial system.
>
> The present Government continues to keep in force those laws that are found to be necessary for the maintenance of law and order in the country.
>
> Since former State Organs have been abolished, a new Judiciary Law regarding administration of justice was enacted. The present system of administration of justice is aimed at

the flourishing of justice and equality, protecting public welfare, rule of law and prevalence of regional peace and tranquillity. It also aims at winning trust and reliance of the public in the courts.

The Code of Criminal Procedure and other subsequent Laws provide comprehensive legal framework and guarantees to ensure that a fair trial be given to every defendant at a law court. There are also legal safeguards against the abuses of legal proceedings during trial .

The conduct of trials and the administration of justice are carried out in public courts in strict observance of the principles upon which the administration of justice shall be based and the provisions of the Code of Criminal Procedure, that the independence of the Judiciary is well maintained, and that there is no control or influence exercised by the Government over the administration of justice by the Judiciary.

The National Convention

Since the assumption of State responsibilities, the SLORC, in keeping with its declared commitment, has taken concrete and systematic steps to build a genuine multi-party democratic state in accordance with the aspirations of the people of Myanmar. In this process, and considering past painful and costly experience, a strong and enduring State Constitution is an essential prerequisite; at the same time it is also the expressed wish of the great majority parties that are legally existing in Myanmar.

It is in fulfilment of this requirement, and in response to the aspirations of the people of Myanmar, that a National Convention has been convened. Six months prior to the commencement of the first session of the convention, the Steering Committee met with representatives of the existing political parties, including the NLD. From the suggestions and proposals, which were given in a free and open manner by the participants, the types of delegates who were to be invited to the National Convention were agreed upon as follows:

- Representatives from political parties
- Representatives elect
- Representatives of national racial groups
- Representatives of peasants
- Representatives of workers
- Representatives of intelligentsia and technocrats

- Representatives of State Service Personnel

- Other invited personages

The National Convention Convening Commission drew up the working procedures which were then published accordingly. The objective and nature of the working procedures is to facilitate the delegates in holding discussions systematically and freely.

The National Convention is an all encompassing representative body, comprising nearly 700 representatives from the whole spectrum of the people of Myanmar. The delegate groups enjoy ample opportunity to put forth their opinions openly, and the discussions held so far have shown that all the groups were able to present and record their views freely.

The work of the National Convention has reached the halfway point. The delegates have reached a consensus that the new State Constitution should be a Presidential type of constitution with a National Assembly at the Centre and that there will be a bicameral legislature. At the same time, States and Divisions will have their own legislatures.

The Tatmadaw

One of the objectives laid down to serve as guide during the deliberations at the National Convention is for the Tatmadaw to be able to participate in the national political leadership role of the future state. This role envisaged for the Tatmadaw is a role in keeping with Myanmar's historical traditions.

The Tatmadaw follows the tradition of serving people's interest loyally and faithfully. It has served to protect the nation and the people in times of national crisis in the period following independence. After the assumption of State responsibilities, the Tatmadaw is now endeavouring, together with the people, to build a peaceful, prosperous and modern nation according to the aspirations of the people.

As the Tatmadaw represents the single disciplined and most cohesive organisation in the country, and it has always shouldered its primary responsibility of defending the nation, ensuring the non-disintegration of the Union, the non-disintegration of national solidarity, and the perpetuation of national sovereignty, it is only logical that the Tatmadaw should play a corresponding role in the transition that the country is undergoing from one political, economic and social system to another, as well as in the future of the State."

NIGERIA

On 12 June 1993, presidential elections which had been postponed three times, were finally held and Chief Moshood Abiola was elected president with an overwhelming majority. The election results were subsequently annulled by General Babangida, who had been in power since 1985 and Chief Abiola was subsequently jailed. In August 1993, after surrendering to internal and international pressure, General Babangida stepped down as President and transferred power to an Interim National Government, whose members he hand-picked himself. In November of the same year, General Sanni Abacha, former Defence Minister, seized power in a bloodless coup. All democratic institutions were suspended, and the main decision-making body, the military Provisional Ruling Council (PRC) has ruled since by decrees ordered by General Abacha, the sole Commander in Chief. Chief Abiola remained in prison throughout 1996.

On 1 October, 1995, General Sani Abacha announced a timetable for a return to civilian rule. An elected government was to be gradually restored with local elections held first, and a national presidential election at the end of 1998. In January 1996, three decrees setting out details of the transition were issued:

- the Transition to Civil Rule (Political Programme) Decree N° 1 of 1996 makes punishable any person who undermines the realisation of the political programme;
- the Transition to Civil Rule (Lifting of Ban on Politics) Decree N° 2 of 1996; and
- the National Electoral Commission of Nigeria Decree N° 3 of 1996.

Human rights and pro-democracy associations were sceptical about the programme, because a similar programme, which led to the 1993 elections, was aborted by military intervention. In fact, despite General Abacha's announcement to return Nigeria to civilian rule, the military authorities made no effort in 1996 to pave the way for that transition. Human rights, including freedom of expression, assembly, association and movement and freedom from arbitrary detention and the right to a fair trial continued to be violated throughout 1996. Detainees continued to be denied access to lawyers, families and essential medical care and there were continued allegations of extra judicial executions by Nigerian law enforcement officials. The trial and execution of Ken Saro Wiwa, President of the Movement for the Survival of the Ogoni People and eight others in November 1995 drew international criticism and resulted in missions from the United Nations and the Commonwealth (see *Attacks on Justice, 1995* and below).

In accordance with the timetable set out in October 1995, the first local council elections after the abortive presidential polls in 1993 were held on 16 March 1996. The ban on political parties, issued the day after the coup led by General Sanni Abacha on 17 November 1993, remained in force. Candidates were given only five days to campaign and no voter's register was

prepared; electors voted by lining up behind their candidate, making the verification of votes cast impossible. Pro-democracy activists opposing the vote were subjected to harassment which included arrests and raids by the State Security Service. Government-selected administrators replaced elected officials, effectively nullifying the results. Further, the six new states were created in October 1996 and consequently the local government elections due to be held in December 1996 were postponed until 1997 despite the transition schedule.

INTERNATIONAL FACT-FINDING MISSIONS

UN FACT-FINDING MISSION: TRIAL OF MR. KEN SARO WIWA

By resolution 50/199 of 22 December 1995, the UN General Assembly, condemned "the arbitrary execution, after a flawed judicial process, of Ken Saro-Wiwa and his eight co-defendants...." The General Assembly expressed "deep concern about other violations of human rights and fundamental freedoms....". It noted that although the principle of multi-party democracy had been affirmed, "only limited action in this regard has followed". The General Assembly requested the Secretary-General "to undertake discussions with the Government of Nigeria and to report on progress in the implementation of the present resolution and on the possibilities for the international community to offer practical assistance to Nigeria in achieving the restoration of democratic rule".

On 29 March 1996, a UN fact-finding mission arrived in Lagos "to examine the judicial procedures of the trial" of Mr. Ken Saro-Wiwa and the eight other Ogoni activists. The mission investigated the trial "in the context both of the various international human rights instruments to which Nigeria is a part and of relevant Nigerian law". The mission also evaluated Nigeria's progress towards the restoration of civilian democratic rule.

The fact-finding mission examined the authority and constitution of the special tribunal that tried Ken Saro-Wiwa. Under the Civil Disturbances (Special Tribunal) Decree N° 2 of 1987, special tribunals can be created when a "civil disturbance investigation committee" is appointed by the President under four specified conditions. The committee is appointed to investigate the disturbance and report to the President. In the case of Ken Saro-Wiwa, neither a copy of the order constituting the committee nor the committee's report was ever produced. The mission made, among others, the following conclusions:

- whereas special tribunals do form an integral part of the regular judicial system of Nigeria, the special tribunal that tried Ken Saro-Wiwa was established without a report by a duly constituted investigating committee, as required by Decree N° 2 of 1987. Accordingly, the special tribunal had no jurisdiction to try Mr Ken Saro-Wiwa and the others;

- the procedures actually followed in the course of the trial were not fair and the procedure itself did not provide for judicial review by way of appeal or revision; and
- the composition of the special tribunal, with the presence of a military officer on the tribunal itself, was not in conformity with the standard of impartiality and independence set out in applicable human rights law.

The mission specifically recommended the repeal of the Civil Disturbances (Special Tribunal) Act to allow similar offences to be tried by the ordinary criminal courts.

After the UN fact-finding mission, the Federal Military Government enacted ten decrees, of which two were relevant to human rights and the judiciary. One amended the State Security (Detention of Persons) Amendment Decree N° 14 of 1994, which had excluded courts from granting writs of *habeas corpus* in respect of persons held under Decree N° 2 1984. The new Decree restored the right of *habeas corpus*. However, the main ouster clause in Decree N° 2, which prevents the courts from inquiring into the legality of a detention order, remained in place. In its interim response to the report of the fact-finding mission, the Government advised it had directed a review of the cases of all persons currently being detained without trial under Decree N° 2 of 1984 as amended. It reported that "[v]ery shortly, such persons will be released based on an assessment of the individual merit (sic) of each case".

A second decree repealed Decree N° 12 of 1994, which ousted the courts' jurisdiction in relation to anything done under the Decree itself and specifically excluded the courts from considering violations of fundamental rights guaranteed in the Constitution.

Although the Government failed to repeal the Civil Disturbances (Special Tribunal) Decree N° 2 of 1987, it amended it to preclude members of the armed forces from sitting on tribunals constituted under the Decree and provided for the right to appeal. Before publishing the text of the decree, the Government clarified that military personnel convicted of coup plotting will not enjoy the right of appeal. Even though nothing was said concerning civilians convicted of coup plotting, it was assumed that the amendments would not apply to them either.

Commonwealth Ministerial Action Group

In November 1995, the Commonwealth Ministerial Action Group (CMAG) was established in the wake of the execution of Ken Saro-Wiwa and other Ogoniland leaders, and the consequent suspension of Nigeria from the Commonwealth was sanctioned. Commonwealth efforts to persuade Nigeria to restore democracy and respect human rights were blocked by the Nigerian Government's resistance.

In March 1996, the Government made it clear, through the Foreign Minister, that it would not welcome a Commonwealth Ministerial Mission. In August, the Government relented. The CMAG, comprised of representatives from each of Canada, Ghana, Jamaica, Malaysia, New Zealand, South Africa, the United Kingdom and Zimbabwe, visited Nigeria from 18 to 20 November 1996. The Nigerian Government refused to allow the CMAG access to detained human rights campaigners, opposition activists and political detainees such as Chief Abiola, the presumed winner of the 1993 presidential elections, and Olusegun Obasanjo, former head of state. The Government also rejected any suggestion that the Commonwealth had the right to monitor the transition to democracy. The Canadian Government, which in June 1996 had announced unilateral sanctions against Nigeria, withdrew its delegate when the Nigerian Government refused visas to its security officials.

UN Human Rights Commission and Committee

On 23 April 1996, at its 60th meeting, the Human Rights Commission adopted, without a vote, resolution 1996/79 and noted that the absence of a representative government in Nigeria had "led to violation of human rights and fundamental freedoms". It also noted that there had been limited action with respect to implementing a multi-party democracy as announced by the Government on 1 November 1995. It called for the Government of Nigeria to "accede to the request of the Special Rapporteurs on extra judicial, summary or arbitrary executions and on the independence of judges and lawyers to pay a joint investigative visit to Nigeria". It further called upon the Government to abide by its obligations under the ICCPR, to co-operate with the mechanisms of the Commission on Human Rights and to take "immediate and concrete steps to restore democratic government". In fact, the Government refused to co-operate with the Special Rapporteurs who later aborted their mission.

On 24 July 1996, the UN Human Rights Committee accused Nigeria of committing a wide range of human rights violations, ranging from summary executions to censorship. The Committee was concerned that:

> the Government of Nigeria had not abrogated the decrees establishing special tribunals or those revoking normal constitutional guarantees of fundamental rights as well as the jurisdiction of the normal courts. The Committee deplores the statement of the delegation that the decrees are not to be abrogated because they pre-dated the entry into force of the Covenant in Nigeria and are an essential part of military rule in Nigeria. The Covenant precludes measures derogating from the state party's obligations other than in the limited circumstances provided for by Article 4 which have not been applied in the case of Nigeria.

The Committee also stressed that there was "no legal protection of rights, as a consequence of the non-applicability of the 1989 Constitution and the adoption of Decree N° 107 of 1993 that re-established the 1979 Constitution, while excluding the application of the section dealing with fundamental rights". Moreover, the high number of decrees "suspending or restoring previous laws, with exceptions in some cases," created a situation of "uncertainty as to which rights and laws might be invoked and which are suspended". The Committee expressed its deep concern at the large number of persons detained without charge and at the lengthy periods of pre-trial detention, often incommunicado, and without access to the courts.

The Human Rights Committee recommended that "all decrees revoking or limiting guarantees of fundamental rights and freedoms should be abrogated. All courts and tribunals must comply with all standards of fair trial and guarantees of justice prescribed by Article 14 of the Covenant".

Human rights developments

On 17 June, the Military Federal Government constituted the National Human Rights Commission, established under Decree N° 22 of 1995. The Commission is composed of 16 members, headed by a former supreme court justice. It is charged, *inter alia,* with the duty of monitoring and assisting victims of human rights violations.

A second step toward the recognition and protection of human rights was taken by the Court of Appeal sitting in Lagos on 12 December 1996. The court considered an application by **Chief Fawehinmi** contesting his detention without trial under Decree 2 of 1984 which purported to oust the Court's jurisdiction. The Court ruled that no decree could preclude courts from hearing cases of human rights violation under the African Charter on Human and Peoples Rights. In this way it affirmed the supremacy of the Charter over domestic law. The Court reasoned that since human rights are protected by international law, the Military Government is not legally permitted to legislate itself out of its obligations (for more on Chief Fawehinmi, see *Attacks on Justice 1995,* and below).

The Judiciary

Since General Babangida seized power in 1985, a dual judicial system has evolved, with ordinary courts, as established by the Constitution and by the laws organising the judiciary, and parallel military special tribunals, partly established on an *ad hoc* basis through a long list of decrees. The first was Decree N° 1 of 1984, which modified and suspended the Constitution and established a parallel system of military tribunals with a restricted jurisdiction over crimes such as coup plotting, corruption, armed robbery and illegal sale of petroleum. Under the current regime, proliferation of such

tribunals has taken place at the cost of the jurisdiction of ordinary civil courts. Moreover, Decree N° 12 of 1994, continued to divest "all courts of jurisdiction in all matters concerning the authority of the federal Government," even after the amendments made by the Government in the wake of the UN fact-finding mission (see above).

The 1979 Constitution, that was re-established in part by Decree N° 107 of 1993, contains provisions organising the judiciary in sections 210 to 260. At the apex there is the Supreme Court of Nigeria, headed by the Chief Justice and composed of by no more than 15 other judges, appointed by the President on the advice of the Federal Judicial Service Commission. The Court has both original jurisdiction (in disputes between the federal government and the states and between the states themselves) and appellate jurisdiction, to hear appeals from the Court of Appeal.

Next in the hierarchy is the Federal Court of Appeal, consisting of the President of the Court and no less than 15 judges, appointed by the State President on the advice of the Federal Judicial Service Commission from amongst those persons qualified to practise as legal practitioners for not less than 12 years. The Federal Court of Appeal has only appellate jurisdiction from any civil inferior court. The Federal High Court, headed by a Chief Judge of the Federal High Court, hears matters of federal jurisdiction. When exercising other jurisdictions conferred on it by the legislature, this court has the powers of a state High Court.

At the state level, the superior courts include State High Courts, with unlimited jurisdiction on state matters, Sharia Courts of Appeal, which have appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law, and Customary Courts of Appeal, exercising appellate and supervisory jurisdiction in civil proceedings involving questions of Customary law. The lower courts are Customary or Area Courts, followed by the Magistrate and District Courts. It is the nature of the case which determines which court has jurisdiction. In principle, Customary and Sharia Courts have jurisdiction only if both the plaintiff and defendant agree, but in practice, legal costs, delays and the distance to civil courts lead many litigants to prefer these courts.

The UN fact-finding mission pointed out that at present, "the judiciary is not in a position to carry out the constitutional responsibilities entrusted to it in protecting fundamental rights as its jurisdiction is curtailed by the issuance of decrees that have made serious inroads into the authority of the courts in regard to both fundamental issues of substance, such as basic human rights provisions and procedures such as the resort to special tribunals".

Resources

In addition, the maintenance of court buildings, judges' residences and furnishings, the purchase of cars and other equipment is in the absolute

discretion of the executive, both at the federal and state levels. The problems of the judiciary are further compounded by poor remuneration of judges that makes them susceptible to corruption. There was an increase of the salaries of judges, but it had little impact in the face of inflation. The lack of the necessary infrastructure for the effective administration of the judicial system has led to considerable delays in the processing of cases. It may take seven to ten years to determine a case. Access to courts remains theoretical because some cases are never dealt with or are dealt with only after considerable delay.

Moreover, there is a growing trend to use members of the armed forces and the police to prevent the execution of valid court judgments and to intimidate judicial officers. Court orders have often been disregarded by the military officials and military administrators. For example, on 17 July 1996, the Federal High Court ruled that the police did not have grounds to detain three senior opposition and pro-democracy leaders, Alhaji Ganiyu Dawodu, Chief Ayo Adebanjo and **Chief Abraham Adesanya** (see below), in connection with the murder of Mrs Kudirat Abiola, wife of Chief Abiola. The Court ordered their release and the payment of compensation of N 500,000 to each of them. The police refused to release the men. They were released from detention only in October 1996, more than three months after the Federal Court had ordered their release. In the face of this disobedience, courts have sometimes declined to make an order against government officials, claiming that it will only be disregarded. A case in point is *Simeon Olugbile vs Attorney General* and two others, Suit No ID/135M/96, where the Lagos High Court discouraged the lawyer, Mr Akin Ajani, from making an application for damages against the respondent. The reason given was that, since the application was against the Government, issuing such an order would be nothing but a waste of time because of the incessant disregard and disobedience of court orders by the Government.

Lawyers

The Legal Practitioners Decree N° 21 of 1994 created a new Body of Benchers removing power from the Bar Council, that had been elected by the members of the Bar. Through this act, the government effectively limited lawyers' right of association. The UN fact-finding mission expressed its concern about such an interference with the right of association of the lawyers.

Cases

Tunji Abayomi {Lawyer and counsel to the detained former Head of State, General Olusegun Obsanjo}: Mr. Abayomi was detained on 26 July

1995 after criticising the secrecy surrounding the "Coup Trial," wherein 52 persons were arrested and charged with plotting to overthrow the Abacha Government (see *Attacks on Justice, 1995)*. He was arrested while specifically addressing a press conference and arguing that his client, a defendant in the "Coup Trial" was innocent. Mr. Abayomi was released on 22 June 1996 on the eve of the meeting with the Commonwealth Ministerial Action Group in London. On 24 October 1996, Mr. Abayomi complained to the Inspector General of Police that unknown persons had been harassing him because he was representing a pro-democracy activist.

Peter Adekoya {Lawyer, Festac Town, Lagos}: Mr. Adekoya obtained a judgment in favour of his client and proceeded to execute the judgment in October 1996. The judgment debtor complained to the Chief Justice of Ikeja who invited all parties to the court but refused to hear submissions by Mr. Adekoya on behalf of his client. Subsequently, each of Mr. Adekoya, his client and the court bailiff were charged before an Apapa Magistrate Court for conduct likely to cause a breach of the peace.

Chief Abraham Adesanya {Lawyer, pro-democracy activist}: Chief Adesanya was one of the three detainees who remained in detention three months after his release was ordered on 17 July 1996 by the Federal High Court. Chief Adesanya had been detained in connection with the murder of the senior wife of Chief Abiola, although the Federal High Court found there was no evidence linking him or his two colleagues to the murder.

Olisa Agbakoba {Human right lawyer and former President of the Civil Liberties Society}: On 3 February 1996, Mr. Agbakoba's passport was confiscated on his return from a trip to Canada and Europe (see also *Attacks on Justice 1995*).

Robert Azibaola and **Uche Ukwukwu** {Lawyers}: Mr. Azibaola and Mr. Ukwukwu represented 15 of the 19 accused who remained on trial in the "Ogoni Trial" when they were, for the first time, brought before a court on 17 July 1997. The two lawyers argued that the prosecution had not pursued the case against the defendants. The case for the 15 was adjourned to 5 August and that of the remaining four, who were not in court, was adjourned to 6 August. The cases were adjourned again to 3 September, for the four and to the 3 October for the 15 defendants. At the hearing, a photographer attempted to photograph the detainees who were reportedly in poor physical condition. After the hearing on 3 October, both lawyers were detained by members of the State Intelligence and Investigation Bureau (SIB) and held overnight at the SIB facility in Port Harcourt. The next morning, Mr. Azibaola and Mr. Ukwukwu were charged with obstructing the course of justice, purportedly for trying to prevent the arrest of the photographer. They were then released on bail.

Chief Olabiyi Durojaiye {Lawyer and founding member of the National Democratic Coalition (NADECO)}: Chief Durojaiye was arrested on 3 December 1996 in the middle of the night by seven armed officers of

the State Security Service. No reasons were given for his arrest, although it may have been connected to his support and involvement with the pro-democracy group NADECO. In 1996, several NADECO supporters were killed, including Kudirat Abiola, the senior wife of Chief Abiola.

His family was refused access to him but it was believed Mr. Durojaiye was held at the headquarters of the Directorate Military Intelligence in Apapa, Lagos, although no official confirmation was given. It was thought that, if true, this was very unusual since political detainees are normally held in custody by the security police and not by the armed forces.

Femi Falana {Human rights lawyer, President of the National Association of Democratic Lawyers}: Mr Falana was arrested on 14 February 1996, while trying to investigate the detention of Chief Fawehinmi (see below). He was detained under the State Security (Detention of Persons) Decree N° 2 of 1984, which provides for the indefinite incommunicado detention, without charge or trial, of any person deemed to have threatened the security of the state. He was released unconditionally from detention on 20 November (see also *Attacks on Justice 1995*).

Chief Gani Fawehinmi {Human rights lawyer and President of the National Conscience Party (NCP)}: Chief Fawehinmi was arrested at his home in Lagos on 30 January 1996 and was detained under the State Security (Detention of Persons) Decree N° 2 of 1984. On 20 November he was released unconditionally from detention (see also *Attacks on Justice 1995*).

Judge Bello Abdullahi Gasau {Former Sokoto State Chief Judge}: Judge Gasau was dismissed on 19 August 1996 for alleged misconduct by the former Military Administrator of Sokoto State, Colonel Muazu. It was alleged that Judge Gasau had misapplied money from the estate of a deceased businessman.

The removal of Judge Gasau was likely unconstitutional. Section 256 of the 1979 Constitution of Nigeria, in force in 1996, provides for the removal of judicial officers for misconduct by the Governor acting on the recommendation of the Federal Judicial Service Commission. It does not provide for the removal of a judge by the Military Administrator (former or otherwise). This section was never repealed or suspended by the Government.

Simeon Ogwuche {Lawyer based in Maiduguriand member of the Civil Liberties Organisation}: On 19 March 1996, Mr. Ogwuche was seized from his office by soldiers who beat him, reportedly because of his representation of a client and because of his membership in the Civil Liberties Organisation.

Ayo Opadokun {Lawyer and at the time of his arrest, Secretary General of NADECO}: Mr. Opadokun was arrested on 11 October 1994 and was detained without charge. No official reason was given for his continued detention, which appeared to be solely due to his leading role in the pro-democracy organisation. The authorities announced his release in June 1996, but it appeared he was still being detained at the end of 1996.

PAKISTAN

The 1973 Constitution of the Islamic Republic of Pakistan provides for a federal state and a parliamentary system. Federal legislative power vests in the Parliament, consisting of two houses: the National Assembly and the Senate. The National Assembly is composed of 207 Muslim members and ten additional members of other religions, elected for a five year term. The Senate, the upper house, is composed of 87 members, elected for a term of six years. The President has the power to dissolve the National Assembly and to call for new elections, whereas the Senate can not be dissolved.

Executive authority of the Federation vests in the President, who is also the "head of the State and [represents] the unity of the Republic". The President is elected for a renewable term of five years by the members of both houses sitting together and he or she is aided and advised in the exercise of his executive functions by the Prime Minister and the Cabinet. Since 20 March 1990, the President's discretion in the appointment of the Prime Minister was reduced and the selection of the Prime Minister must now command "the confidence of the majority of the members of the National Assembly". All the other Federal Ministers are appointed from amongst the members of the Parliament by the President on the advice of the Prime Minister. The Cabinet is collectively responsible to the National Assembly.

Each Province has a Governor, "appointed by the President at his discretion after consultation with the Prime Minister", who vests the executive authority of the Province, with the aid and advice of a Cabinet of Ministers, and a Provincial Assembly. The latter is composed of a number of different members according to the Province, who are elected for a five year term.

From November 1988 to 1990 and from 1993-1996, Mrs Benazir Bhutto was Prime Minister of Pakistan. When she was appointed in 1988, she was the Islamic world's first female leader. On 5 November 1996, President Farooq Ahmed Leghari dissolved the government of Prime Minister Bhutto, dissolved the National Assembly and called for new elections to be held on 3 February 1997. President Leghari invoked the 1985 Eighth Amendment of the Constitution, which provides that, "...the President may also dissolve the National Assembly in his discretion where, in his opinion, a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary".

In October 1996, anti-Government protests intensified. Fifteen opposition parties accused the government of corruption and economic ineptitude and requested the President to dissolve the Government. As a result, the President, who had been considered to be an ally of Prime Minister Bhutto, dismissed Prime Minister Bhutto and her Government, accusing them of massive corruption, undermining the judiciary, with the illegal killing of thousands of alleged terrorists in Karachi, and for gross economic mismanagement. On 5 November, a new interim caretaker Government was appointed.

Mrs. Bhutto was briefly placed under house arrest. On 13 November, she challenged her dismissal and the dissolution of the National Assembly in the Supreme Court. On 15 December, President Leghari filed a report before the Supreme Court to justify his recourse to Article 58(2b). The Supreme Court dismissed Mrs. Bhutto's application.

The police and the paramilitary forces continued to be involved in serious human rights violations. It was reported that some magistrates and doctors helped to conceal human rights violations perpetrated by the security forces, by issuing false investigation and medical reports. Further, investigating officers also reportedly shielded their colleagues involved in abuses. In his report of October 1996, the Special Rapporteur on torture, Nigel S. Rodley, maintained that "torture, including rape, and similar cruel, inhuman or degrading treatment [were] rife in Pakistan" and that "this state of affairs [was] perpetuated by the virtual impunity from criminal sanction of the perpetrators of these grave crimes". He added that "Pakistan should become party to the Covenant against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights and its Optional Protocols" which still were not ratified by the country.

The Judiciary

Part VII of the Constitution is dedicated to the judiciary and provides that "the judiciary shall be separated progressively from the executive within 14 years from the commencing day". The Government twice delayed full separation by constitutional amendment. The Supreme Court, in response to the Government's delay, ordered it to ensure separation was implemented no later than 23 March 1994. However, the Government continued to stall and in January 1996, the Supreme Court again ordered the Government to ensure separation by 31 March 1996. In March 1996, the Government enacted the Law Reforms Ordinance, 1996, in response to the Supreme Court Order. However, the Ordinance was of a temporary nature only and had to be reissued every four months - which it was in July and again in November 1996. The draft bill was pending before the Senate when the Government was dissolved in November 1996 and therefore remained only a temporary measure requiring renewal.

Previously, magistrates heard only criminal cases and were controlled by the executive. The process of separating the powers created "judicial magistrates" who now come under the supervision of the High Courts. The Ordinance, however, continued to allow petty offences, such as traffic violations, public nuisances and minor threats to the peace to be heard by the "executive magistrates". In some cases, these "executive magistrates" have the power to sentence defendants to three years imprisonment and it was thought by local non-governmental organisations that the executive could

use the executive magistrates to harass citizens. Further, an insufficient number of judicial magistrates were appointed, requiring civil judges to assume their duties. The Chief Justices, at a meeting on 31 October 1996, cited delays in the process of separation and called for the expeditious appointment of a sufficient number of Judicial Magistrates.

Court Structure

The judicial system is composed of a Supreme Court of Pakistan, a High Court for each Province and, at the lower levels, civil and district courts for civil proceedings, and magistrate and session courts in the criminal system. There is also a Federal Shariat Court and Special Terrorism Court (see below).

The Supreme Court enjoys original jurisdiction in every dispute between the Federal Government and the Provincial Governments and appellate jurisdiction "from judgments, decrees, final orders or sentences of a High Court". The High Courts' jurisdiction is extensively detailed in the Constitution.

Court challenge of judicial appointment procedures: The Judges Case

The appointment procedure provided for in the Constitution overwhelming favours political appointments and necessarily invites interference from the Government.

The Supreme Court consists of the Chief Justice, appointed by the President, and many other judges are determined by an act of Parliament or are fixed by the President. The puisine judges are appointed by the President on the advice of the Chief Justice. According to Article 180, if the office of the Chief Justice of Pakistan is vacant or if the Chief Justice is absent or unable to perform the functions of the office, the President is to appoint the most senior of the other Judges of the Supreme Court. If any of the offices of a Judge of the Supreme Court is vacant or the Judge is absent or unable to perform his or her duties, the President may appoint, on consultation with the Chief Justice, a judge of the High Court to *act temporarily* as a Judge of the Supreme Court. The President may revoke this appointment at *any* time.

Every High Court is composed of a Chief Justice and as many other judges as determined by law or fixed by the President. All the Judges of High Courts, including the Chief Justices, are appointed by the President, after consultation with the Chief Justice of Pakistan, the Governor of the Province and, except in case of the appointment of the Chief Justice, the Chief Justice of a High Court. As with the Chief Justice of Pakistan, the President may appoint a Judge of the Supreme Court or a Judge of the High Court to act as Chief Justice of a High Court if the office is vacant or if the Chief Justice is unable to fulfil his or her duties. If the office of a

Judge of a High Court is vacant or a judge of the High Court is absent or unable to perform the functions of his or her office *or* if it is necessary to increase the number of Judges of a High Court, the President may, after consultation with the Chief Justice, the relevant Governor and the Chief Justice of the relevant High Court, appoint a qualified person to be an Additional Judge *"for such period as the President may determine, being a period not exceeding such period, if any, as may be prescribed by law".*

The Constitution provides that "no judge shall be so transferred except with his consent", but, in the same article, it adds that "a judge of a High Court who does not accept transfer to another High Court [...] shall be deemed to have retired from his office".

Although it may have been that the provisions permitting the appointment of acting and additional judges were drafted to see the judiciary through times of flux, the Government was seen as abusing the provisions, relying on them to stack the judiciary with their supporters. In recent years, three of the four High Courts have had acting Chief justices appointed for indefinite periods. It was also reported that the Government relied on the provisions permitting transfers to assign judges to the Federal Shariat Court, which has traditionally been thought to end a judicial career.

In *Attacks on Justice, 1995*, the CIJL reported the court challenges launched against the Government concerning the appointment of judges in 1994. It was widely-believed that the appointments were purely political; 13 of them were former activists in the Pakistan People's Party (PPP) and three others, from the Muslim League faction which supported the Bhutto coalition. In fact, Prime Minister Bhutto ignored tradition and appointed as Chief Justice a judge who had made decisions favourable to Prime Minister Bhutto instead of appointing one of the two most senior judges from the Supreme Court. It was alleged that these appointments were made contrary to the advice of the Chief Justice, although as indicated above, Article 177 of the Constitution requires judges of the Supreme Court to be appointed by the President on consultation with the Chief Justice. The court challenge also disputed the practice of appointing acting and additional judges to the High and Supreme Courts.

Against this background, the Supreme Court rendered its decision in one of the cases challenging the 1994 judicial appointments, known as the "Judges Case"(cited as *Al-Jehad Trust v. Federation of Pakistan et al.)*. In its decision of 20 March 1996, the Supreme Court concluded, *inter alia*;

- the opinion of the Chief Justice of Pakistan and of the Chief Justice of a High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President/Executive;
- if the President/Executive appoints a candidate found to be unfit and unsuitable for judgeship by the Chief Justice of Pakistan and the Chief

Justice of the High Court concerned, it will not be a proper exercise of power under the relevant article of the Constitution;

- that since consultation for the appointment/confirmation of a judge of a superior Court by the President/Executive with consultees mentioned in the relevant Article of the Constitution is mandatory, any appointment/confirmation made without consulting any of the consultees as interpreted above would be violative of the Constitution and, therefore, would be invalid;
- no ad hoc judges can be appointed in the Supreme Court while permanent vacancies exist;
- that Additional Judges appointed in a High Court against permanent vacancies acquire a legitimate expectancy to be considered for permanent appointment upon the expiry of their period of appointment as Additional judges. They are entitled to be appointed as such if they are recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan in the absence of strong valid reasons to be recorded by the President/Executive.
- the most senior judge of a High Court has a legitimate expectancy to be considered for appointment as the Chief Justice and in the absence of any concrete and valid reasons to be recorded by the President/Executive, he is entitled to be appointed as such in the court concerned; and
- the transfer of a Judge of one High Court to another High Court can only be made in the public interest and not as a punishment.

On 19 March, and 24 hours before the decision was to be delivered in the "judges case", the Government tried to pre-empt the decision. Then Prime Minister Bhutto issued orders making permanent the appointment of ten judges of the Lahore High Court and seven judges of the Sindh High Court.

Prime Minister Bhutto then criticised the decision in the National Assembly on 28 March. She also asserted that the Chief Justice had exceeded his jurisdiction. Despite the criticism, the Government amended the Constitution and proceeded to implement the decision. Under pressure from the Supreme Court Order, the Government was forced to appoint permanent Chief Justices of the High Courts of Lahore, Peshawar and Karachi. Acting Chief Justices of the Lahore and Sindh High Courts, who were judges of the Supreme Court, were recalled by the Chief Justice of Pakistan to serve in the Supreme Court. The newly appointed Chief Justices of the High Courts in Lahore and NWFP recommended the termination of judges who had been appointed contrary to the procedures set out in the Supreme Court judgment. Ultimately, two ad hoc judges of the Supreme Court were removed, six High Court Judges resigned and 11 were removed. In September, President Leghari approved the appointment of

29 judges appointed by the PPP to the Sindh, Lahore and Pshawar High Courts.

Federal Shariat Court

The Federal Shariat Court has the power to examine and decide if a law or its provisions complies with the Injunctions of Islam. In addition, the Federal Shariat Court "may call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of Hudood". Appeals against the decision of the Federal Shariat Court are heard by a Bench of the Supreme Court, known as the Shariat Appellate Bench.

The eight Muslim members of the Federal Shariat Court are appointed by the President for a renewable term of three years. The President has the power to "(a) modify the term of appointment of a judge; (b) assign to a judge any other office; and (c) require a judge to perform such other functions as the President may deem fit". The renewable term and ability to transfer judges violates the UN Basic Principles on the Independence of the Judiciary while the latter provision is incompatible with the commission of a judge.

Special Terrorism Courts

According to the Suppression of Terrorist Activities (Special Courts) Act of 1975, the Government has the power to refer cases involving terrorism activities, bombings, sabotage and similar offences to Special Terrorism Courts. The judges sitting in those courts are appointed by the Federal Government in its sole discretion resulting in political appointments of unqualified judges. It is reported that many legal experts maintain that the special courts do not provided for fair trials and that during both the investigations and the trial proceedings, the presumption of innocence is systematically ignored. Government officials and some attorneys justified the special courts because of judicial backlog. But the statistics in 1996 showed that in the Hyderabad court alone, 380 cases were pending.

In July 1996, a full bench of the Lahore High Court declared sections of the Suppression of Terrorist Activities (Special Courts) Act of 1975, to be unconstitutional. In particular, the Court considered the sections which governed the appointment of the "presiding officers" to these courts. It cited the fact that the "presiding officers" of the Special Terrorism Courts were appointed with "no security of tenure whatsoever". It noted that the power to transfer cases to the courts was vested with the executive and the supervision and the control of the High Court was totally undermined. It specifically held that the offending sections eroded the independence of the judiciary and ordered the "notifications appointing the Presiding Officers to these Special Courts" quashed. The Special Terrorism Courts were, for a time, abolished and cases pending before them were transferred to the

Sessions Courts. However, the High Court had also held that the Special Terrorism Courts could continue if they were properly constituted. By the end of 1996, a number of Special Terrorism Courts were recreated with duly appointed Session Court Judges as their Presiding Officers. The procedural irregularities remained.

Discipline Procedures: Supreme Judicial Council

All the judges of the Supreme Court and of the High Courts shall hold office until they attain the age, respectively, of 65 and 62 years, "unless he sooner resigns or is removed from office in accordance with the Constitution".

The Constitution creates a Supreme Judicial Council composed of the Chief Justice of Pakistan, the two most senior judges of the Supreme Court and the two most senior Chief Justices of High Courts. The Council has the power, on the direction of the President, to investigate a judge's ability to perform his or her duties or any reported misconduct. After making inquiries, the Council reports to the President, who has the power to remove the judge from office if the report concludes the judge is unable to perform his or her duties or is guilty of misconduct.

Cases

Nizam Ahmed {Former Justice of the Sindh High Court, member of the Pakistan Bar Council}: Former Judge Ahmed had received death threats in connection with a case he had filed with the Sindh High Court in Karachi. Although Mr. Ahmed reported these threats to the authorities, Judge Ahmed received no protection. Both Judge Ahmed and his son were killed.

Asmar Jahangir {Lawyer, Chair of the Human Rights Commission of Pakistan}: In 1996, a group of young fundamentalists broke into her office and threatened to kill her if she continued to represent Saima Waheed, who was accused of marrying without the consent of a *wali*, a custodian. On 10 March 1997, the Lahore High Court recognised Ms. Waheed's right to choose her husband freely. At the time of the court decision, Ms. Jahangir was still under the protection of the police.

Government Response to CIJL

On 28 July 1997, the Government of Pakistan responded to the CIJL's request for comments. The Government stated:

"The President's Power to Dissolve the National Assembly

The National Assembly, through a unanimous vote, adopted

the 13th Amendment to the Constitution. The Amendment has repealed the power of the President to unilaterally dissolve the National Assembly. The National Assembly can only be dissolved "if so advised by the Prime Minister".

The power of the President to appoint a Governor in each of the four provinces has also been taken away. Governors will only be appointed on the advice of the Prime Minister. Such advice, under the Constitution, is binding on the President of Pakistan.

Prior to the Thirteenth Amendment, the President's power to dissolve the National Assembly, was exercised on four occasions.

The dissolution orders passed by general Zia-ul-hag sending Prime Minister June Jo back to the polls was declared illegal by the Supreme Court. Since the entire nation, including former Prime Minister June Jo, had welcomed the new elections, discretion was not exercised by the Supreme Court in favour of restoration of the National Assembly and the Government.

Prime Minister Nawaz Sharif's challenge to dismissal of his government by President Ghulam Ishaq Khan and dissolution of National Assembly was also declared illegal by the Supreme Court in 1993. He was reinstated with full honours.

Former Prime Minister Benazir Bhutto lost the court battle appealing against the dismissal of her Government both in 1990 and 1996, for charges, inter-alia, of corruption. Regarding the dissolution of the National Assembly in 1996 by President Farooq Leghari, the Supreme Court of Pakistan upheld the decision of the President Farooq stating that:

> "extensive constitutional and pervasive failure to observe not one but numerous provisions of the Constitution, creating the impression that the country is governed not so much by the Constitution but by methods unconstitutional ... and ... her (Mrs. Benazir Bhutto's) speech before the National Assembly had ridiculed the judgement of the Court – Articles 190 and 2A of the Constitution are violated – under orders of the petitioner (Ms Benazir Bhutto) telephones of the Judges of the Supreme Court, leaders of the political parties and high ranking military and civil officials were being taped and transcripts sent to the petitioner for reading ... ."

The Supreme Court, therefore, rejected the petition.

The Judiciary

Separation of Judiciary from the Executive

The full separation powers between the judiciary and the legislature as desired by the Constitution was twice delayed by the previous Government. The Supreme Court, because of the this delay, ordered the Government to ensure separation was implemented no later than 23 March 1994. The then Government filed a review seeking time for the separation of powers to be implemented by 31 March 1996. In March 1996, in response to the Supreme Court Order, the Government enacted the law Reforms Ordinance, 1996.

Ordinances are of a temporary nature and need to be renewed. The Law Reforms Ordinance 1996 had to be reissued in July and November 1996. It was also violative of another Supreme Court judgement which has declared repetition of Ordinances unconstitutional.

The separation process is near completion under the present Government. The legislative process in the Parliament is underway.

Court Structure

The suppression of "Terrorist Activities (special courts) Act of 1975 has been amended. Courts of Sessions will perform the functions of these courts. The Session Judges unlike their predecessors have security of tenure and instead of executive control are subject to control and supervision of the High Court. Procedural irregularities have, thus, been eliminated.

Court Challenge of Judicial Appointment Procedure: The Judges' Case

The decision by the Supreme Court in the " judges' case" resulted in clarifying the role of the executive in the appointment of judges.

The previous Government had criticised the decision but was forced to implement it due to the efforts of the Bar Associations and the judiciary. Its attempts to stall the implementation of the Supreme Court judgement was in violation of the Constitution. This was one of the reasons for the dismissal of the previous government.

The 29 judges appointed by the previous government to Sindh, Lahore and Peshawar High Courts were confirmed by President Leghari on recommendations of the Chief Justices and Governors of the Provinces, and in consultation with the Chief Justice of Pakistan. Six more Judges have since been appointed in the Punjab in accordance with the decision of the Supreme Court.

Federal Sharía Court

The CIJL draft does not consider the purpose and impact of Article 203C (4c) of the Constitution of Islamic Republic of Pakistan which guarantees that while performing the functions which a judge is required under clause (4b) to perform or holding any other office assigned to him under the said clause a judge shall be entitled to the same salary, allowances and privileges as are admissible to the Chief Justice or as the case may be, Judge of the Court. Thus there is adequate safeguard that terms of service of a judge who has been asked to perform other functions such as those of a Vice Chancellor of a University cannot be varied to his disadvantage however there can always be an enhancement.

Special Terrorism Courts

After the judgement of a full bench of the Lahore High Court, the power to appoint judges to the " suppression of terrorist activities Special Courts" has been taken away from the executive.

Session Court Judges have since been appointed as presiding officers (judges) they not only enjoy security of services but also fall under the control and supervision of the High Courts.

The judgement of the Full Bench of the High Court was challenged by the previous government before the Supreme Court of Pakistan.

The present Government has withdraw the appeal and implemented the judgement in letter and spirit. Procedural infirmities have also been eliminated. In Punjab alone, 47 Courts have been established for speedy disposal of cases.

Cases

Nizam Ahmad: The present government has ordered a fresh inquiry into the matter and all efforts are being made to arrest the culprits.

Asma Jahangir: Ms. Jahangir is being provided all possible assistance and protection by the police for safeguarding her person and property from the religious zealots who do not agree with her views."

PERU

In April 1992, President Alberto Fujimori's formally suspended the Constitution and revoked the independence of the judiciary. The nation was placed under military control and Congress was dissolved. Since then, the balance of power between the three branches of the state has not been fully restored. In 1996, power was still centralised in the executive and in particular, in the President.

The President governs together with a Council of Ministers. The 120 seat Congress holds legislative power. President Fujimori's party "New Majority Change-90" *(Nueva Mayoría Cambio-90)* won a majority of the seats in the parliamentary elections held simultaneously with the presidential elections in 1995.

The 1993 Constitution allows the President to serve for only two consecutive terms. However, in 1996, Congress passed a law allowing the President to run for a third term. The law was challenged by the opposition parties and the civil society. The Lima Bar Association brought an application challenging the law before the Constitutional Tribunal. The Tribunal however, failed to obtain a majority vote in favour of declaring the law unconstitutional.

The new Penal Procedure Code which was submitted to the executive in December 1995 had still not been promulgated. The Code is expected to streamline the processing of criminal cases, but was opposed by the National Police.

In September 1996, the first human rights ombudsman took office. This position was provided for in the 1993 Constitution but was only realised in 1996.

VIOLENCE AND ANTI-TERRORISM MEASURES

Despite President Fujimori's efforts to eliminate the insurgent movements, in particular, the Shining Path *(Sendero Luminoso)* and the Túpac Amaru Revolutionary Movement *(Movimiento Revolucionario Túpac Amaru,* MRTA), terrorist activities and internal disturbances persisted in Peru in 1996, creating an environment of violence. Elements from the MRTA raided the Japanese embassy on 17 December 1996, taking over 400 persons as hostages, amongst them several high level Government officials and foreign ambassadors. In the beginning of 1997, the situation was still not resolved and 72 hostages were still being held.

Police and security forces have been given broad powers to curb terrorism. Although subversive violence, forced disappearances and extra judicial killings have diminished significantly since 1992, the police and security forces continued to use these powers, often excessively, when arresting and

detaining people in 1996. This situation was reinforced by the decree laws on terrorism and treason (see further below under Faceless Judges and Military Courts), and the existence of states of emergency in some areas of the country, where some constitutional guarantees are suspended due to high levels of internal disturbances. Even in areas which are not under a state of emergency, military presence is manifest. In carrying out their duties, police and security forces violate human rights; it was reported that they continued to carry out extra judicial killings, arbitrary arrests and hold detainees *in communicado*, beating and torturing them.

Various mechanisms of the United Nations, including the Special Rapporteur on the Independence of Judges and Lawyers, the Special Rapporteur on Extra Judicial, Arbitrary and Summary Executions, the Special Rapporteur on Torture, the Working Groups on Arbitrary Detentions and on Forced Disappearances and the Human Rights Committee, highlighted the violations of international human rights norms which continued to be committed in Peru in 1996.

The Judiciary

The Peruvian judicial system includes the Supreme Court of Justice at the apex, followed by Superior Courts in the 24 judicial districts, Courts of First Instance and Judges of the Peace. There is also a military court system (see below). In May 1996, the Executive Commission of the Judiciary created a special court for illegal trafficking of drugs. This court never functioned properly and was deactivated on 27 February 1997.

The Tribunal of Constitutional Guarantees *(Tribunal de Garantías Constitucionales)* was incorporated into the Peruvian judicial order through the 1979 Constitution. It too was disbanded in April 1992 and cases before it were paralysed. The 1993 Constitution provided for the Constitutional Tribunal with expanded competence: it is formally independent and autonomous. The Tribunal may declare unconstitutional a law or any Government action, so long as at least six of the seven members agree. Upon the appointment of its members, the Tribunal began to function in June 1996. Its *de facto* independence has been questioned because two of its members in 1996 were allegedly associated with the President and his party. Furthermore, recent legislation has required any constitutional challenge of a law to be filed within six months after its promulgation.

Appointment Procedure

Although the Constitution provides for permanency in tenure and fair remuneration, the judiciary has not recovered from the dismissal of more than 500 judges in 1992 by President Fujimori. As a consequence of the dis-

missals, approximately 80 percent of the judges served on a temporary basis in 1996. Even under the new Constitution, judges are subject to recertification every seven years, leaving them vulnerable to external interference. The UN Human Rights Committee in July 1996 expressed its concern that this requirement of re-certification "tends to affect the independence of the judiciary by denying security of tenure".

In an effort to depoliticise the judiciary, the new Constitution provided for judges to be appointed by the National Council of the Magistracy. The Council is to be composed of representatives from the Supreme Court, the prosecutors, the bar association, the remaining professional associations and deans from the national and other universities. It selects, appoints and supervises judges and prosecutors.

Resources

The judiciary prepares its budget proposal, which is presented to the executive, which defends it before the Congress. The 1979 Constitution contained a provision assuring the judiciary a minimum of two percent of Government spending, however, this provision was not included in the 1993 Constitution. This created potential for the executive to determine the budget according to its own criterion and priorities. Nevertheless, in 1996, the judiciary received its largest budget in four years, US $111 million, equalling 1.3 percent of the general budget of the country. Despite this, the judiciary remained in need of additional resources in 1996.

Judicial Reform

Corruption and inefficiency are ingrained problems that cripple the independence of the judiciary and the administration of justice, which in turn creates a lack of public confidence in the judiciary. To overcome these problems, the Government initiated reform and modernisation of the judiciary at the end of 1995. Law N° 26546 of 21 November 1995 suspended some of the articles of the 1991 Law on the Judiciary, including those concerning the Governing Council of the Judiciary, and created the Executive Commission of the Judiciary to carry out the reforms. The Commission was *inter alia* charged with decision-taking and budget preparing. Members of the Executive Commission are the Supreme Court President, the Presidents of the Penal, Constitutional and Social Chambers of the Supreme Court and a retired Navy Commander, acting as Secretary of the Executive Commission. The appointment of the retired Navy Commander was reportedly a measure taken to assure executive control over the judicial system.

In June 1996, Law N° 26623 established a Judicial Co-ordination Commission as a co-ordinating body and umbrella over the various organs involved in the administration of justice. It was given the power to reorganise the organs within the court system and to extend its mandate in time, as

well as its functions and powers during the reorganisation period (1996-1998). The law further authorised the Executive Commission to discharge judges that do not have "good conduct and suitability" for the job. Notwithstanding the reforms were intended to improve the functioning of the judiciary, power has been concentrated in the few members of these temporary commissions, allowing them to impose radical measures.

In July, the Bar Associations of Lima and Arequipa challenged Law N° 26623 before the Constitutional Tribunal. On 29 October 1996, the Tribunal repealed several provisions of the law, including those concerning the power of the Judicial Coordination Commission to extend its mandate and the authority of the Executive Commission to dismiss judges.

Further, due to problems concerning its construction, the Judicial Coordination Commission was unable to accomplish much in practice. On the other hand, the Executive Commission, however controversial, did take positive actions in relation to the high number of persons detained without having received a sentence and corruption, and has increased the number of courts.

The "Amnesty Law"

Law N° 26479 of 15 June 1995 granted general amnesty to all members of the security forces and civilians who were the subject of complaints, investigation, indictment, trial or conviction for both military and common crimes committed "under circumstances resulting as a consequence of the fight against terrorism" between May 1980 and 14 June 1995 (see *Attacks on Justice 1995)*. In its Preliminary Observations on the Report submitted by Peru under Article 40 of the International Covenant on Civil and Political Rights, the Human Rights Committee on 25 July 1996 expressed its deep concern that the amnesty granted by Decree Law N° 26479 absolves all criminal responsibility...". It continued to say:

> [s]uch amnesty prevents appropriate investigation and punishment of perpetrators of human rights violations, undermines efforts to establish respect for human rights, contributes to an atmosphere of impunity among perpetrators of human rights violations and constitutes a very serious impediment to efforts undertaken to consolidate democracy and promote respect for human rights and is thus in violation of Article 2 of the Covenant. In this connection, the Committee reiterates its view, as expressed in its General Comment 20(44), that this type of amnesty is incompatible with the duty of States to investigate human rights violations, to guarantee freedom from such acts within their jurisdiction and to ensure that they do not occur in the future.

FACELESS JUDGES

One purported reason behind President Fujimori's 1992 coup was to fight terrorism. In June and August 1992, Decree Law N°s 25475 and 25659, on terrorism and treason respectively, were introduced (see *Attacks on Justice* 1995). The laws established that political violence, defined either as terrorism or treason, would be tried in special courts where judges and prosecutors would be anonymous. Cases of terrorism are heard by faceless civil courts whereas cases of treason are tried by faceless military courts.

The anti-terrorism legislation and the use of faceless courts do not only violate the principles of a fair trial, but also present several other concerns, including the following.

- The definition of a terrorist as established in Decree Law N° 25475 is an individual who "carries out acts against the life, physical integrity, health, freedom and security of individuals". The law further applies to 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 crime of treason, defined in Decree Law N° 25659, is based on the definition of terrorism, but links it to the means utilised, such as car bombs, explosives etc., and their effect on life and property. Those accused of being members of an armed opposition group, and anyone who aids and assists "traitors" may be charged with treason (see *Attacks on Justice 1993-1994*). The distinction between a common crime and a crime of terrorism is not clear, and it is difficult to objectively differentiate between terrorism and treason, which entail completely separate procedures: treason is tried before the military courts.
- Punishments are severe, ranging from five years to life imprisonment, and many persons have been convicted to long sentences without due process of law.
- The legislation gives the police extensive powers of arrest and detention. The period of detention before presenting a person before a judge may be extended from 24 hours to 15 days and in communicado detention may continue for ten days, solely upon a decision made by the police, who only later informs the Judge.
- It permits the police to decide whether there is sufficient evidence to lay charges, what those charges will be and whether the accused will be tried in a civilian or military court.
- The court proceedings are summary and secret, implying limitations on the rights of the defendant who does not have adequate access to court files and information. Only the defendant and his attorney may be present and because the proceedings are conducted by "faceless" judges and prosecutors communication with the prosecutors becomes impossible, as is cross-examination of anonymous witnesses. Thus, judges, who are

often incompetent and amenable to executive pressure cannot be investigated because they cannot be identified.

- The procedure prevents public debate on it and any resulting judgement.

President Fujimori acknowledged that hundreds of persons have been falsely accused of having committed crimes of terrorism and have been convicted by faceless courts. National human rights organisations estimate that some 1,400 persons have been falsely accused and are being imprisoned without sufficient evidence of their presumed connection to terrorism. By Law N° 26655 of 17 August 1996, a three member *ad hoc* Commission was established with the mandate to evaluate and propose to the President that prisoners presumed to be innocently held awaiting trial benefit from the right to clemency *(derecho de gracia)*. The Commission is composed of the Ombudsman, a priest as the President's representative and the Minister of Justice. By the end of 1996, 110 persons had been granted presidential pardons. While these developments are very important, they are lacking. The unjustly imprisoned do not obtain any compensation for the judicial error and furthermore, although released from detention, they have not benefited from any judicial review whereby the convictions against them are annulled.

These courts have been criticised and condemned widely, both by national and international organisations. The UN Human Rights Committee in July 1996 urged the Peruvian Government to abolish the system of faceless judges. The UN Special Rapporteur on the Independence of Judges and Lawyers paid special attention to this issue during his visit to Peru on 7 to 15 September 1996, during which he publicly expressed that "the continuing use of 'faceless judges' makes a mockery of human rights [and] should be abolished immediately". Nevertheless, Congress on 10 October 1996, by means of Law N° 26671, extended the use of faceless courts for yet another year, until 15 October 1997.

Military Courts

Members of the armed forces and the National Police are tried under military jurisdiction if they commit a crime while on duty. Crimes committed off duty are supposed to be tried in ordinary courts. The definition of crimes committed while on duty has however been interpreted to include those crimes committed outside the sphere of active duty. In addition to trying military officials under the exceptional legislation in force, Peruvian military courts are entrusted with the task of trying civilians who are accused of "treason to the country".

Military courts are mainly composed of active military officials, who are not legally trained. According to recent modifications however, it is required that one of the judges must be a lawyer. In treason cases, proceedings are secret and judges are anonymous. There are even more severe limitations on

the rights of the defence in faceless military courts than in its civilian counterpart. It is nearly impossible for defence attorneys to have access to evidence and other trial documentation. Lawyers may be notified only one day in advance of a trial hearing, or not informed at all, resulting in some defendants being sentenced without their lawyers being aware of it.

Judgment must be rendered within ten days of the hearing, and an appeal made to the Superior Military Council must also be decided within ten days. The final appeal to the Supreme Council of Military Justice must be heard within five days, but that hearing is often subject to delays. Moreover, if a person is acquitted, he or she must remain in prison until the acquittal has been confirmed by the Supreme Council of Military Justice, which may take months. According to the statistics of the Supreme Council of Military Justice, between 1992 and August 1996, military tribunals tried 1,498 cases of treason. During the period of January to August 1996, 124 verdicts were rendered: 41 life sentences; 59 sentences of 30 years or less; 23 cases were sent to civilian courts for trial and one person was found not guilty.

Lawyers

In 1996, the major concerns reported by lawyers focused on the limitations in the practising of their profession. Police reportedly hindered lawyers from communicating with detained clients, as well as from reading documents and the police certificates (an official police document containing the denunciation, declarations of witnesses and other information which serves as a basis for the accusation). In defending cases before military courts, lawyers were subject to humiliating treatment when entering a military base where a trial is held. In some cases lawyers are hooded before taken to the court and throughout the proceedings. Alternatively, lawyers were often required to physically face a wall in order not to see the judges.

Cases

Jesús Rudolfo Asencios (Lawyer): On 26 February, Mr. Asencios was detained and accused of terrorism. His house was also destroyed by dynamite.

Heriberto Benítez Rivas (Lawyer with *Asociación Pro Derechos Humanos* (APRODEH) - Association for Human Rights): Mr. Benítez is the lawyer of the retired General Rodolfo Robles Espinoza, who was abducted in November 1996 and detained. General Robles was accused of disobedience and insulting a superior officer and the military in connection with media statements he had made regarding the paramilitary group "Colina", reportedly responsible for the 1992 disappearance and killing of ten persons at the La Cantuta University. General Robles Espinoza had denounced the crime

in 1993. Throughout the year, Mr. Benítez suffered from threats, which according to him, originated from the National Intelligence Service.

On 26 November, Mr. Benítez appeared on a television show wherein he expressed his concern that because not all members of the Supreme Council of the Military are lawyers, there was a risk that these judges may apply the law incorrectly. Law N° 26677 that modified the Organic Law of the Military Justice, establishes that only five of the ten members of the Supreme Council of the Military must belong to the judicial body of the armed forces. The following day, the instructing judge of the Supreme Council *(Vocal Instructor)* delivered a resolution suspending Mr. Benítez from practising the profession of lawyer in military courts for three months, because of false declarations regarding the military courts affecting their dignity. On 28 November, Mr. Benítez appealed the sanction imposed on him. The War Council confirmed the sanction and extended the suspension to five months. On 5 December 1996, Congress passed a law granting amnesty to retired army officers, including Mr. Benítez (see case of Greta Minaya, below). (See also *Attacks on Justice 1995)*

Gloria Cano Legua {Lawyer with the *Equipo de Defensa y Asesoría Campesina,* Peasant Defence and Advice Team, as well as APRODEH}: (See also *Attacks on Justice 1995)* Ms. Cano is acting as a defence lawyer for the survivors of the 1991 Barrios Altos massacre. In 1996, the threatening telephone calls she received in 1995 continued. She received numerous telephone calls harassing her sexually and threatening her with sexual violence. On 28 March, someone tried to force the lock on her office door. Members of the National Intelligence Service were suspected of being responsible for these threats.

Angélica Matías Ronceros { Lawyer for the Association of Relatives of Victims of Terrorism *(Asociación de Familiares de Víctimas del Terrorismo)}:* In the last week of February 1996, Ms. Matías Ronceros was intercepted by two men who identified themselves as agents of the National Intelligence Service. She was taken to a building where she had to walk in and out of several offices, apparently to upset and confuse her.

Ms. Matías Ronceros also received telephone calls threatening her life while mentioning the cases of terrorism which she is defending. (See also *Attacks on Justice,* 1995)

Greta Minaya {Judge}: A *habeas corpus* submitted on behalf of General Rodolfo Robles Espinoza (see case of Heriberto Benítez above) was approved by Judge Minaya on 29 November 1996, who ordered his immediate release. A military judge and prosecutor then refused to accept her ruling and military officers refused to release him. After ordering General Robles Espinoza's release, Judge Minaya was accused of negligence in her duty and transferred from her position. When the ombudsman announced that General Robles Espinoza's rights had been infringed, the military court accused him of interfering in military affairs.

The Government received significant criticism from the international community after the arrest of General Robles Espinoza. President Fujimori then claimed there had been "procedural errors" in the arrest and that he would pardon General Robles if the military court insisted on proceeding with their charges. President Fujimori then drafted a bill of amnesty for retired military officers, like General Robles Espinoza, who consider themselves to be civilians. The bill was passed into law on 5 December 1996. General Robles Espinoza was released, and Judge Minaya was reinstated.

President Nugent {President of the Constitutional Court}: On 8 November 1996, an attempt was made on the life of Judge Nugent.

Julio Morgan Zevallos {Lawyer}: On 18 March 1996, Mr. Zevallos was refused entry to the Castro prison without any reason. He was also mistreated by members of the National Police.

Government Response to CIJL

On 7 July 1997, the Government of Peru responded to the CIJL's request for comments. Below is a translation into English of the Government's comments which were submitted in Spanish:

> *"State of Emergency*
>
> The legal framework of the Peruvian State contains dispositions which guarantee the rights of persons during a state of emergency. Article 200 at the end of the Constitution states that the exercise of actions of *habeas corpus* and *amparo* are not suspended when states of exception are in force. The judges should examine the reasonability and proportionality of the curtailing act. This constitutional norm, in the hierarchy, tacitly derogated from article 29° of Law N° 25398, which limited proceedings in the exercise of *habeas corpus* during a state of emergency.
>
> States of emergency are constitutionally supported in domestic law and are compatible with norms of international law, such as the American Convention on Human Rights and the International Covenant on Civil and Political Rights as far as the effective upholding and protection of human rights are concerned.
>
> There are norms and procedures to observe to facilitate the development of operations in areas where a state of exception has been declared, which take the precaution to guarantee the validity of human rights, particularly concerning the visits of authorities of the public prosecutor's office, the judiciary and the international red cross. The declaration of the state

of exception does not interrupt the activity of the public prosecutor's office, nor to the right of citizens to have recourse and approach the office in a personal capacity. Neither are the activities of the ombudsman suspended in such cases.

Maintaining a state of exception is justified when even if terrorist activities have diminished in a great part they have not been totally eliminated. It would be highly risky, when we are almost reaching our objective, to eliminate one of the fundamental elements upon which has been based the anti subversion strategy in which so many good results have been achieved in such a short time. As far as the state of exception goes against the validity of human rights, it should be indicated that paradoxically when the state of exception was extended in the country, and several measures of an exceptional and provisional nature were adopted in the law, allegations of violations of human rights in Peru diminished in a substantial way.

Legal Reform

In respect of the legal reform carried by the Executive Commission, it would also be useful to highlight the main areas:

- Reorganisation of the leadership of the judiciary
- Reorganisation of the Archives of the Supreme Court of Lima
- Creation of a new Register of sentences
- Creation of a statistical Register of practising lawyers and of the Public Register of requisitions
- Creation of a National Registry of charged persons in detention

Law of Amnesty

The amnesty promulgated by the Congress of the Republic in the exercise of its mandate constitutes a means of a primarily political nature which aims at restoring social tranquillity and concord. In doing that, the State renounced in part its criminal potential, because of higher public interest exigencies, which have created a necessity to call collective pacification and concord. By virtue of this, the accused is pardoned, not because of personal reasons or because of subjective considerations, but only because of interests which pertain to coexistence and conviviality in society.

In this sense the objective of Law N° 26479 is to re-establish national reconciliation to put an end to the national conflicts

and misunderstandings, to finally obtain social peace. The underlying reason is to reconcile national interests by way of the restoration of a lasting peace to be based upon strong bases such as pardon, understanding and repentance. The amnesty seeks to harmonise national unity in order to consolidate the pacification process in the country.

It should be added, in conformity with the Inter-American Court of Human Rights, that "international protection of human rights should not be confused with criminal law". The aim of international human rights law is not to impose sentences on persons who perpetrated violations against it, but to protect the victims and help them to obtain reparation for the wrongs which gave been inflicted upon them by the States responsible for such acts" (Case of Velasquez Rodriguez, § 72).

Criminal law establishes individual responsibility, and will only allow protection to the victims who seek reparation for the wrongs which have occurred, if the sentence that will come at the end of the trial orders the payment of reparation for the victim in addition to other sanctions. However, in a case where there is no payment of an indemnity or where it was not possible to pass judgment on alleged perpetrators, the law of Peru offers the possibility of adequate and efficient ways to compensate the victims or their relatives.

If it is correct that Law N° 26479 impedes criminal law to settle individual responsibilities as far as the amnesty is concerned, it does not limit the possibility for the parents of victims to have recourse to court of law to obtain compensation.

Military Tribunals

We do not share the perception concerning the lack of legal education of military judges. There are of course few judges in the military with no such education, but the majority has legal training. This concerns not only officers who have studied law concomitantly and have obtained the title of advocate, and in the majority of cases the advocates have been incorporated in the military legal corps in accordance with the law. The norms on due process are followed by the Military. The fact that the judgement is not publicly divulged is also allowed by virtue of article 14 (1) of the Covenant on Civil and Political Rights. It should be noted that it is possible in the Military that a sentence be reviewed by a higher court. Even in cases of final sentences, there exists the extra-ordinary remedy of reviewing which can be actioned by the convicted or the lawyer or relatives.

Faceless Judges

This is another means, together with the trial of civilians in military courts, of an exceptional nature which is maintained valid If it is certain that the accused, in this system, does not know who is the judge who will decide to sentence him, this means responds to the necessity of protecting the judge and guaranteeing his independence. Such considerations are recognised by the United Nations Working Group on Arbitrary Detention, in its communications to the Commission on Human Rights (communications which was approved by the Commission at its 52nd session). The observation of the aforementioned Working Group that in its opinion such a practice resulted many times in a diminishing of judicial guarantees, does not necessarily mean that this is the case in Peru, and even less invalidates the reasoning which supports this procedure and its efficiency. It should be noted that our position of principle is that, in ordinary circumstances, civilians should be judged by civilian judges. But we are in a state of exception, as clearly defined in the law, and properly standardised, in compliance with the principle that nobody should be put on trial in a court not established by law, nor for offences which have not been clearly standardised at the moment of their having been committed, as stated in articles 14 and 15 of the Covenant on Civil and Political Rights."

THE PHILIPPINES

Since the ousting of Ferdinand Marcos in 1986, the Republic of Philippines has had two elected Presidents; Fidel Ramos succeeded Corazon Aquino in the presidential elections held in 1992. The Constitution, approved by referendum in February 1987, designates the President as holder of the executive power, which he or she exercises together with the Cabinet. The President is elected for only one term of six years. President Ramos was expected to seek an amendment to the Constitution to allow re- election. However, in October 1996, the Senate removed its own President, a close ally of President Ramos, to prevent such a constitutional amendment.

Legislative power is vested in a bicameral Congress: a Senate composed of 24 members elected by the nation at large, and a House of Representatives, comprising maximum 250 members elected from specific legislative districts. Although a multi-party system has evolved since 1986, it remained unstable in 1996.

VIOLENCE, HUMAN RIGHTS AND DUE PROCESS

The armed forces and the Philippine National Police, responsible for fighting insurgency and terrorism, continued to be the main human rights abusers, committing extra-judicial killings and carrying out arbitrary arrests. In 1995, as part of the internal peace process, the Government offered an amnesty to former communist and Muslim rebels and Government security forces with a deadline of 1 June 1995. The eligible crimes included those committed by rebels as a result of their political beliefs, and in the case of security forces, crimes committed while performing their duties. The amnesty would, however, exclude members of the security forces who had committed serious human rights violations. A quasi-judicial body, the National Amnesty Commission, was established to process amnesty applications.

In January 1996, the Government introduced anti-terrorist measures in preparation for the Asia-Pacific Economic Co-operation summit which was held in November. After protests from human rights groups, trade unions and other organisations that the restrictions would limit freedom and implied a return to martial law, the government did not permit the arrest of people without a warrant.

The Government attempted, however, to interfere with guarantees of due process and other constitutional rights in 1996, by submitting to Congress several bills, including an Anti-Terrorism Bill and a Crime Control Bill. These bills involved granting law enforcement officers the power:

- to conduct arrests without warrant of individuals suspected of being engaged in acts of terrorism or criminality;
- to detain persons suspected of being engaged in acts of terrorism or criminality without charge for periods of as long as 30 days;

- to inquire into bank deposits of any individual on the suspicion that he or she may be engaging in acts of terrorism or criminality;
- to sequester, freeze, forfeit assets, funds, bank deposits, etc. of individuals suspected of being engaged in acts of terrorism or criminality; and
- to intercept communications of individuals suspected of being engaged in acts or terrorism or criminality.

Due to public protests, these measures were not implemented during 1996. However, Government officials, including the President, senators, congressmen and police officials continued to call for wider powers to make arrests without a warrant and longer periods of detention without charge.

The death penalty

Article 19 of the Constitution prohibited the death penalty "unless for compelling reasons involving heinous crimes, the Congress hereafter provides for it". In 1993, the Death Penalty Law (Republic Act No. 7659) reimposed the death penalty. The law requires the automatic review of all death sentences by the Supreme Court. By the end of 1996, more than 200 defendants had been sentenced to death, 12 of which had been reviewed. In 11 of the reviews, one defendant was acquitted, four decisions were overturned and remanded to the lower court for retrial, four convictions were affirmed but the sentence reduced, one defendant was convicted and sentenced to death *in absentia* and one death penalty was affirmed. The decision affirming the death penalty was under reconsideration at the end of 1996.

In the twelfth case, the issue of judicial discretion was specifically at issue. The lower court judge had imposed the penalty of *reclusion perpetua*, although the law required the imposition of the death penalty. The prosecutor brought a civil application for *certiorari* to require the court to impose the death penalty. The civil court held that the trial judge had acted without or in excess of his jurisdiction or with grave abuse of discretion amounting to a lack of jurisdiction when he imposed the penalty of *reclusion perpetua.* The case was returned to the trial court for the imposition of the death penalty. It will be subject to an automatic review.

The Judiciary

Structure of the Courts

The common court structure involves Metropolitan Trial Courts (or Municipal Trial Courts or Municipal Circuit Trial Courts, depending on where they are located), Regional Trial Courts, the Court of Appeals and the Supreme Court. There are several specialised courts including the Court of Tax Appeals, Shari'a Courts which deal with issues of personal status and

the *Sandiganbayan*, which considers matters of corruption and malpractice by Government employees. There are also a number of quasi-judicial bodies.

President Decree N° 1508 establishes a system by which disputes may be settled amicably at the "Barangay level". The law mandates the creation of the *Lupong Tagapayapa* in every Barangay of which is composed of a Barangay Chair, and not less than 10 nor more than 20 members. The *Lupong Tagapayapa* may arbitrate or mediate any case except in specified circumstances. For example, it has no jurisdiction where one of the parties is the Government, where the official functions of a public officer or employee are at issue, or in such other classes of disputes which the President may, in the interest of justice, determine on the recommendation of the Secretaries of Justice and Local Government and Interior.

Legislation establishes a limit of 90 days for hearing a trial, and 45 days for deciding a case. These time limits, however, do not begin until a case is brought to the court, allowing defendants to be virtually kept in prison for years before the case is brought before a judge. Delays in the administration of justice are the norm, caused by, among other things, a shortage of judges to deal with the heavy caseload and the existing backlog of cases. Poor court facilities and the country's infrastructure, which make it difficult for parties and witnesses to appear before the court, add to the delay.

Appointment and Removal Procedures

The Supreme Court is composed of 14 justices and the Chief Justice. Prior to 1987, judges were appointed by the President, although the appointments were confirmed by a Commission on Appointments which reportedly strictly screened the applicants. Since 1987, the Judicial and Bar Council (JBC), composed of seven representatives from the Supreme Court, the Government, the legislature, the bar association, the academic community and the private sector, nominates three to five candidates for each vacancy on the Supreme Court and the lower Courts. The President makes the final choice. The President also retains the power to directly appoint the Chief Justice of the Supreme Court, whose role in the appointment process is significant.

Although the JBC was created to remove political influence, the President and powerful politicians can still ensure that a candidate of their preference is amongst the nominees, who can then be legitimately appointed by the President. The JBC has also been criticised for basing their nominations on personal and political considerations rather than qualifications. The system of a minimum of three candidates has also created a problem in relation to filling the many vacancies in the Philippine judiciary, in particular in the lower courts. When the required number of candidates is not possible to obtain, the President cannot appoint a judge, and the vacancy remains. On the other hand, since there is a shortage of judges, it is

likely that all candidates once approved by the JBC eventually will be appointed, which further facilitates interference with the independence of the judges.

All judges enjoy life tenure until they reach the age of 70. The judiciary, through the Supreme Court, administers, supervises and disciplines its own members. Article VIII(11) of the 1987 Constitution provides that "members of the Supreme Court and judges of lower courts shall hold office during good behaviour or until they reach the age of seventy years or become incapacitated to discharge the duties of their office". The Supreme Court *en banc* has the power to discipline judges of lower courts or order their dismissal on a majority vote of the Members involved in the determination of the case. Members of the Supreme Court, according to Article XI(2) of the Constitution "...may be removed from office, on impeachment for and conviction of, culpable violation of the Constitution, treason, bribery graft and corruption, other high crimes, or betrayal of public trust".

This system has been considered a burden on the Supreme Court which has also been accused of being too lenient in its discipline of judges, although it has asserted that its disciplinary record refutes the accusation. A transfer of these responsibilities to the Department of Justice has been discussed, and with regard to some issues, such as supplies, the suggestion may not be unwarranted. However, a transfer of disciplinary procedures would create the possibility for the executive to exercise disciplinary supervision as a direct means of influence, or indirect, if judges resorted to self-censorship. Such change would constitute an interference with the independence of the judiciary and create potential for its politicisation.

Resources and other influences

The financial autonomy of the judiciary is constitutionally confirmed, however, due to the procedure of budget approbation, both the executive and the legislative branches exercise control over and may change the judiciary's budget proposal. The budget of the judiciary amounts to less than one percent of the annual Government budget, which must be compared to the 2.5 percent the Supreme Court has estimated as necessary for the effective functioning of the judiciary. As a result, judges' salaries are not adequate, evidently leaving them open to corruption which reportedly permeates all levels of the judicial system; the rich and influential have effectively been granted impunity.

The Philippine judiciary is subject to undue influence both from executive and from private entities. Social ties involving expectations of mutual favours create a potential for interference in matters within the judge's sphere of work. Personal and professional relationships outside court between judges and the individuals and corporations whose cases they are deciding are also a source of concern. Because of socio-cultural factors, Philippine judges may find it difficult to refuse to give an audience to any person or

lawyer who approaches him or her. It has been suggested that a Code of Judicial Conduct might limit this influence, although it would be preferable if the judges were able to enforce their independence themselves.

LAWYERS

Although the law profession enjoys a high status in the Philippines, the quality of lawyers may vary. Some law firms are reportedly known as "case fixers".

All lawyers must be members of the Integrated Bar of Philippines, supervised by the Supreme Court which has exclusive power to discipline members.

Lawyers representing victims of human rights violations are reportedly harassed and labelled as leftist supporters if their client is assumed to be linked to the communist insurgency.

CASES

Ramon Edison Batacan, Laurente Ilagan, Paul Montejo and Manuel Quibod and Carlos Zarate {Lawyers from the Free Legal Assistance Group (FLAG) in Davao City}: These lawyers received death threats in 1996, reportedly as a result of their filing a complaint against the gold processing plants in Apokon, Tagum, Davao del Norte, in which it was alleged that pollution by mercury and cyanide chemicals emitted by the plants had killed four school children and contaminated 12 others since 1993. The FLAG lawyers successfully tried the case before the Regional Trial Court of Tagum, which struck out a local zoning ordinance permitting the construction of a gold mine in the area. Approximately 20 gold mining companies were adversely affected by the decision and it was reported that in retaliation, some of the companies intended to wage war with the FLAG lawyers.

Roger Berbano {Senior Special Prosecutor}: Mr. Berbano was involved in the *Kuratong Baleleng* case wherein 11 suspected bank robbers were killed in May 1995 while in police custody. The investigations suggested that the suspects were deliberately and summarily executed by the Philippine National Police; 27 of the 98 police officers originally implicated were eventually charged by the Ombudsman, although only after allegations of intentional delay had been made. In February 1996, Mr. Berbano received death threats and withdrew from the case.

Clarence Agarao {Lawyer}: Mr. Agarao was gunned down on 30 April 1996 in front of his father's house in Manaluyong City, Metro Manila, after filing a murder complaint earlier that day against Mayor Reynato Macalalag of Lumban, Laguna, in connection with the killing of a former *barangay tanod*

chief in 1995. Mr. Agarao had earlier expressed his fear that Mayor Macalalag's men would kill him. Mayor Macalalag and nine others were subsequently arrested and charged with the murder of Mr. Agarao. At the end of 1996, the case was pending before the Regional Trial Court of Manila.

José Balajadia (Justice in *Sadiganbayan* Court), **José Manuel I. Diokno** (Attorney and Vice Chair of FLAG), **Francis Garchitorena** (Justice in *Sandiganbayan* Court), **Efren C. Moncupa** (Lawyer and member of FLAG Executive Committee), **Alexander A. Padilla** (Lawyer and FLAG Regional Co-ordinator for Metropolitan Manila), **Francis P.N. Pangilinan** (Human rights lawyer), **Arno V. Sanidad** (Lawyer and FLAG Deputy Secretary), **Lorenzo R. Tanada III** (Human rights lawyer), **Wigberto R. Tanada Jr.** (Human rights lawyer) and **Theodore O. Te** (Lawyer and member of FLAG): Between 31 January and 5 February 1997, Justice Balajadia and Justice Garchitorena received a written death threat, which also included threats against the above mentioned lawyers. Although the threat did not specify the names of the lawyers, hints concerning the identities of the lawyers to be targeted were provided. The threat was unsigned, but it is believed to have been sent by members of the Philippine National Police.

These lawyers were threatened throughout 1996 and were subjected *inter alia* to unauthorised surveillance and break-ins. The on-going threats were reportedly connected with the lawyers involvement in the *Kuratong Baleleng* case, where 27 members of the Philippine National Police have been charged.

On 7 February 1997, the CIJL intervened with the Government of the Philippines and urged it to "order an independent and impartial investigation into these threats and to bring those responsible for them to justice". It further urged the Government to provide each of the lawyers and judges "with immediate and effective protection". The CIJL, also issued an Alert on 10 February in which it expressed its concern over the ongoing harassment and death threats made against the judges and lawyers and asked for others to join its intervention and request the Philippine Government to provide each one of the lawyers and judges with immediate and effective protection.

Government Response to CIJL

On 4 July 1997, the Government of The Philippines responded to the CIJL's request for comments. The Government stated:

> "The Supreme Court has always endeavoured to strengthen doctrines and jurisprudence protecting the rights of the accused. In *Morono V. Lomeda, 246 SCRA 69, 1995,* the Court required physical examination of persons confessing to crimes by independent and qualified physicians to determine whether or not torture and been employed in obtaining them. It nullified pro-

ceedings upon finding that an indictment for robbery with homicide had not been read to the accused in a language he could comprehend and deemed inadmissible physical evidence recovered as a result of his confession rendered without counsel (People V. Alicando, G.R.N° 117487, 1995). It also disregarded the extra judicial confession of the accused upon failure of the prosecution to show that he was assisted by "effective and vigilant counsel" (Peo v. Paule, G.R. N° 118168 to 70, 1996). In Peo v. Parel (G.R. N° 108733, 1993) the Court did likewise upon showing that the investigating officers failed to inform the accused of his right to remain silent and that the waiver of his rights was not made in writing and with the assistance of counsel. The Court nullified the waiver executed by another accused despite the presence of counsel, upon showing that the lawyer did not explain to him the import of the waiver (Peo v. Pagawa, G.R. N° 95352). Constitutional protection over property rights was upheld when the Court applied the stringent requirements of a search warrant to a Search and Seizure Order issued by the Presidential Commission on Good Government in connection with the recovery of ill-gotten wealth (Republic v. Sandiganbayan, et. al. G.R. N° 112708 to 9, 1996).

To promote the speedy disposition of cases, the Supreme Court released the 1997 Rules of Procedure which govern all aspects of litigation in civil cases (effective 01 July 1997). The Rules simplify the manner by which litigation is conducted at all levels of the judicial system, encompassing every aspect of civil procedure, except for the admissibility, presentation and evaluation of evidence.

Supreme Court circulars provide for a mandatory continuous trial system not to exceed ninety (90) days from the initial hearing. A detained defendant can also invoke his right to bail, except if he is charged with a capital offence punishable by *reclusion perpetua,* where evidence of guilt is strong. Republic Act 85 provides that, when the accused has undergone preventive imprisonment of the offence charged to which he may be sentenced and his case is not yet terminated, he shall be released immediately without prejudice to the continuation of the trial or the proceeding on appeal'.

To speed up the administration of justice, Presidential Decree 1508 (Barangay Conciliation Decree) was repealed by the Local Government Code which provides that crimes and other offences may now be considered by the *Lupong Tagapayapa,* provided the imposable penalty does not exceed one (1) year of imprisonment or a fine of 5,000 pesos.

The ongoing Justice System Infrastructure Program (JUSIP) has completed numerous Hall of Justice projects and undertaken the construction/rehabilitation of the buildings housing the Courts and offices of Prosecutors, Public Attorneys, Parole and Probation Officers.

It should be noted that while the President does indeed directly appoint the Chief Justice, he has to choose the appointee only from a list of nominees submitted by the Judicial and Bar Council (JBC).

With regard to allegations of corruption'permeat (ing) all levels of the judicial system', the Supreme Court and the Office of the Court Administrator would welcome any formal charges of corruption by judges so that appropriate administrative disciplinary proceedings could be instituted.

The 'rich and influential' do not enjoy impunity, as shown by the wave of indictments and convictions involving prominent individuals for common crimes, e.g., a provincial mayor convicted of rape and murder of two students; the son of a former Chief Justice convicted of murder;a popular movie actor and a former congressman separately convicted of illegal possession of firearms; and an incumbent congressman now being tried for alleged rape of an 11-year old child.

There is already an existing Code of Judicial Conduct for Judges which was promulgated by the Supreme Court on 5 September 1989. Its strict enforcement by the Supreme Court should address the issue of alleged undue influence on the judiciary.

There is no basis for the allegation that some law firms are know as ' case fixers'. Indeed, what lawyers hold themselves out to be or how they are rumoured to 'operate' in the practice of their profession, are matters quite distinct from, and have little or nothing to do with, the way the judicial and court systems function.

The harassment of lawyers, judges and justices through death threats is not uncommon in the Philippines. Experience shows that these threats are largely meaningless and undeserving of any serious attention or concern. In any case, whoever feels seriously threatened may seek assistance from the National Bureau of Investigation (NBI) or other law enforcement agencies for investigation and protection. Any alleged threats on the lives of human rights lawyers and advocates are referred by the Department of Justice to the NBI and the Philippine National Police for investigation and appropriate action."

It would be appreciated if the above text can be published in its entirety. It addition, it is requested that the name "Commission of Appointees" in the section on the *"Appointment and Removal Procedures"* be corrected to read Commission on Appointments.

Attention is also invited to the statement that "in 1996, the President continued to directly appoint the Chief Justice of the Supreme Court". This is incorrect since the position of Chief Justice was not vacant at that time. The incumbent Chief Justice was appointed by former President Aquino on 8 December 1991."

THE RUSSIAN FEDERATION

The Russian Federation came into existence after the collapse of the Soviet Union in 1991. In June 1991, Boris Yeltsin was elected President. In 1993, President Yeltsin dissolved the old Soviet legislature and replaced it with a bicameral Federal Assembly, as established in the new Constitution which was approved in a popular referendum in December 1993.

The 1993 Constitution provides for the division of the state powers, which include the President and the Government, the Federal Assembly and the courts. The President is elected for a period of four years. Yeltsin ran for a constitutionally lawful second term in presidential elections held on 16 June 1996, however, since no candidate obtained the prescribed 50 percent plus one margin, run-off elections were held on 3 July 1996. By gaining 53.8 percent of the votes, Yeltsin defeated his closest rival, Communist Party leader Gennady Zyuganov. Yeltsin was sworn in as President on 9 August 1996.

The legislative body is the Federal Assembly, comprising the upper chamber Federation Council, holding 178 seats and the 450 seat State *Duma* as the lower chamber. The President has the power to, and often does issue decrees. The Assembly may provide advice concerning the Decrees, but it may not annul them. The President may also veto legislation from the Federal Assembly, giving the Presidency a powerful position in relation to the legislature. Executive power is exercised by the Government, comprised of the Chair and Deputy Chair of the Russian Federation and the Federal Ministers, all appointed by the President, with the consent of the State *Duma*.

The transformation from the Soviet Union to the Russian Federation involved profound changes in the political, economical and social field, which had not yet been completed in 1996. Democratic institutions and practice had not been sufficiently developed and new legislation had yet to be passed and implemented. In January 1995, Part I of the new Civil Code entered into force, establishing new provisions on civil law, property rights and contractual obligations. In January 1996, Part II of the Civil Code was signed. The new Criminal Code was passed in 1995 and came into effect on 1 January 1997. Many provisions of the Constitution protecting individual rights could not be applied until new legal codes have been adopted. For instance, according to Article 21.1 of the Constitution, arrest and detention exceeding 48 hours is permitted only by judicial decision. Transitional provisions of the Constitution declared however, that the existing procedure will continue to apply until the new Criminal Procedure Code is adopted.

In February 1996, Russia was admitted to the Council of Europe. The Parliament however failed to adopt a law that would establish a Human Rights Ombudsman, as provided for in the Constitution and required of members of the Council of Europe.

Violent and organised crime is widespread. Arbitrary detentions, extremely harsh penitentiary facilities and violence against detainees, including

rape, beatings, extremely low standards of health, nutrition and sanitation as well as other human rights violations were reported in 1996. The number of deaths in detention or imprisonment was reported to have been between 10,000 to 20,000. The twenty month war between Russia and Chechnya, which ended with the execution of the Khasavyurt Agreements gave rise to massive violations of human rights.

The Judiciary

Although the Constitution designates the judiciary as one of the state powers, it has encountered difficulties securing its independence in practice. While formal supervision of the courts is assigned to the Supreme Court of Justice, executive organs play an important role in relation to the judiciary. The Ministry of Justice prevails over the administration of the judiciary, the drafting of relevant laws pertaining to the judiciary and training of judicial personnel. Also, the State Legal Affairs Administration of the President of Russia (GPU), created in 1991, is given wide powers which conflict with those of the Ministry of Justice. It is responsible for co-ordinating legal policy between the President's office and other executive and legislative bodies, drafting laws and advising the President on the implementation of laws. It also supervises the armed forces, the police, the state security agency, the Procuracy and the arbitration courts.

In addition the tradition of the Soviet period, which regarded work of the judiciary as an administrative function continued to prevail. Several factors from the Communist era specifically undermined the integrity of the judges and these included judicial appointments of Communist Party members and "judgment by telephone" (i.e. party secretaries instructing judges how to decide a particular case). Changes and developments in the 1990's have focused on strengthening the independence of the Russian judiciary, as established in the Constitution and further developed in the Law on the Status of Judges. However, the system continued to permit significant political influence through the appointment of judges because of the lack of resources allocated to the judiciary. The failure to truly separate the powers has been compounded by the failure of the judges themselves to fully understand the concept of judicial independence and believe in the force of the guarantees of judicial inviolability.

Court Structure

The Russian judicial system comprises courts of general jurisdiction, which include a Supreme Court and lower ordinary district and municipal courts (*rayoniye*) from which decisions are appealed to the regional and city courts (*oblastniye*). There are also arbitration courts that consider disputes between business entities.

There are also military courts, which are organised into a special branch of the judiciary and regulated by a special statute and specialised arbitration courts that decide economic disputes including those brought against the Government. In its comments to the report of Russia submitted in 1995, the United Nations Human Rights Committee included the following comment regarding the military courts.

> The Committee expresses concern over the jurisdiction of the military courts in civil cases. Persons detained by members of the armed forces are said to be able to raise complaints before the Military Procurator's Office in charge of the detention centre where they were held. This would appear to create a situation in which the army is entrusted with the judgment and sentencing of the crimes committed by its own members. The Committee is concerned that such a situation may cause miscarriages of justice, particularly in the light of the Government's acknowledgement that the army, even at the highest levels, is not familiar with international human rights law, including the (International) Covenant (of Civil and Politcal Rights).

The 1993 Constitution also establishes a Constitutional Court, which was created already in 1991. It grew from President Gorbachev's efforts in 1990 to strengthen the independence of the judiciary. Article 125 of the Constitution provides for the Court to be composed of 19 judges while the law which established it called only for the appointment of 15 judges. Parliament however, could only agree on the appointment of 13 judges and the other two seats remained vacant.

Many perceived the Constitutional Court to be a promising institution. On 17 October 1993 however, President Yeltsin suspended the activities of the Constitutional Court by decree, pending the adoption of the new Constitution. The Decree further charged the Court with playing "a negative, essentially complicit role in the tragic events in the city of Moscow on October 3-4, 1993", and indicated the possibility of eliminating the Constitutional Court. Nevertheless, the Constitutional Court was incorporated into the new Constitution, enlarged to 19 judges. It was not until February 1995 however, that the last of the 19 judges was appointed to the Constitutional Court. Its judges are nominated by the President and then appointed by the Federal Council. The Court is charged with examining the conformity of laws and other normative acts with the Constitution. Individual citizens may bring claims before it involving constitutional violations.

Given that the Constitutional Court has had such a tenuous start, reports that the Constitutional Court will remain powerless until the balance between the powers is fully established appear to be justified. A new law on the Constitutional Court, adopted on 21 July 1994, helped to fortify the position of the Constitutional Court within the Russian judicial system, but it is feared that the Court will become politicised.

Appointment Procedure

There are approximately 15,000 judges in approximately 2,500 courts throughout Russia. In addition, there are 2,000 judges that sit in 82 arbitration courts. According to the Constitution, a judge must have a higher education in law and have served in the legal profession no less than five years before being appointed to a lower court. The Law on the Status of Judges then requires a judicial candidate to write the qualifying examination administered by the Examination Commission, composed of executive appointees which are approved by the Qualifying Collegia of Judges. The Qualifying Collegia are charged with reviewing applications of candidates for posts in federal courts. In its review, the Qualifying Collegia are able to consider other criteria such as education, work experience, political affiliations and other considerations that may not be directly relevant to judicial competence. The Qualifying Collegia themselves are constituted by judges that are elected by the Congresses of Judges at district, regional and federal levels. If a Qualifying Collegium approves a candidate, the application is reviewed by the President for final approval or rejection. The President thus has the power to veto candidates selected by the Qualifying Collegia.

Judges in the Supreme Court are required to have ten years of experience and are selected directly by the President whose nomination is confirmed by the Federation Council (the upper chamber of the Federal Assembly). On 4 December 1996, the Federation Council was unsuccessful in approving the Constitutional Law "on the Judicial System of the Russian Federation", which would have *inter alia* given the President the power to appoint all federal judges.

A law adopted in 1992 establishes that judges are to be elected for life. Under the present system however, judges in *rayoniye* courts are first elected for a five year term, after which they may be re-appointed for life. This creates obvious potential for abuse during the initial appointment period. Judges of the *Oblastniye* Court, the Supreme Court and the Supreme Arbitration Court, on the other hand, enjoy life tenure.

Courts of first instance in civil and criminal matters consist of one professional judge and two so called people's assessors. These people's assessors are elected for a term of two years amongst the citizens in general meetings held in public work places and residential areas, however, they cannot be called to serve for more than two weeks during the year. In court, they have all the powers of the professional judge, including the right to decide on innocence or guilt.

Discipline

The Qualifying Collegia are charged with the supervision and discipline of the judiciary. According to the Constitution, judges are irremovable and their powers may only be terminated "on the grounds and in accordance with the procedure established by federal law". In turn, Article 13 of the

Law on the Status of Judges provides that a judge may be suspended upon decision of the Collegia on the following grounds:

- the Collegium consents to bring the judge to criminal responsibility or into custody;
- the judge undertakes activity not compatible with his post; or
- the judge is medically incapacitated or disappears.

A judge may appeal a suspension order one month after it is rendered, to the Qualifying Collegium, but a confirmation of the suspension by the Highest Qualifying Collegium is final.

According to Article 14 of the Law on the Status of Judges, the main grounds for removal of a judge by the Qualifying Collegium are:

- continuing activity not compatible with the post;
- a verdict of guilt by a court;
- the commission of an act defaming the honour and dignity of a judge; and
- prolonged incapacity due to state of health or other reasons.

Judges subject to a removal order are entitled to appeal to the Supreme Court. The Law on the Status of Judges prohibits the reprimand or removal of a judge if the decision is overturned.

Russian judges are not required to provide reasons for their decisions and the Constitution grants them immunity "otherwise than in accordance with the procedure established by federal law". However, they may be subject to criminal prosecution and imprisonment of up to 10 years for "infamously" improper orders, decisions or statements made during the course of their duties. A civilian who believes he or she was wronged by a decision may join a civil suit with the criminal prosecution.

Resources

The Constitution establishes that courts shall be financed only from the federal budget, which shall guarantee sufficient resources for the proper administration of justice. The Law on the Status of Judges also specifies judicial remuneration, including salaries that cannot be reduced, insurance, pension and health benefits, and generous vacation, housing and transportation allowances. However, reality does not mirror the law. Large discrepancies between the courts' facilities in different regions suggest that personal contacts and lobbying within the Ministry of Justice and the State Law Department play an important role in the determination of resources received. Despite the constitutional guarantee, courts continue to be dependent on local authorities for financial assistance. Reportedly, more than 1,000 courts are located in buildings that should be condemned and computers and other office equipment are nearly non-existent.

In June 1996, the All-Russian Council of Judges adopted a resolution which expressed their lack of confidence in the Justice Minister, since the courts had received less than one fifth of the amount necessary to meet their expenses. In October, 17 of a staff of 19 at the St. Petersburg Courts went on strike since they had received only one quarter of their salary during eight months and thereafter no salary at all for two months.

As a result of the lack of finances, judges are poorly paid, necessarily inviting corruption. According to some NGO's, the biggest challenge facing the judiciary is the extensive bribery practised by politicians and business persons. Bribes are reportedly common and local officials demand favours in return for material and other support to the courts. A judge estimated that bribery attempts by both public officials and civilians were made in one out of every three matters. A report originating from the *Duma* indicated that approximately one-fourth of all persons convicted of bribery worked in the law enforcement field. Although the 1989 Law on Disrespect for the Court allows for the prosecution of those attempting to influence the judiciary, judges have rarely pursued their right to do so.

Public disrespect for the courts and the low status accorded to the judicial profession also affect its independence. Court personnel are frequently threatened, and due to lack of resources, there are little or no means of security. The implementation of a law on social protection for judges was suspended on 18 August 1996 by an austerity decree issued by President Yeltsin.

In its comments on the report submitted to it by Russian Federation in 1995, the United Nations Human Rights Committee stated that it was concerned "about the lack of independence and efficiency of judiciary and the long delays in the administration of justice, which do not conform with the requirements of both Articles 9 and 14 of the Covenant (on Civil and Political Rights)..." The Committee also noted that the judicial system could not be "effective to ensure protection of rights until there is a sufficient number of well-trained and qualified judges and lawyers".

The Procuracy

During the Soviet era, the Procuracy was a powerful agency with a hierarchical and centralised structure. The Procuracy was considered to be the "eyes of the state" to ensure the absolute implementation of Government policy. Its broad powers and functions embraced supervising administrative officials, agencies and citizens, including ensuring the full execution of the political policies, reviewing and appealing criminal and civil cases, supervising prisons and prisoners' release, supervising the actions of the police and the secret police, and supervision of the courts.

By the end of the 1980's, as a result of *perestroika* and the disclosure of the widespread failure of the Procurators to comply with the established procedures involving fabrication of evidence, coerced confessions, "telephone justice" and the execution of persons who later were found to be innocent, the role and actions of the Procuracy began to be questioned. The Collegium of the USSR Procuracy was disbanded in August 1991, and by November 1991, some 39,000 employees had been laid off. The recognised need to restructure the Procuracy was given expression in the 1991 draft Constitution of the Russian Federation, which called for limiting the functions of the Procuracy to prosecution in criminal matters only in court. The Law on the Procuracy of the Russian Federation, passed in January 1992, however retained the powers of the Procuracy to supervise "the implementation of laws by local legislative and executive bodies, administrative control organs, legal entities, public organisations and officials, as well as the lawfulness of their acts". It may challenge the constitutionality of treaties and legislation before the Constitutional Court and challenge judgments and resolutions by a court if they are considered to be contrary to the law, thus intervening also in civil cases. The Law on the Procuracy furthermore establishes that it shall be involved in the drafting of laws. Importantly however, the Procuracy is no longer in charge of supervising the activities of the courts.

The Procuracy, comprising the Procurator General and the Public Procurators within the republics of the federation, was incorporated in the 1993 Constitution. Upon the proposal of the President, the Procurator General is appointed and dismissed by the Federal Council. The Procurator General elects the Public Procurators.

Traditionally, criminal procedures have been heavily biased in favour of the Procurator. The presumption of innocence is ignored and the accused often has to prove his or her innocence instead of the Procurator proving guilt. In 1993, adversarial jury trials were introduced in some regions, covering approximately 23 percent of Russia's population. In 1996, such trials had yet to be introduced in 80 regions.

LAWYERS

As was the order prior to the creation of the Russian Federation, lawyers are organised in city and *oblast* bars. Only members of the Bar Association may enjoy the status of advocate in legal proceedings and they, together with a few others, have a monopoly on rendering legal services to defendants during preliminary investigations and before courts. After 1988, lawyers were permitted to set their own fees. The profession may face liberalisation, as a new law on the *Advokatura* was anticipated in 1996.

CASES

Galina Borodina {Head of the Moscow *Oblast* Justice Administration}: Ms. Borodina was shot and killed on 25 June 1996 in her apartment building in Podolsk.

Olga Lavrenteva {Judge at the Ostankino Municipal Court in Moscow}: On 30 August 1996, Judge Lavrenteva was stabbed to death by a street vendor whom she had convicted the day before for illegal trading, ordered his goods confiscated and fined US$7. The vendor returned to the court building and stabbed her repeatedly.

Jurij Markowitsj Schmidt {Lawyer}: On 10 February, Mr. Schmidt was reportedly retained by a former navy officer, Mr. A. K. Nikitin who had been arrested on 4 February and charged with espionage. Mr. Schmidt was advised that he would only be granted access to his client on the condition that his telephone would be tapped throughout the investigation and for an indefinite time period after the trial. Mr. Schmidt would also be prevented from leaving Russia for five years after the trial. These restrictions not only violate Article 48 of the Criminal and Legal Procedure Code of Russia but also Principle 16 of the United Nations Basic Principles on the Role of Lawyers which requires Governments to ensure that "lawyers are able to perform their professional functions without intimidation, hindrance harassment or improper interference" and "are able to travel and to consult with their clients freely both within their own country and abroad".

RWANDA

On 6 April 1994, the death of President Habyarimana ended the fragile transitional peace process between the Government and the Rwandan Patriotic Front (FPR) and fuelled wide-scale violence. Hundreds of thousands, mostly Tutsi, were killed and by May 1994, the killings had reached genocide proportions. The Tutsi-dominated FPR claimed victory in the civil war in mid-July 1994 and formed a new coalition Government, without elections. Pasteur Bizimungu, leader of the FPR, was nominated President and the Government announced that multiparty elections would be held in 1999. A Multiparty National Assembly was appointed and included representatives from nine different political parties. In July 1994, more than 1.5 million, most of them ethnic Hutus, fled their country in the aftermath of the genocide to Zaire, Tanzania and Burundi. Repatriation efforts were largely unsuccessful, at least in 1996. There were an additional two million persons internally displaced.

The killings and disappearances of civilians by members of the Rwandese Patriotic Army (RPA) did not cease throughout 1996. Human rights organisations reported that in the first half of 1996, at least 650 people were killed. Moreover, in June 1996, the UN Human Rights Field Operation in Rwanda (HRFOR) expressed its concern regarding "the increasing number of reported attacks on genocide survivors and witnesses to genocide". It was believed that they were harassed in order to destroy evidence and to prevent them from being called as witnesses before the International Criminal Tribunal for Rwanda which had been created in November 1994.

THE RWANDAN REFUGEES

In July and August 1996, more than 40,000 refugees returned from Burundi, although it was reported that organisations active in the refugees camps described the repatriation as "eviction" under pressure from the Tutsi-dominated Burundian army. On August 21-22, an agreement was signed between the Prime Ministers of Rwanda and Zaire for the repatriation of an estimated 1,300,000 Rwandan refugees settled in eastern Zaire. The mainly Hutu refugees had resisted previous programs for repatriation, fearing the absence of justice and widespread human rights abuses in Rwanda. In the wake of the civil war in North and South Kivu, in the fall of 1996, however (see the chapter on Zaire), the repatriation of another 600,000 refugees from Zaire was registered.

In early December 1996, a joint statement which ordered that "..all Rwandese refugees in Tanzania [were] expected to return home by 31 December 1996" was issued by the Tanzanian Government and the UNHCR. No mention was made of any alternative for those refugees who feared human rights abuses and continued to feel unsafe in Rwanda. It was reported that by the end of 1996, the majority of the estimated

540,000 refugees in Tanzania returned, although as many as 300,000 Rwandese who had left the country in 1994 still remained outside at the end of 1996.

Genocide Trials

Among the most serious problems facing Rwanda in 1996 was the means by which those detained under suspicion of participating in the genocide would be processed It was unofficially estimated that more than 80,000 detainees were being held in 1996. Although there were no facilities for trials, during the first six months of 1996, the Rwandan Patriotic Army (RPA) arrested genocide suspects at a rate of approximately 800 every week; thereafter the rate lowered to 400. Further, despite the Rwandese government's commitment not to prosecute or arrest any returning refugee without fair investigation, it was reported that by early January 1997, approximately 5,500 arrests had been made from among those returning from Tanzania and 2,000 from among those returning from Burundi. The arrests were often made on the base of oral complaints and unsubstantiated accusations. The inability of the existing 250 prisons and detention centres to accommodate detainees led to gross overcrowding with enormous health and sanitation problems and a high mortality rate.

On 31 March 1995, the Ministry of Justice announced the formation of a *Commission de Triage* (Screening Commissions) comprised of representatives from the prosecutor's office, the military, the Gendarmerie and the Prime Minister's intelligence service. Commissions were to operate in each prefecture and at the national level and quickly determine who might be eligible for provisional release. In fact, as of July 1996, they still did not function nation-wide. Moreover, no law was enacted to grant them judicial jurisdiction and their working methods and screening criteria were not clear. Government efforts to encourage the *Commission de Triage* to act resulted in an increase in releases starting in March, but overall, the impact was almost indiscernible.

The International Tribunal for Rwanda, established by the Security Council of the UN acting under Chapter VII of the Charter, has "the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory on neighbouring States, between 1 January 1994 and 31 December 1994". The Tribunal has jurisdiction over natural persons accused of having committed genocide, crimes against humanity or having violated Article 3 of the 1949 Geneva Convention for the Protection of War Victims. Moreover, the International Tribunal and national courts have concurrent jurisdiction, but the former enjoys "primacy over the national courts of all States". The Statute enforces the principle of *non bis in idem*, establishing that no person can be tried twice for the same crime.

On 10 January 1996, the International Tribunal for Rwanda, based in Arusha, Tanzania named the first three individuals accused of involvement in the genocide. On 24 September, Richard Goldstone, the then Chief Prosecutor of the International Tribunal announced that to date, only 22 persons alleged to have led the massacre had been incriminated and that the total would probably never exceed 40. All other accused would be tried within the Rwandan national court system.

The number of detainees to be processed is overwhelming in and of itself; the most well-equipped justice system would find the task daunting. Very few judges, prosecutors, judicial inspectors and court clerks have remained in the country, if they have survived. The Rwandese Bar Association ceased to exist; the building which housed the Ministry of Justice, courthouses and prosecutors offices were destroyed or seriously damaged; all the equipment was destroyed or stolen. Since then, attempts to reconstruct the judicial system have gradually occurred. New legal personnel were trained, justice officials appointed, courthouses rebuilt and basic supplies and legal texts provided.

Despite these efforts, it was reported that in early 1997, there were still only two judges with a proper judicial background in Kigali; all the others had three months training. In June 1996, there were only 16 practising lawyers in the whole country, almost all of them in Kigali. Ruhengeri, the fourth largest city in Rwanda, had only a "para-legal" qualified to represent clients, and then only in non-criminal cases. More and better trained personnel are required at virtually every level of the judicial system. Judges were also harassed: on 20 May 1996, the President of a first instance court and his wife were injured when a grenade was thrown at their home.

At the end of 1996, it was impossible to foresee how the Government could provide a fair trial to all those detained. Genocide is a unique crime and prosecutors and investigators need specialised training. In fact, the Government, in January 1996, passed the Basic Law Amendment Act which amended the Constitution to retroactively authorise the prosecution of crimes which were not punishable under Rwandese Law when they were committed, although recognised internationally as crimes under general principles of law. To address the insufficient number of law graduates, the Basic Law Amendment Act allows for the appointment of persons without law degrees to be temporarily appointed to the Courts of Appeal. The Act also granted military courts jurisdiction over accused civilian accomplices of military offenders.

In May, provisions of the Code of Criminal Procedure were amended accordingly and all arrests and detentions carried out or ordered since April 1994 were retroactively legalised. A defendant's right to appeal against detention was abolished in all circumstances. The amendments are to remain in force until 17 July 1999.

The law also distinguished between three categories of accused persons: those already in detention at the time of its publication; those arrested or in detention between the date of publication and 31 December 1997; and those arrested or in detention between 1 January 1998 and 16 June 1999. The law gave arresting officers until 31 December 1997 to submit arrest reports for suspects in the first category and thirty days and five days respectively for those in the second and third categories. The prosecutor, who previously had to issue an arrest warrant immediately on receiving the arrest report, now has until 31 December 1997 for those in the first category and four months and two months from the date of the arrest for suspects falling into the second and the third categories respectively. Judges have until 31 December 1997 to issue detention orders for those in the first category. For those in the second and third categories, judges have three and two months respectively. The validity of the detention order is now six months for suspects of the first and second categories, and three for those in the third. As indicated above, no appeal is allowed.

On 30 August, the Transitional National Assembly enacted the "Organic Law on the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990." The Act is applicable to those crimes committed between 1 October 1990 and 31 December 1994. Article 2 divided the accused into four categories. Category One offenders are the planners or instigators, those who acted in a position of authority, notorious murderers or persons who committed acts of sexual torture. If convicted, category one offenders are liable to the death penalty. According to Article 9, a list of persons suspected of committing acts within Category One shall be published three months after the law itself was published and periodically thereafter. The "perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing the death" fall into the Category Two and are subject to life imprisonment, if convicted. Category Three refers to those charged with other serious assaults against the person and the penalties are provided for in the Penal Code. Category Four offences deal with crimes against property and will give rise to civil damages.

The Organic Law allows those in Categories Two and Three to plead guilty in exchange for a reduction in sentencing which will be greater if the plea is made before the trial. Persons who fall within Category One are not eligible to a reduction in the penalty unless they confess before their name is published in accordance with Article 9. In that case, they will be placed in Category Two. In December 1996, a list of 1,946 suspects was published and several of them were arrested.

Chapter V of the Organic Law gives exclusive jurisdiction to try these crimes before Specialised Chambers within the Tribunals of First Instance and the Military Courts. Each Specialised Chamber may include several benches, each of which is to be composed of by three magistrates. Presidents and "Career Magistrates" of the Specialised Chambers of the Courts of First

Instance will be appointed by the President of the Supreme Court following a decision of the College of the President and the Vice-Presidents of the Supreme Court. Career Magistrates are to be named from among the magistrates of the Tribunal of First Instance, whereas "Auxiliary Magistrates" and the Presidents of the Specialised Chambers of the Military Courts are to be appointed "in accordance with normal procedures" (see below, under the Judiciary)".

Article 22 establishes public prosecutors for the Specialised Chambers, named by the Prosecutor General of the Court of Appeal from among those assigned to the Office of the Public Prosecutor.

All the decisions of the Specialised Chambers may be appealed within 15 days on question of law or flagrant errors of fact to the Court of Appeal, whose decision "is not subject to appeal or review". An exception is made where the Court of Appeal condemns a person to death who had been acquitted in the first instance. In that case, the defendant may appeal to the Court of Cassation within 15 days. The Prosecutor General of the Supreme Court may, "in the sole interests of the law, apply to the Court of Cassation for judicial review of any decision contrary to law rendered at the appellate level within three months of that decision".

Finally, Article 36 recognises "the same rights of defence given to other persons subject to criminal prosecution, including the right to the defence counsel of their choice, but not at government expense".

On 27 December 1996, the first trial of genocide suspects took place before the Specialised Chamber of the Court of First Instance. The trial lasted only approximately four hours and the accused, Deogratias Bizimana and Egide Gatanazi, were denied the right of access to legal counsel before and during the trial, despite the fact they were facing a death sentence. The defendants were not granted the right to call witnesses in their defence or the right to cross-examine the prosecutor's witnesses. It was reported that the general climate in the court room was hostile, with the defendants being booed and prosecutors applauded, thereby undermining at least the appearance of a fair trial. Prosecutors allegedly passed notes to the judges during the trial. Moreover, it was reported that preliminary investigations, from which the defendants' lawyers were excluded, were conducted not by an examining magistrate, but by the Public Prosecutor.

On 3 January 1997, Deogratias Bizimana and Egide Gatanazi were found guilty of genocide and crimes against humanity and sentenced to death by a Specialised Chamber in Kibungo. They were given 15 days to appeal. If their appeal is unsuccessful, they will have three months to demand presidential grace or to ask for their sentences to be commuted.

The trials that followed were also characterised by a denial of adequate time to prepare a defence, if not a complete denial of access to legal counsel. The prosecutor requested the death sentence in the majority of the cases. It was estimated that, at the rate of one trial a day, seven days a week, it would

take 35 years for the seven Rwandan Specialised Chambers to try all the persons charged with genocide and crimes against humanity and jailed in Rwandan prisons at the end of 1996.

In January 1997, the ICJ sent an observer to the trial of Froduald Karamira which opened on the 14 January before the Specialised Chamber of the Court of First Instance in Kigali. Mr Karamira, the former vice-president of the opposition party "Mouvement des Republicains" allegedly took an active part in organising, planning and executing the genocide. He was the first defendant to have legal counsel and to summon witnesses. Because of the lack of lawyers generally and the lack of willingness of those lawyers who do exist to agree to act for those accused of genocide, Mr. Karamira was represented by **Maître Kato Atita**, a lawyer from Benin sent by the association, *Avocats sans Frontières*. Mr. Atita was given only five days notice of the trial. When he arrived in Kigali three days prior to the trial, he was only permitted access to his client the day before the trial. At the opening of the trial, Maître Atita challenged the competence of the tribunal to try Mr. Karamira, claiming he should be tried by the International Criminal Tribunal. Maître Atita requested an adjournment to properly prepare a defence. The request was rejected, as was his request for an interpreter from Kinyarwanda to French for at least the most important statements of the defendant. As of 31 January 1997, the trial was still in process.

Meanwhile, the International Criminal Tribunal in Arusha, marred by political and managerial problems finally got underway in September 1996, only to postpone several of the trials. On 31 October, the International Tribunal postponed, until early January 1997, the trial of Jean-Paul Akayesu, former mayor of Taba and on 7 November, the trial of Clement Kayichema, the former prefect of Kibuye was postponed until February 1997. The reason given by the Prosecutor for the postponements was the conflict in eastern Zaire.

The Judiciary

The Rwandese justice system is a combination of the French Civil Law system and the Belgian model. The Constitution is known as the Fundamental Law, and in 1996 included four different texts: the Constitution of 1991, which provides for a multiparty system for the first time since independence, the Arusha Accords of 1993 (see below), the RPF declaration of 1994 and the Interparty Accords of 1994.

The ordinary courts operate with a parallel system of traditional justice, called *gacaca*. The *gacaca* deals with disputes over land, especially on questions concerning grazing rights, family problems and small business arrangements between individuals. There are Military Courts with jurisdiction over soldiers, and recent legislative developments (see above) extended their jurisdiction, at least temporarily, over civilian accomplices of military offenders of genocide.

The court system remained essentially the same as before the genocide, save for a newly constituted Supreme Court created by the Arusha Accords, signed in August 1993 between former President Habyarimana and the FPR. The Supreme Court is to be comprised of five sections, including the *Cour de Cassation* and the Constitutional Court. All 20 members of the Supreme Court are trained lawyers.

The ordinary court structure is based on approximately 145 Cantonal Courts, at the lowest level of the judicial hierarchy, followed by 12 *Tribunaux de Première Instance* (First Instance Courts), one for each prefecture apart from Kigali with two, and four Courts of Appeal. Judicial personnel are divided between *magistrats du siége* (sitting judges) and *magistrats de parquet* (prosecutors). A panel of three judges is required to preside at trials, even in the initial trial courts. This provision has made adequate staffing difficult, particularly in the circumstances that prevailed in 1996. The HRFOR report on the administration of justice in post-genocide Rwanda highlighted that, since May 1994, of the 12 *Tribunaux de Première Instance*, only six had enough judges to function and that not a single Court of Appeals was functioning because of the lack of judges to constitute panels. At the beginning of 1997, the ICJ Observer to the Genocide trial of Mr. Kaamira reported that the number of working First Instance Tribunals had been raised to seven. It must be noted however, that while general attention has focused on staffing the First Instance Courts with jurisdiction over the genocide trials, the Cantonal Courts, as of mid-1996, remained in grave disrepair without hope of receiving the much needed immediate attention.

The Arusha Accords also provided for the creation of the *Conseil Supérieur de la Magistrature* to guarantee independence from the executive. It is to nominate, appoint and manage the careers of all the judges and supervise their work. The *Conseil*, composed of jurists representing various courts headed by the President of the Supreme Court, only began functioning on 15 April 1996 because of the delay in passing the implementing legislation by the Transitional National Assembly. The *Conseil* is supposed to be appointed by a college of judges, which did not exist in 1996. In order to appoint the first *Conseil*, the Basic Law Amendment Act passed in January authorised the President of the Supreme Court to appoint its members for a one year period. In May 1996, the *Conseil* elected its officers, adopted internal regulations and appointed 89 newly trained judges, raising the number of judges in the whole country to a total of 283. Moreover, the Supreme Court, the Courts of Appeal, the First Instance Courts and several Cantonal Courts received additional personnel.

Lawyers

The Bar Association had not been reconstituted at the end of 1996. Those entitled to appear before a court are those with authorisation from the Minister of Justice, and not necessarily those with certified training or competence. This system has left the entire legal profession in the hands of the

Minister of Justice. Foreign lawyers defending defendants accused of genocide receive permission on an *ad hoc* basis, leaving the defendant's right to counsel of choice subject to a potentially arbitrary decision.

Lawyers representing defendants accused of genocide reportedly were the target of hostility and sometimes harassment from the public.

CASES

Claudien Gatera (President of first Instance Court in Kigali): On 27 February 1996, Mr Gatera was suspended from his position by the Council of Ministers, allegedly on charges of corruption.

Fidèle Makombe (Prosecutor at the *Parquet* of Kibuye): Appointed only in January 1996, Mr. Makombe had several disagreements with various officials who expected him to proceed with arrests for which he believed there were insufficient evidence. On 25 April 1996, approximately 30 people demonstrated in the streets of Kibuye against the Mr. Makombe and the *Parquet*. On 1 May Mr. Makombe, when returning from Kigali, was stopped in his car near the *Parquet* by an officer of the Rwandan Patriotic Army (RPA), who accused him of being absent from his job, slapped him in the face, threw him to the ground and kicked him.

On 10 May 1996, following a meeting of the Council of Ministers, Mr. Makombe was suspended from his functions, awaiting the establishment of a commission of inquiry. The suspension followed an interview he gave to *Radio France International* about the assault he suffered. He also discussed the disagreements between the *Parquet* of Kibuye on one side, and the Prefecture and certain civil authorities on the other, regarding their relative areas of competence. In particular, there had been significant disagreement concerning the arrest and release of one man previously employed by the Prefect. Initially, the reason given for Mr Makombe's suspension was the interview, but on 28 May, he was officially informed in a letter issued by the Minister of Justice that the reason was the loss of confidence of the local population in him, as manifested by the protest of April. Mr Makombe reported to the HRFOR that he had never been asked by the Ministry of Justice, by the Prosecutor General at the Court of Appeal in Ruhengeri, his direct superior, or by any commission of enquiry, to present his own case.

THE FEDERAL REPUBLIC OF YUGOSLAVIA (SERBIA)

Serbia and Montenegro declared themselves to be the independent successor state of the former Yugoslavia in April 1992. The status of the prevailing constitutional authority remained unclear in 1996. Although the Constitution of the Federal Republic of Yugoslavia was adopted in 1992, the Constitution of the Republic of Serbia was reportedly never amended to conform with it. It further appears that if any constitutional provisions were applied in the Republic of Serbia in 1996, those provisions would have been drawn from the state constitution rather than the Constitution of the Federal Republic.

Slobodan Milosevic, who was serving his second term as President exercised substantial control over the country, through his Socialist Party of Serbia, even though it did not hold the majority of the seats in either the National Assembly or the Federal Parliament.

THE JUDICIARY

MUNICIPAL AND LOCAL ELECTIONS AND THE ROLE OF THE COURTS

On 3 and 17 November 1996, municipal elections were held in several Serb towns, including Belgrade. Several irregularities were reported. Among them, the reports that electoral lists were not available and that the electoral laws had been amended to favour the Socialist Party of Serbia (SPS) just prior to the elections. For example, the composition of the local election commissions and polling station committees gave a majority to the SPS, allowing it to make the final decision in any discrepancy or dispute. To add to this, the electoral laws governing federal, republican, provincial, city and municipal elections were not harmonised, thereby making it extremely difficult to detect irregularities. Finally, the media was strictly controlled.

Despite these obstacles, the opposition ZAJEDNO Coalition (the Together Coalition) reportedly won in 11 of the 16 municipalities in Belgrade. It also won local elections in the cities of Belgrade, Novi Sad, Kikinda, Zrenjanin, Vrsac, Jagodina, Kragujevac, Kraljevo, Nis, Cacak, Pirot, Uzice, Trsenik and in several other small towns.

The opposition victory was short lived: it was annulled either by the SPS controlled Electoral Commissions which in some instances, were actually composed of judges, or through recourse to the municipal courts. Results in favour of the opposition were annulled in more than 500 polls. In total, 97% of the results annulled were those in favour of the ZAJEDNO Coalition. In some instances, the SPS representative refused to sign the polling record, when it became apparent that the SPS candidate had lost. In others, the electoral commissions declared their own counting results to be invalid so the results could be annulled. In the city of Nis, the Electoral Commission

simply reversed the results, giving the SPS a majority (see below). At several polls, the first copy of the records disappeared as soon as it was realised the SPS had been defeated. In those cases in which judges refused to annul the election results, other judges were transferred to the court to make the appropriate order.

The events which followed, some of which are described below, demonstrated the complete lack of independence of the Serbian judiciary in 1996.

Elections of the Belgrade City Assembly

The first results of the elections in Belgrade City Assembly reported the ZAJEDNO Coalition had won 70 of a total of 110 seats. The City Electoral Commission nullified election results in 10 polls based on complaints lodged by the SPS. The SPS then applied to the First Municipal Court alleging irregularities in all polls where it had not been declared the winner. The SPS applied to the Court irrespective of whether or not it had already lodged complaints with the Electoral Commission or of the decision the Commission might have issued.

The Court accepted the SPS's contention that the Electoral Commission had not considered its complaints. The minutes of the Electoral Commission, however, showed otherwise but they had not been filed in the court record - neither the SPS nor the Court had notified the ZAJEDNO Coalition of the SPS' application. The ZAJEDNO Coalition was made aware of this fact only after the judgments were delivered. Further, the SPS had not lodged complaints with the Electoral Commission concerning all the polling results it challenged before the courts and accordingly, the Electoral Commission had not been given an opportunity to even consider those results. Despite these procedural irregularities, the First Municipal Court ordered new elections to be held on 27 November in those polls affected by its decision.

The ZAJEDNO Coalition decided to boycott the new elections and called for massive demonstrations to protest the decisions of the Electoral Commission and the First Municipal Court. The voters complied. It was estimated that on 25 November, more than 100,000 protesters marched in Belgrade protesting the rulings that had annulled the ZAJEDNO Coalition victory. On 27 November, the government announced that the SPS had won the polls in the new elections. The protests continued for weeks, calling for President Milosevic's resignation and reinstatement of the original election results.

The ZAJEDNO Coalition also brought 34 applications before the First Municipal Court and asked it to reconsider its decision on the basis that the minutes of the City Electoral Commission showed that the SPS complaints had in fact been considered and rejected. The First Municipal Court refused.

The ZAJEDNO Coalition also brought 34 applications to the Supreme Court of Serbia, requiring the re-examination of the first decision of the First Municipal Court whereby it ordered new elections to be held. The ZAJEDNO Coalition cited the substantive and procedural violations highlighted above and asked the Supreme Court to postpone the new elections. It relied on the minutes of the Electoral Commission which had not been considered by the First Municipal Court and which demonstrated that the Electoral Commission had considered the complaints filed by the SPS. With approximately 150,000 supporters of the ZAJEDNO Coalition protesting in the city centre in anticipation of a reversal of the decision of the First Municipal Court, the Supreme Court heard the appeal of the ZAJEDNO Coalition. It refused all the petitions and confirmed the judgment of the First Municipal Court. The Supreme Court maintained that disagreement on the legal form of the Minutes of the Electoral Commission and the time of the submission to the Court was insufficient to cause the Supreme Court to render a different decision.

The ZAJEDNO Coalition also appealed to the Supreme Court from the First Municipal Court's refusal to reconsider the matter on the basis of the minutes of the Electoral Commission. The Electoral Commission also appealed. The Supreme Court refused the applications.

The ZAJEDNO Coalition ultimately appealed to the Federal Constitutional Court alleging violations of the right to vote, of equal protection before courts and of the prohibition against discrimination, as recognised by the Constitution of the Federal Republic of Yugoslavia. It was reported that in early 1997 the case was still pending.

In early December, five judges of the Supreme Court, in a letter sent to the newspapers, dissociated themselves from the decisions taken concerning the election results. Mr Zoran Ivosevic, Justice of the Supreme Court of Serbia, in a separate letter to the press stated that "the judicial branch is still suffering from the hangover of the unity of powers. It has not emancipated itself as a separate branch, nor has it become a partner for the legislative and executive branches. These branches continue to impress the judiciary with their political will, so that in the critical moments of its functioning it has neither the strength nor the courage to live up to its Constitutional position" (*unofficial translation*).

Elections of the Municipal Assembly of Nis

In Nis, an overwhelming success of the opposition (41 ZAJEDNO Coalition's representatives were elected, 21 for the SPS) was transformed by the Electoral Commission into a victory of the SPS by altering the recorded votes. The ZAJEDNO Coalition applied to the Nis Municipal Court for a review of the Electoral Commission's decision. It was reported that not one of the 50 judges of the Nis Municipal Court would accept to sit as president of the judicial chamber in those proceedings. It was alleged that the judg-

ments denying the application, had already prepared. Ultimately a "loyal" judge from Bela Palanka, was transferred to the Nis Municipal Court to sign the judgment. This judge was the president of the Bela Palanka Municipal Court and of the Electoral Commission in Bela Palanka. She had heard complaints concerning the elections results in her capacity as the President of the Electoral Commission and then again when the decision of the Electoral Commission was appealed to the Bela Palanka Municipal Court.

Criminal complaints of forgery were filed by the ZAJEDNO Coalition against the members of the Nis Electoral Commission, but as of the early 1997, no criminal proceeding had been instituted.

Second elections were held in Nis, which the ZAJEDNO Coalition boycotted and the SPS won a majority of seats. The ZAJEDNO Coalition filed an application before the Nis Municipal Court challenging the results. On 15 December, the Nis Municipal Court, which was reportedly controlled by the Government, reversed its previous decision and ordered the City Electoral Commission to present its records to the Court. It was thought by some that President Milosevic was hoping to allow the ZAJEDNO Coalition to take office in Nis, which was facing severe economic problems, in exchange for the SPS maintaining control of Belgrade and other major cities.

Despite the order from the Electoral Commission to present its records to the Court, it refused to do so. The Municipal Court then requested that the Electoral Commission verify its results against those presented by the ZAJEDNO Coalition. Again, the Commission refused to comply. Instead, it ordered yet another round of elections for all seats in which the results were questioned. Shortly after a group of students visited President Milosevic on 18 December and gave him the first electoral records, which showed a victory for the opposition, the Ministry of Justice sent a message to the Nis Electoral Commission refusing permission to hold new elections, allegedly on the grounds that, "it [was] against Mr Milosevic's promise" to the students. Nevertheless, the Electoral Commission went ahead with its decision, and ordered a new round of elections to be held. The case was still pending at the beginning of 1997.

On 16 December, and as protests continued, the Smederevska Palanka Municipal Court ordered the local Electoral Commission to award the election victory to the ZAJEDNO Coalition. In clear defiance of the Court Order, the Electoral Commission confirmed the SPS as the winners of the November elections.

On 13 December 1996, the Yugoslavian Foreign Minister formally invited the Organisation for Security and Co-operation in Europe (OSCE) to send a delegation to Serbia to investigate the allegations of election irregularities. The OSCE's report was issued on 27 December, and concluded the opposition had won the elections. In fact, the delegation, headed by the former Spanish Prime Minister Felipe Gonzalez Marquez, invited the Serb

Government to accept the ZAJEDNO Coalition victory in Belgrade and 13 other towns.

By January 1997, trade unions and even the Serbian Orthodox Church had joined the supporters in their calls for the Government to reinstate the elections results. On 3 January, the Government acknowledged that the ZAJEDNO Coalition had won the election in three provincial towns and nine municipalities in Belgrade, but it refused to acknowledge the opposition victory in Belgrade and said the situation remained "unclear" in Nis.

By mid-January 1997, the Government, in the face of international pressure and continued protests by the population, issued a statement saying that the will of the citizens' "must be fully respected".

President Milosevic chose to resolve the issue by proposing a law which recognised the results as verified by the OSCE. However, he failed to recognise the irregularities and claimed the Government was recognising the results but the strong pressure from outside the country was an obstacle for the development of the country". On 12 February 1997, the law was passed by the National Assembly and on 13 February, the Belgrade Electoral Commission confirmed the victory of the ZAJEDNO Coalition. The remaining Electoral Commissions followed.

TUNISIA

According to the Constitution of Tunisia, the executive power is held by the President of the Republic, who is elected every five years by universal suffrage. President Zine El-Abidine Ben Ali was re-elected for a second term in March 1994. According to Article 39 of the Constitution, the President may be elected for a maximum of three five-year terms. The President appoints the Prime Minister and the Cabinet.

Political life in 1996 continued to be dominated by a single political party, the Constitutional Democratic Rally (RCD). Legislative power is vested in the unicameral parliament, the Chamber of Deputies, which is also elected for five years by universal suffrage. In 1996, the 163-seat Parliament was dominated by the RCD which won 144 seats in the 1994 legislative elections. The other 19 seats were divided among four opposition parties. The RCD also dominated the Cabinet and the regional and local governments; in 1995, it won 4084 of the 4090 seats in municipal elections.

The Government continued to commit serious human rights abuses despite its ratification of international human rights conventions and its creation of human rights bodies in various ministries, which were to address and resolve human rights violations. Repression, arbitrary arrest and detention of government opponents, families of prisoners and human rights activists continued throughout the year. Hundreds of suspected Islamists as well as leftists were detained and prosecuted on charges relating to distributing or possessing illegal material, attending unauthorised meetings and belonging to unauthorised political parties.

HARASSMENT OF MEMBERS OF THE OPPOSITION

Since May 1988, some political parties have been legalised. Others, however, such as the Islamist *Al-Nahda* party (Renaissance), and the leftist *Parti communiste des ouvriers tunisiens* (PCOT) continued to be banned.

Members of both legal and illegal opposition parties were subjected to various types of harassment, including arbitrary detentions, for their public criticism of the government. On 28 February 1996, Mohamed Mauada, leader of the main legalised opposition party, the *Mouvement des Démocrates Socialistes* (MDS), was sentenced to 11 years in prison and fined 125,000 Tunisian Dinars (approximately US$ 135,000) on charges of treason for allegedly selling information concerning national security to a Libyan citizen. Mr. Mauada was arrested on 10 October 1995, two days after the political bureau of his party held a meeting and made public a letter it had sent to President Ben Ali complaining of the lack of political freedom and demanding reform.

In May 1996, Khemais Chammari, also a member of MDS and of Parliament was arrested after a seven month judicial investigation and sentenced to five years imprisonment on charges of illegally disclosing information about the Mauada case. Mr. Chammari was prosecuted for his

outspoken criticism of the government. The ICJ observed his trial and concluded that it was unfair.

On 31 December 1996, following continuous international pressure, both Messrs. Mauada and Chammari were granted conditional release. However, they were prohibited from resuming their parliamentary activities, and from exercising their civil and political rights. Moreover, they were placed under 24-hour police surveillance on 1 January 1997 and forbidden from travelling abroad for either private or professional reasons.

Also in May, Moncef Marzouki, an opposition politician and former president of the LTDH, had his passport confiscated shortly after it had been returned to him following a previous confiscation. Hamma Hammami, former editor of the PCOT newspaper also had his passport confiscated in 1996 which prevented him from attending an international conference on torture.

Harassment of other human rights activists

Human rights activists continued to be targeted by the authorities and prevented from accomplishing their work by various means. In November, for instance, the government cancelled at the last minute an educational seminar which the Tunisian Human Rights League (LTDH) had organised concerning the law on *garde à vue* and preventive detention. The LTDH's critical press releases were systematically ignored by the Tunisian media due to Government pressure, and its members were arrested and questioned about seminars and conferences they had attended or about their contacts abroad. In October, Salah Zeghidi, the Vice-President of the LTDH, was arrested upon his return from a human rights conference he attended in Paris. Frej Fenniche, the Executive Director of the Arab Institute of Human Rights was also arrested on 10 May and questioned during four days concerning documents related to Khemais Chammari that were found in his luggage.

The authorities also prevented human rights activists, journalists and opposition members from travelling and attending seminars or conferences abroad by confiscating their passports under to Law No. 75-40 of 14 May 1975. This law permits passports to be confiscated "for reasons of public order and security".

International human rights organisations have not been spared from the Tunisian Government's scrutiny either. The President of the central office of the *Federation International des Droits de l'Hommes* (FIDH) in Paris was on a mission to Tunisia and was turned back upon his arrival at Tunis airport. In August 1996, a Tunisian member of the staff of Amnesty International's headquarters in London was arrested when visiting Tunisia with his family. He was held *incommunicado* for a week in the Ministry of Interior, where he was questioned about his work for the organisation. Also in 1996, delegates of Human Rights Watch and the Lawyers Committee for Human Rights were subjected to police surveillance and prevented from meeting with victims of human rights violations and with human rights activists.

Culpability for acts conducted on foreign territory

Since the November 1993 amendments, Article 305 of the Code of Criminal Procedures (CCP) has stipulated that "[a]ny Tunisian who commits, outside Tunisian territory one of the offences mentioned in Article 52 bis of the Penal Code, can be prosecuted and tried by Tunisian courts, even though these offences are not punishable under the law of the country where they are committed". Article 52 bis of the Penal Code defines those activities as:

> ...all actions relating to individual or collective initiative, aiming at undermining individuals or properties, through intimidation or terror. Acts of incitement to hatred or to religious or other fanaticism, regardless of the means used, are treated in the same way. The imposition of administrative controls for a period of five years is compulsory...The sentence cannot be reduced to less than half the minimum.

Thus Tunisian citizens exercising political activities considered legal in the countries where they take place may be arrested and prosecuted as soon as they return to Tunisia. In recent years, individuals living or studying abroad were arrested and prosecuted upon their return to Tunisia under Articles 305 of the CCP and 52 bis of the Penal Code. Article 52 bis of the Penal Code has also been used against other individuals accused of having links with the Islamist party *al-Nahda*. In its response to the CIJL's request for comments on the 1995 chapter on Tunisia, the Government claimed that the legislation was progressive and directed at combating fanaticism and hatred based on racial or religious criteria in accordance United Nations orientations.

Detention

The CCP authorises the police to arrest suspects without warrants. Following arrest, a suspect may be held *incommunicado* for 10 days. Frequently, however, it is reported that the authorities extend the 10-day limit of detention by falsifying the date of arrest. During this pre-trial period, suspected individuals are denied access to legal counsel and to members of their families, and their whereabouts are sometimes unknown.

In cases involving crimes for which the sentence may exceed five years or which involve national security, the CCP provides that pre-trial detention may last for six months and may be extended by court order for a further three months for minor crimes and for two four-month periods for major crimes. Despite such lengthy periods in detention before trial, individuals have been arrested and detained for even longer periods.

Torture

Despite legal prohibition, torture remained a serious problem in

Tunisian detention centres and reportedly on the very premises of the Ministry of Interior. It was allegedly practised systematically in order to coerce confessions from detainees. In August 1996, five students arrested for membership in an illegal organisation reported being tortured during their six-day detention. Radhia Aouididi, arrested on 9 November 1996, was also reportedly tortured during her prolonged *incommunicado* detention. Moreover, although Tunisian law requires a medical examination to be conducted at the request of the detainee or his or her family the authorities often denied medical examinations to ensure allegations of torture would be difficult to prove.

Under Article 12 of the UN Convention against Torture (CAT), which Tunisia ratified in 1988, Tunisian authorities have the obligation to carry out "prompt and impartial investigations, wherever there is reasonable ground to believe that an act of torture" has taken place, even if the victim has not filed a complaint. However, such investigations were not normally carried out into the numerous cases brought to the attention of the Tunisian Government and the Judiciary. Perpetrators of such acts were not punished, contrary to Article 101 of the Penal Code, which provides for five years imprisonment and a fine for "public servants who, in the exercise of their functions use violence or cause it to be used against individuals, without any legitimate motive".

The judiciary failed to conduct investigations into allegations of torture or ill-treatment. Therefore, statements made by defendants under duress or torture are often admitted as evidence.

The Judiciary

The judiciary is comprised of civil and military courts. The civil courts are organised in three levels: the Court of Cassation, located in Tunis, Courts of Appeal, and Courts of First Instance. Courts of Appeal hear appeals from the lower courts. The Court of Cassation issues final judgments, but only on points of law.

According to Article 65 of the Constitution, the judiciary is independent. In reality, however, it is to a great extent influenced by the executive power and in particular, in politically sensitive cases by the Ministries of Justice and the Interior. The President of the Republic has direct influence over the appointment of judges. He appoints by decree the presidents of the higher courts and other senior judges such as the Prosecutor General of the Court of Cassation and the Prosecutor General Director of Judicial Services. He also appoints lower judges upon suggestion of the High Council of the Judiciary, which is to ensure "the respect of the guarantees given to judges with regards to the appointment, promotion, transfer and discipline".

The High Council of the Judiciary (the Council) is presided over by the

President of the Republic and is composed of the Minister of Justice (Vice-President), the first presidents of the Court of Cassation and of each Court of Appeal, the president of the Court of Property, the Attorney General, the Prosecutor General of the Court of Cassation, the Director of Judicial Services and the Inspector General of the Ministry of Justice, all of whom are appointed *ex officio*. Two female judges are appointed by decree upon suggestion of the Minister of Justice for two renewable years, and two other judges are elected by the members of the Council for two years according to a procedure established by the Minister of Justice. According to Article 8 of the Law on the Judiciary, the Council adopts its decisions by majority. In a case of equal votes, the President of the Council or, in some cases, the Vice-President's vote prevails.

In addition to recommending appointments to the lower courts, the Council examines the transfer of judges. However, the Minister of Justice may decide during the year to transfer a judge "when necessary" and submit the transfer order to the High Council of the Judiciary during its next meeting. Moreover, according to this law, the age of retirement of judges may be extended for a maximum of five years. Judges may thus fear they will be transferred or an extension refused, if they issue judgments which conflict with the interests of the executive power.

The Right to a Fair Trial

Although Tunisian courts usually hold their trials in public, they do not always guarantee fair trials to defendants. Courts are not required to hear a case within a designated time period, and this has resulted in suspects remaining in detention for prolonged periods of time.

Frequently, individuals have been tried *in absentia* and were thus denied the right to defend themselves. This is particularly serious when a person is tried twice for the same act. The case of Mohamed Hedi Jouini, who has been repeatedly convicted and imprisoned since 1991 for his membership in Al-Nahda party, is quite relevant. Mr Jouini was re-arrested on 10 June 1996 after he had been tried *in absentia* while he was still in prison for the same acts for which he had been tried and sentenced in 1993. Double jeopardy is a clear violation of Article 14(7) of ICCPR which prohibits the retrial of a person who has been acquitted or convicted for the same crime.

Lawyers

Tunisian lawyers faced various obstacles in the exercise of their profession, such as being informed of the trial date on short notice and being denied or having restricted access to evidence or key documents in the case. For example, Mr. Chammari's defence lawyers complained that they received inadequate notice of the date of the hearing before the Court of

Cassation and were restricted access to Court records, including the final judgment of the Criminal Court of Appeal. In Mr. Mauada's case, his lawyers were not able to question the prosecution's main witness. Moreover, trials were often dominated by the panel of judges hearing the case and lawyers have very little opportunity to participate actively in the defence of their clients.

CASES

Alia Cherif-Chammari {Lawyer and human rights advocate} : The passport of M. Chemmari, who is also the wife of Khemais Chammari (see above) was confiscated from 29 October 1995 until 31 January 1997. In early January 1996, three police agents followed her as she entered a court in Tunis. She had a camera with her and took photos of the agents in the hope of scaring them away. As she left the court house, the three approached her, pushed her down and took her camera before running off. She filed a complaint with the prosecution, accusing the police of abuse of power, theft and violence. On 17 February 1996, Me Cherif-Chammari and her daughter were the victims of a car accident, reportedly caused by a security service car.

Mohammed Nejib Hosni {Human rights lawyer } Mr. Hosni was detained on 15 June 1994, shortly after meeting with a representative from the Lawyers Committee for Human Rights and was charged with falsifying a land contract in 1989. He was held in pre-trial detention for more than 18 months and reportedly subjected to torture. In January 1996, he was sentenced to eight years in prison by the Court of Appeal in El-Kef. His lawyers walked out in protest, after being given insufficient time to prepare a defence. On 22 May 1996, the UN Special Rapporteur on the Independence of Judges and Lawyers sent an urgent appeal to the Government of Tunisia concerning this case. On 21 June 1996, the Government responded and informed the Special Rapporteur that the withdrawal of the lawyers had been an attempt to influence the court's decision.

Although the Tunisian Government informed both the CIJL and the Special Rapporteur that Mr. Hosni had been convicted of common crimes, he was released on 14 December. However, the conviction was not withdrawn, and he was forbidden from working as an advocate for five years. He was also deprived of his civil and political rights, and his passport was not returned to him (see also *Attacks on Justice 1993-1994 and 1995*). Moreover, three days after his release, his telephone line was interrupted, and he was placed under constant police surveillance.

Hechmi Jegham {Lawyer, President of the Tunisian section of Amnesty International}: Mr. Jegham was detained for three hours on 8 March and four-and-a-half hours on 9 March 1997 at the Central Police Station in Sousse. On both occasions he was arrested without a warrant and interro-

gated concerning his participation in a legal conference scheduled to take place in Tunisia on 17 March. He was also questioned about his contacts with human rights and judicial organisations abroad and was asked to notify the Tunisian authorities of any contacts with such organisations in the future.

Radhia Nasraoui {Human rights lawyer (see *Attacks on Justice 1993-1994 and 1995*)}: Mrs. Nasraoui acts for some clients who are involved in cases which appear to be politically motivated. In December 1996, Mrs Nasraoui sent letters to the Minister of Interior requesting that the passports of her clients be restored to them. She also requested an investigation into allegations that police officers had insulted her clients and searched their apartments, late at night, on several occasions. In January 1997, Mrs Nasraoui was informed by one of her clients, that the police had summoned her to enquire about her activities. Her other clients were summoned shortly thereafter for the same purpose. Mrs. Nasraoui asked the Bar Association and the Bâtonnier to intervene with the authorities, however, as of the beginning of 1997, the situation had not improved.

Apart from the open surveillance to which she is frequently subjected, Mrs. Nasraoui has also complained that her mail, private and professional, is regularly intercepted by the police.

Government Response to CIJL

On 4 July 1997, the Government of Tunisia responded to the CIJL's request for comments. Below is a translation into English of the Government's comments which were submitted in Arabic and French:

"1. Firstly, it is surprising that in a report entitled "Attacks on Justice: Harassment and Persecution of Judges and Lawyers" most of the observations regarding Tunisia paint an incorrect and misleading picture of the general political situation and quote Mohamed Moada, Khémais Chamari, Moncef Marzouki, Hamma Hammani and Saleh Zghidi, none of whom are judges or lawyers.

2 As regards the allegations that human rights activists are being harassed, we regret to note that the Centre persists in raising the same cases and the same false information pertaining to them, despite the corrections that have already been made ...

3. The insertion of a new paragraph into Article 305 of the Code of Penal Procedure has absolutely nothing to do with the independence of judges and lawyers. On the contrary, it is the fruit of pioneering work carried out by the Tunisian legislator

in relation to incrimination and prosecution for terrorist and fanatical acts.

4. Regarding police custody, members of the Criminal Investigation Department can arrest suspects without first having obtained a warrant from court authorities but, contrary to what is stated in the report, they are under no circumstances allowed to hold a suspect in secret for ten days. Article 13a of the Penal Procedure Code, adopted as part of the law passed on 26 November 1987, stipulates that "the suspect can not be held more than four days without the *Procureur de la République* (public prosecutor attached to the county court) being informed. The latter may order the suspect to be kept in custody, first for a further four days and then, if absolutely necessary, for another two days only ..."

5. The serious accusation that dates of arrest have been falsified is both inaccurate and unfounded. No case is cited in the report, and the accusation ignores the existence of the aforementioned article, which is categorical on this point. It states that "members of the Criminal Investigation Department ... must keep a special, numbered register in their stations and enter therein the identity of all persons held by them along with the date and time of when they were taken into custody and of when they were released from custody".

6. Again contrary to what is suggested, Tunisian law does permit persons being held in custody to be medically examined, either at their own request or that of a member of their family, including (grand)parents, (grand)children, brothers, sisters or spouse.

7. As for "remand", Article 85 of the Penal Procedure Code, amended by the law passed on 26 November 1987, refers solely to crimes or offenders arrested *in flagrante delicto*. There is no reference whatsoever to "national security". This concept, which is mentioned in the report, is not found in Tunisian law, but stems rather from misinterpretation.

8. In respect of the affair involving the students Lotfi Hammani, Bourhan Gasmi and Mohamed Tahar Brahmi, they were arrested by members of the Criminal Procedure Department on 18 August 1996 for possession of tracts and publications inciting hatred and violence, undermining law and order and public security and attacking the legal authorities. During the judicial inquiry, they claimed that their confessions had been extracted by force. That same day, the chief examining judge ordered a medical examination at their request and decided to temporarily release the students. On

26 August 1996, the medical examination concluded that "there were no signs or traces of violence". On 23 November 1996, the examining judge, having failed to establish all elements constituting the grievances raised, decided to close the investigation and completely drop the case due to lack of evidence.

9. Radhia Aouididi was arrested at the Tunis-Carthage airport as she was about to leave for Germany to join her fiancée, who is on the run from Tunisian justice. Standard checks revealed that she was in possession of a false passport bearing a name other than her own.

A judicial inquiry discovered that the man behind the operation was an activist from the extremist movement "Ennahdha" who preaches religious intolerance and violence, is condemned by Tunisian justice and has fled abroad. Since 16 November 1996, Radhia Aouididi has been held in the civilian prison at Mannouba by the chief examining judge in connection with Criminal Case N° 72112/1. This case was the subject of an international letter of request to the Belgian and French authorities. As to the allegations of her being tortured, they are in no way founded. The accused has had a number of medical examinations, none of which have revealed traces of violence.

10. The report paints a picture of the Tunisian legal authorities which is neither accurate nor objective. The Ministers of Justice and of the Interior have never influenced the course of justice. The former, as head of the Public Prosecution Department, deals solely with *procureurs* (agents of the public prosecutor), public prosecutors and assistant public prosecutors in relation to public prosecutions. He is not in any way connected with the bench, which is entirely independent. The Minister of the Interior is neither entitled to nor does he have any dealings with the judicial body.

Six judges are elected to the Supreme Magistrates Council and not "merely two", as is incorrectly stated in the report. Two judges are elected for each of the three grades.

Significant measures were adopted by the Supreme Magistrates Council in July 1996. They aim to:

- speed up judgement in cases where persons have been remanded in custody;
- avoid, in so far as is possible, imposing short-term prison sentences, which, in the end achieve no more than a deprivation of liberty;
- encourage the imposition of suspended prison sentences;

- promote release on bail wherever possible.

People judged by default are not denied the right to defend themselves. They can lodge an appeal, causing the judgement by default to be revoked and the case to be retried.

According to Tunisian law, nobody can be judged twice for the same offence, on the grounds that a judgement, once delivered, marks the end of prosecution. This does not apply in the case of Mohamed Hédi Jouini because the charges against him relate to continued offences which require new trials for as long as the criminal intent and membership with which he is charged are ongoing.

11. The report describes allegations relating to a tiny minority of Tunisian lawyers – three out of 2,000. These allegations are inaccurate and untrue, and the following corrections should be made:

- Ms Chamari's passport was temporarily confiscated by the judicial authorities because she was implicated in a matter which the chief examining officer decided did not involve her, following her statement that her husband had taken the documents from the Moada file without her knowing. Her allegations of assault and pursuit on public highways are the subject of complaints against X and are being examined by the judicial authorities. The inquiry has not yet produced anything conclusive as a result of the plaintiff's failure to offer clear proof.

- Contrary to what is suggested, Hachemi Jegham has never been arrested. He was summoned by the criminal investigation office in connection with statutory formalities, which no citizen can avoid. They were in no way related to his position as lawyer or as president of the Tunisian branch of Amnesty International.

- The allegations concerning the lawyer Radhia Nasraoui are completely unfounded. It is hard to determine the responsibility of the authorities when an office happens to be involved in any type of serious crime. The Tunis Bar, of which Ms Nasraoui is a member, has not stated its position on this matter, which will merely be used as a weapon for political rivalries. It is, therefore, surprising that the incident has assumed such importance, particularly since the guilty party has been arrested and has confessed at a judicial inquiry."

TURKEY

Turkey is a secular constitutional republic with a multi-party parliamentary system. The 450-seat unicameral Parliament, the Grand National Assembly, is elected every five years in a system of proportional representation. Executive power is vested in the President of the Republic who is elected by the Parliament for a 7 year term. The President appoints the Council of Ministers which is headed by the Prime Minister from among the members of the parliament.

In the December 1995 elections, the pro-Islamic Welfare Party (*Refah*) won the largest number of seats but failed to win the 276 seats necessary to govern alone. This led to the formation of an unstable coalition between the Motherland Party and the True Path Party which collapsed in the spring of 1996. On 28 June 1996, Necmettin Erbakan, leader of the *Refah* party, became Prime Minister of a coalition Government formed with the True Path Party of Former Prime Minister Tansu Ciller who was appointed Deputy Prime Minister and Minister of Foreign Affairs.

Turkey has ratified various international and regional human rights instruments including the European Convention on Human Rights, the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Its successive Governments have also stated their commitment to protect the human rights of all people in Turkey. Despite these assurances, violations of these rights continued in 1996 not only in the South-Eastern provinces, but elsewhere in Turkey. Freedom of expression remained severely restricted, and scores of lawyers, human rights activists writers and journalists were arrested, detained and prosecuted for publicly expressing their views concerning human rights violations in Turkey and the issues involving Kurdistan (see below).

Since 1984, the Turkish Government has been engaged in conflict with the Kurdistan Workers' Party (PKK). The goal of the PKK is to establish a separate state of Kurdistan in the south-eastern regions of the country. As a result, a state of emergency has been in force since 1984 in nine south-eastern provinces.

In the State of Emergency regions, the armed forces, together with the *Jandarma* (police officers in rural areas), the security forces and the Special Operations Teams, continued to resort to extra-judicial killings and enforced disappearances and torture. According to Turkish human rights organisations, some 194 disappearances, 190 extra-judicial executions and 78 murders by "unknown assailants" were reported to them in 1996 (see below). The PKK has also been responsible for significant human rights abuses including killings and disappearances of civilians.

JUDICIARY

STRUCTURE OF THE COURTS

The Turkish judiciary is composed of general law courts including civil, administrative and criminal courts, as well as military and state security courts. The High Court of Appeals is the highest court and has the jurisdiction to review decisions of both the regular courts and the state security courts (see below).

The Constitutional Court has the jurisdiction to examine the constitutionality of both the form and substance of laws and decrees. However it may only examine the form of any constitutional amendment and it has no jurisdiction to examine the unconstitutionality of a law or decree issued during a state of emergency, martial law or in time of war.

The Council of State reviews decisions and judgments made by administrative courts.

Military courts have jurisdiction over military personnel and offences as well as "non-military persons" committing "military offences" as specified by law or committing offences against military personnel and places. The Military High Court of Appeals reviews judgments issued by military courts.

APPOINTMENT AND REMOVAL PROCEDURES

Article 138 of the Constitution guarantees the independence of the judiciary and provides that "no organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, or send them circulars, make recommendations or suggestions". In spite of Article 138, other articles of the Constitution itself make it impossible for the judiciary to be independent. The appointment of senior judges, for instance, is made by the President of the Republic. He appoints members of the Constitutional Court, members of the Military High Court of Appeals, members of the High Military Administrative Court of Appeals, members of the Supreme Council of Judges and Prosecutors (see below), one-fourth of the judges of the Council of State, and the Chief State Prosecutor and his Deputy. The President's power to appoint these senior judges necessarily makes the judiciary dependent on the executive branch.

The Supreme Council of Judges and Prosecutors has wide prerogatives with regard to the admission of judges and public prosecutors of civil and administrative courts to the profession. It is also authorised to appoint, transfer, delegate *temporary powers*, and promote and discipline judges and prosecutors (emphasis added). According to Article 159 of the Constitution, the Supreme Council of Judges and Prosecutors (*Hakimler ve Savcilar Yüksek Kurulu*) "shall exercise its functions in accordance with the principles of the independence of the courts and the security of tenure of judges". However, when the Constitution itself provides the Supreme Council with powers

which are incompatible with the independence of the judiciary, for example, the delegation of temporary powers and the fact its decisions cannot be appealed, the practical effect of this provision is in doubt. In fact, although Article 139 of the Constitution guarantees the security of tenure of judges and public prosecutors, the Supreme Council appoints civilian judges and public prosecutors to terms of only four years with the possibility of renewal. This clearly violates any independence of the judiciary the Constitution may have contemplated.

The Supreme Council is presided over by the Minister of Justice and the Under-secretary to the Minister of Justice serves as a member *ex officio*. The President then appoints three regular and three substitute members from a list of candidates nominated by the High Court of Appeals from amongst its own members, who are themselves appointed by the President. The remaining two regular and two substitute members are appointed by the President from a list nominated by the Council of State. The fact that the Supreme Council is comprised of Government appointees threatens the independence of the entire judiciary.

In addition, the Supreme Council does not have a secretariat or a budget of its own; its work is performed by staff from the Ministry of Justice and it functions similarly to other departments within the central organisation of the Ministry.

The Constitution also authorises legislation to regulate the removal of judges who are "convicted for an offence requiring dismissal from the profession, those who are definitely established as unable to perform their duties on account of ill-health, and those determined unsuitable to remain in profession".

State Security Courts

State Security Courts are provided for in Article 143 of the Constitution. They have the jurisdiction to try the offences vaguely defined as being against the "indivisible integrity of the State with its territory and nation, the free democratic order, or against the Republic whose characteristics are defined in the Constitution, and offences directly involving the internal and external security of the State". They generally try offences relating to terrorism, drug trafficking, membership in illegal organisations and attacks against the indivisibility of the state. In 1996, there were eighteen State Security Courts sitting in eight cities.

State Security Courts are composed of a President, two civilian judges, one military judge, one public prosecutor and several deputy public prosecutors. While the civilian judges are nominated by the Supreme Council of Judges and Prosecutors, military judges are nominated by the Ministry of Defence in accordance with the Military Judges Act.

Cases in these courts often continue for several years due to the heavy caseload. Trials may be held *in camera* and confessions that were extracted under duress or torture were often admitted, forming the grounds for conviction. In effect, there is not a presumption of innocence; the burden is on the defendant to prove his or her innocence.

In 1996, most of the cases heard by the State Security Courts dealt with the controversial Article 8 of the 1991 Anti-Terror Law, and Article 312 of the Criminal Code. Article 8 prohibits any "written or 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". Article 312 of the Criminal Code prohibits "incitement to racial enmity".

Freedom of Expression

In 1996, there were 152 laws and 11 decrees in Turkey which regulated and restricted freedom of expression and the broadcasting of information. Most of these laws and decrees, including Article 8 of the Anti-Terror Law prohibited "propaganda against the indivisibility of the State" with the purported purpose of attaining a single Turkish nation. This indivisibility of the state is protected not only by law and decree but by the Constitution itself. It is supported by the refusal to recognise the existence of other nations and ethnic groups which speak different languages. There are bans on languages and cultures, which are, in particular, applied to the Kurdish Community. Thus, any reference to this community is considered by the Turkish authorities to be "separatist propaganda" and a threat to the "indivisibility of the State".

Since the Anti-Terror Law was enacted in 1991, scores of investigations were opened against lawyers (see *Attacks on Justice 1995* and *1993-1994*), writers and publishers, and in some of these cases severe sentences were given. Amendments introduced to Article 8 by Law 4126 of 27 October 1995 (see *Attacks on Justice 1995*), required the state to prove the accused intended to damage the "indivisibility of the State". The amendment led to the release of many prisoners, however, all those released were to be retried under the amended law.

Many of the retrials resulted in second convictions and prison terms. For instance, on 24 November 1995, Ismail Besikçi, a sociologist who had already received sentences upwards of 200 years in prison for writing about the Kurds and Kurdistan, was sentenced to another six years in prison on six separate charges, despite the amendment. The Ankara State Security Court also sentenced Mr. Besikçi's publisher, Unsal Özturk to a year in jail under Article 8. Mehdi Zana, former Mayor of Diyarbakir, was arrested again in August 1996 for writing *A letter to Leyla*, a book he wrote to his wife who is currently serving a 15-year prison sentence on charges of membership in the PKK. Mr. Zana had been imprisoned throughout the 1980s for his non-violent political activities and again from May 1994 until December 1995 for

testifying before the European Parliament on Human Rights violations in Turkey.

On 7 December 1995, 99 intellectuals, writers, publishers and artists were charged and committed to trial under Article 8 for their contributions to a book entitled *Freedom of Thought* (see *Attacks on Justice 1995*). On 22 May 1996, an additional 86 writers were charged in relation to the same publication. At least two lawyers, **Ali Riza Dizdar** and **Emcet Olcaytu** were among those charged. Several trials were commenced in 1996, although none had been completed by the end of 1996.

STATE OF EMERGENCY

The campaign for Kurdish autonomy launched in August 1984 by the PKK continued in 1996. The state of emergency declared in ten of the south-eastern provinces in 1985 remained in force in nine of the provinces; in November 1996, it was lifted in the province of Mardin. The State of Emergency Regional Governor exercised authority over the nine provincial governors as well as two governors in charge of security matters. Under Decree N° 430 of 1990, the State of Emergency Regional Governor has quasi-martial law powers including restrictions on the press and the power to expel from the area persons "who engage in harmful activities either voluntarily or involuntarily". He may also order the security forces to search without a warrant residences or workplaces, as well as vehicles and travellers.

The Government is essentially unaccountable for any action it takes under Decree N° 430. Article 8 of the Decree states that "[n]o criminal, financial or legal responsibility may be claimed against the Minister of Interior, the State of Emergency Regional Governor or a provincial governor within a state of emergency in respect of any of their decisions or acts connected with the exercise of their powers". Moreover, and as mentioned above (see *Judiciary*), no action alleging the unconstitutionality of a law or decree may be brought before the constitutional court if it was issued during a state of emergency.

In August 1996, the Parliament passed a law amending several laws relating to the security situation in the south-east which in fact strengthen the power of the local authorities. Human rights activists criticised these changes as they effectively authorised security forces to use a "shoot and kill" policy. They also granted all governors the power to declare a "state of emergency" and to call in security forces.

The Government security forces, in their fight against the PKK, continued to evacuate Kurdish villages in 1996. According to some estimates, between 2,400 and 3,000 villages and hamlets have been depopulated since 1984. The official reason given for this action is the protection of civilians or to prevent PKK guerrillas from obtaining logistical support from the inhabi-

tants. According to some villagers however, the security forces evacuated them for refusing to participate in the paramilitary village guards, a pro-state civil defence force which operates in the south-eastern region.

As of August 1996, a total of 424 individual applications had been made to the European Commission for Human Rights, 50 of which were concluded, the remaining 374 being still under review. In September 1996, the European Court of Human Rights, in the case of *Huseyin Akdivar et al,* found a violation of the European Convention on Human Rights and ordered the Government to pay the applicants compensation. The applicants' homes were destroyed on 10 November 1992 when the State Security officials destroyed their village of Kelekci, burned the houses and forcibly expelled the inhabitants of the village.

Detention

The Code of Criminal Procedures prohibits testimony gathered with the aid of illegal interrogation methods from being admitted as evidence in either civil of the State Security Courts. However, the extended periods of *incommunicado* detention authorised by the same code have in fact, enabled the routine practise of torture. These extended periods of detention are sufficiently long to allow the physical evidence of torture to diminish or disappear before the suspect is entitled to see a lawyer or be brought before a judge.

Non-political crimes

Pursuant to the 1992 Law N° 3842 which amended the Code of Criminal Procedures, individuals who have allegedly committed non-political crimes may be detained *incommunicado* for 24 hours. In crimes allegedly committed collectively by three or more persons, this period may be extended by written order of the prosecutor to four days. If the interrogation can not be completed within that time, detention may be extended to eight days on the request of the prosecutor and by order of a primary court judge.

While the periods of detention under Law N° 3842 far exceed those provided for in international covenants, the law did offer some guarantees for the rights of those accused of non-political crimes, including the right to remain silent and the right to legal counsel and to meet and communicate with him/her at anytime. The Law also requires records to be kept of the interrogation, and prohibits the taking of statements made under duress. These guarantees were not extended to political crimes.

Political Crimes

Individuals accused of committing political crimes under the jurisdiction of State Security Courts may be detained *incommunicado* for 48 hours and

those committing collective crimes may be detained *incommunicado* for 15 days. For political crimes committed in the State of Emergency regions, the period of *incommunicado* detention is 96 hours for individual crimes and 30 days for collective crimes.

On 27 November 1996, a draft law decreasing the detention period for those suspected of committing political offences was presented by the Government to the Parliament. The amendments were purportedly part of an effort to prevent torture and ill-treatment during arrest and detention. The law came into force on 12 March 1997. It decreased the period of *incommunicado* detention to four days. Access to a lawyer is possible after the fourth day. However, the detention period can be extended by judicial order to seven days for those accused of committing a political crime outside the State of Emergency regions and to ten days for those accused of committing a political crime within the State of Emergency regions.

Although this new law is a positive step, it remains insufficient to fully guarantee the rights of the detained and torture may still occur in the first four days of *incommunicado* detention. Moreover, since detainees are often not registered in the first few days, the four days of *incommunicado* detention may be prolonged, thus allowing time for any evidence of torture to disappear.

Torture and Death in Detention

Although Turkey is a state party to various instruments of human rights and more particularly to the United Nations and the European Conventions against torture, this practice continued to be used systematically by police and security forces during *incommunicado* detention as a means to extract confessions. Very few investigations were conducted by the authorities to prosecute and punish the perpetrators of such acts. Under the 1991 Anti-Terror Law, those officials accused of torture or other mistreatment could continue to work while under investigation and, if convicted, were often only suspended.

Even children were increasingly subjected to torture during detention in 1996. Fourteen were reportedly tortured during their detention from 26 December 1995 to 5 January 1996 at Manisa (West Turkey) Police Headquarters. Ten police officers were tried for allegedly torturing them. Based on historical practices, it was expected that even if the police officers were convicted, they would receive short prison sentences. In October 1996, for example, two police officers found guilty of torturing 12-year old Halil Ibrahim Okkali, were sentenced to two and half months' imprisonment and suspended from duty for three months. Even then, their sentences were later commuted to a fine. Further complicating any attempt to hold the authorities accountable is that during a state of emergency, any lawsuit directed at government officials must be approved by the state of emergency governor, which approval is rarely given.

Deaths in detention increased in 1996 as a result of excessive use of force by police. In January 1996, journalist Metin Goktepe died from wounds inflicted during his detention in Istanbul. Ten other prisoners were beaten to death on 24 September 1996 by security forces while quelling riots at the Diyarbakir prison; the prisoners were protesting the Government's failure to improve prison conditions. The authorities had promised to address this issue in July, following a nation-wide hunger strike which resulted in the death of 12 inmates.

HARASSMENT OF HUMAN RIGHTS ACTIVISTS

Local human rights organisations continued to be targeted by the Turkish Government which, in order to obstruct their work, frequently ordered the closure of their offices and the prosecution of their members.

In the beginning of 1995, only 20 of the 54 branches of the Human Rights Association (IHD) were functioning as a result of harassment and Government orders to close. Most of these branches began operating again as of October 1996. However, the Adana branch was ordered closed in March 1996 by the provincial governor for a period of 15 days, on the ground that it possessed "illegal publications" and the offices in Batman and Hakkari remain closed by the authorities.

Members of the IHD continued to be charged whenever they expressed their views, particularly on the situation in Kurdistan. In August 1996, 15 trials against members of the IHD concerning press statements and public events were outstanding. On 6 March 1996, 17 officials from the organisation went on trial at Ankara State Security Court for their 1 September 1995 Bulletin entitled "Peace is the Solution".

On 21 March 1996, the Adana Public Prosecutor's Office opened case N° 1242 of 1996 against Mustafa Çinkiliç, the representative of the Adana office of the Human Rights Foundation of Turkey and Tufan Köse, a doctor associated with the Foundation. They had been charged under Articles 526 and 530 of the Turkish Penal Code, for "operating an unlicensed health centre" and "negligence in denouncing a crime". As of March 1997, the trial was still in process.

LAWYERS

Principle 16 of the United Nations Basic Principles on the Role of Lawyers (hereafter UN Basic Principles) states that "Governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference". Turkish lawyers, however, do not benefit from these guarantees,

particularly those who speak out on human rights violations in public forums or even within the context of acting as defence counsel in a trial before the State Security Courts.

Like other human rights activists, lawyers are subjected to different means of harassment in the exercise of their profession, ranging from wiretapping of telephones and open surveillance to verbal abuse, investigation proceedings, physical harassment when visiting clients, imprisonment, torture and in some instances even murder.

Contrary to Article 18 of the UN Basic Principles, lawyers who take the defence of politically unpopular clients before State Security Courts are frequently identified with their clients as *"terrorist lawyers"*, and in turn face prosecution on charges which reportedly have little foundation. Lawyers are thus becoming more and more reluctant to involve themselves in political cases. Clients are often warned that their lawyer is a "terrorist lawyer" and then questioned as to their connections with other terrorists. In some cases, legal representation can be more harmful than helpful.

Lawyers are often denied access to their clients, particularly in the State of Emergency regions. If they are granted a visit, it is often conducted in the hallway under supervision of the prison authorities and only on the condition that they and their clients confirm in writing that no allegations of torture are to be made. Lawyers are also often denied access to the prosecution file and are given no longer than 15 days to prepare for a trial, unless there are more than 15 defendants, in which case, one month will be given for preparation. Lawyers who bring a motion challenging the judge for bias are often fined. Given the dangers associated with representing clients before the State Security Courts, more and more lawyers decline to do so.

The Bar Associations are under the administration and the financial control of the Ministry of Justice which may dissolve them or initiate court proceedings against members of the Executive Board to remove them if they breach the Law of Advocacy. Under the same law, lawyers will be disbarred if they are convicted of an offence or if there is a warrant issued for their arrest.

CASES

The Diyarbakir 25 Lawyers' Trial: Gazanfer Abbasioglu, Sebahattin Acar, Abdullah Akin, Arif Altinkalem, Sedat Aslantas, Meral Danis Bestas, Mesut Bestas, Mehmet Biçen, Ferudun Celik, Niyazi Cem, Fuat Hayri Demir, Baki Demirhan, Tahir Elçi, Vedat Erten, Zafer Gür, Nevzat Kaya, Cabbar Leygara, Mehmet Selim Kurbanoglu, Hüsniye Ölmez, Arzu Sahin, Imam Sahin, Sinan Tanrikulu, Sinasi Tur, Fevzi Veznedaroglu and Edip Yildiz {Lawyers}: Each of these lawyers were arrested under the same indictment in 1993 or 1994 under the 1991

Anti-terror Law and under Article 168 II of the Turkish Penal Code. The charges included that of membership in the PKK. The charges were based on an allegation made by a prisoner who had become a police informant (see *Attacks on Justice, 1995*).

All of these lawyers have acted to protect the rights of the Kurdish people. Most of them had acted for those accused before the State Security Courts. Each of Tahir Elci, Meral Danis Bestas, Arzu Sahin, Imam Sahin, Sabahattin Acar, Baki Demirhan and Sedat Aslantas were and continued to be involved in filing complaints before the European Commission of Human Rights.

Each of the lawyers has reported being tortured or mistreated. The indictments laid were vague and did not contain the most basic details, such as the place, time or circumstances of the alleged crimes. The main witness had been charged with PKK membership himself and had faced the death penalty. After he testified, he was released. Other irregularities in the proceedings against these lawyers included the failure to obtain the approval of the Ministry of Justice to criminally prosecute lawyers as is required by Article 58 of the Law of Lawyers. In addition, the interrogations were conducted by the gendarmerie and not by the public prosecutor as required by law.

Hearings were held throughout 1994, 1995 and 1996. At the end of 1996, the trial was still pending and all had been released except for Sinasi Tur, Edip Yildiz and Cabbar Leygara who were detained in connection with other trials.

The trial against the IHD Bulletin: Nebahat Akkoç, Erol Anar, Müjgan Aslan, Alp Ayan, Akin Birdal, Nihat Bulut, Abdullah Çager, Ahmet Turan Demir, Ümit Erkol, Selahattin Esmer, Hediye Gülden Felekoglu, Nazni Gür, Yesim Islegen, Ercan Kanar, Hüsnü Öndül, Özcan Sapan and Hamit Toprak {Lawyers and IHD members}: In the beginning of 1996, the Ankara State Security Court Prosecution Office launched proceedings against these lawyers for publishing "separatist propaganda" in a bulletin entitled "Çözüm Barista" (Solution Lies in Peace). The bulletin was published by the IHD Headquarters on 1 September 1995, in connection with World Peace Day. The prosecution asked for sentences ranging from to one to three years in prison and fines of no less than TL 100 million under Article 8 of the Anti-Terror Law. The trial started at the Ankara SSC on 6 March 1996 and was still continuing at the end of 1996.

Firat Anli and Sinan Tanrikulu {Lawyers and members of the Diyarbakir Branch of the IHD}: Mr. Anli is the provincial leader of HADEP, a legal political party which supports the Kurdish cause. Mr. Tanrikulu represented six lawyers charged in the "Diyarbakir Trial" (see above). Both these lawyers were detained with nine others on 27 February 1995 and seven were charged with holding membership in the PKK on 9 March 1995. After the arrest of these two lawyers, the IHD Diyarbarkir

branch remained closed for one month. The defendants reported being beaten while in custody being forced to sign statements.

Mr. Tanrikulu asserted that he was being prosecuted because he had acted as defence counsel before the State Security Courts. As is often the case, the prosecution failed to obtain permission to prosecute from the Ministry of Justice as is required by Article 58 of the Law of Lawyers.

The two lawyers were also accused of belittling the security forces and the state by sending false petitions to "relevant units in Europe and America complaining of them". Each of the 11 defendants were released from prison on bail on 1 May 1995. In 1996, both Mr. Anli and Mr. Tanrikulu were acquitted of the charges against them.

The Diyarbakir IHD Trial: Abdullah Cager, Nimetullah Gündüz, Mahmut Sakar and Melike Alp (Lawyers and members of the IHD): In December 1994, each of these lawyers were charged with membership in the PKK and producing separatist propaganda as a result of publishing "The State of Emergency Report, 1992". The report detailed human rights violations allegedly perpetrated by the state security forces (see *Attacks on Justice, 1995*).

After a hearing in February 1995 where two of the three prosecution witnesses recanted their previous statements, the lawyers were released on 17 April 1995. The case was adjourned a number of times thereafter and at the end of 1996 remained outstanding.

Hassan Demir and Fazil Ahmet Taner (Lawyers in Istanbul): On 9 April 1994, both these lawyers were arrested and held in detention for 14 days. They were reportedly so tortured that the physical signs remained and both received medical certificates which are rarely issued. Both remained in detention at least until August 1996 and were awaiting trial. They were charged with leading an illegal organisation.

Emran Emekçi (Lawyer, and member of the Izmir Branch of the IHD): Mr. Emekçi was arrested and detained on 7 October 1994 while observing a trial of six Kurdish parliamentarians who had been stripped of their immunity. He was charged with membership in an illegal organisation pursuant to Article 168 of the Turkish Penal Code. At the end of 1996, the trial had not been heard.

Zeynep Firat (Lawyer in Istanbul): Since 1994, Ms. Firat has been subjected to constant police harassment and death threats. On 15 August 1994, Ms. Firat was arrested without charge and lawyers **Muhittin Köylüoglu** and **Nevim Özuen** were denied access to her. She was arrested again in December 1994 and reportedly tortured in custody. She was charged under Article 168 of the Turkish Penal Code for allegedly holding membership in an illegal organisation. On 2 January, 1995, Ms. Firat was released but re-arrested before she reached the prison gates on the grounds that the authorities believed she was about to make a statement before the local

court. When her lawyer obtained a court order requiring her release, she was taken into custody for two additional days.

Zeynep Firat was arrested again on 30 August 1995 with law student Efkan Bolac while they were on their way to defend a client before the Kayseri State Security Court. They were held for five hours and no reason was given for their detention; it was assumed the police simply wanted to prevent her from attending court.

Throughout 1996, Ms. Firat continued to receive death threats. It was reported that she refused to leave her home by herself as she feared for her life.

Mercan Güclü, Yüksel Hos and **Erin Keskin** {Lawyers, member of Istanbul IHD}: Both Ms. Güclü and Ms. Keskin have been subjected to ongoing harassment since 1994. In 1996, each of these three lawyers were being tried under Law of Assembly N° 291, reportedly because the Istanbul IHD had issued a press release in 1992 with respect to a public rally denouncing "Telephone Hotline N° 055". The hotline had been installed by the police to encourage people to report suspicious movements of other persons. At the end of 1996, the CIJL had not received any information that the trial had been concluded.

Turgat Inal {Lawyer, member of the Human Rights Foundation of Turkey (HRFT)}: In December 1995, Mr. Inal and nine other members of the Board of HRFT were indicted under Article 159(3) of the Turkish Penal Code for "insulting the laws of the Turkish Republic" in connection with an article published by the HRFT.

On 16 February 1996, the UN Special Rapporteur on the Independence of Judges and Lawyers sent an urgent appeal to the Government of Turkey, expressing concern that the law might interfere with the defendants' freedom of opinion and expression, and thus an unwarranted restriction on the duty of lawyers to take part in public discussion of matters concerning the law.

On 4 June 1996, the Government informed the Special Rapporteur that the article published by the HRFT showed that Mr. Inal had openly attempted to degrade and insult Turkish law and the Constitution. The Government continued to say that Mr. Inal had not complied with Principle 23 of the Basic Principles on the Role of Lawyers which requires lawyers to "conduct themselves in accordance with the law and the recognised standards and ethics of the legal profession".

Several hearings were held in 1996 but by the end of the year, the trial had not been concluded.

Ercan Kanar {Lawyer, founding member of the IHD, Chair of the Istanbul IHD and Vice-Chair of the national IHD, founding members of the Contemporary Lawyers Association and member of the Socio-Legal Research Foundation}: A lawyer for defendants appearing before the State

Security Courts, Mr. Kanar has been the subject of approximately 70 criminal proceedings since 1991. Since 1990, he was in custody at least twice. At the beginning of 1996, Mr. Kanar faced 35 court actions. Seven of these stemmed from articles he authored on human rights violations which had been published in the newspapers *Özgür Gündem* and *Özgür Ülke*. In two of the cases, Mr. Kanar had appealed his conviction and sentence of 10 months in prison. The five others continued throughout 1996 and at the end of the year, the CIJL had not received any information that the trials had been concluded.

Other proceedings outstanding against Mr. Kanar in 1996 included the following:

- an appeal before the High Court of Appeals of his conviction under Article 8 of the Anti-Terror Law as a result of a special issue of the IHD report concerning World Peace Day in 1993;
- an investigation under Article 8 based on another special issue of the IHD report concerning World Peace Day in 1994; and
- two trials before the Criminal Court of Primary Instance/Istanbul concerning alleged offences against the Law of Assembly and because of protest actions by the central office of the IHD, a motion to Parliament and a press release during human rights week in 1993 and 1994.

Turgut Kazan {President of the Istanbul Bar Association}: Justice Minister Sevket Kazan filed a complaint with the Ankara Prosecutor against lawyer Turgut Kazan under Article 8/3 of the Criminal Procedure Code and other relevant articles from the Turkish Penal Code for having allegedly insulted the Minister. The source of the alleged insult was an article which appeared in the Milliyet newspaper of 21 August 1996 under the headline "Kazan tells nonsense". In this article, it was reported that Turgut Kazan called a proposal of the Justice Minister "nonsense". The Justice Minister had proposed that Islamic punishment, namely that a prisoner should have his/her sentence reduced if he or she cited verses from the Koran, should be applied in Turkey.

Following the complaint, Turgut Kazan was charged before the Supreme Court with insulting the Minister under Article 8/3 of the Criminal Procedures Code and other Articles of the Criminal Code. The prosecution requested a sentence of four to 16 months in prison

The first hearing of Turgut Kazan was scheduled to be held at Ankara Second Primary Court on 20 March 1997.

Hasip Kaplan {Lawyer, founding member of the Socio-Legal Research Foundation}: Mr. Kaplan has been harassed since becoming a lawyer in 1978. He has defended members of the DEP and its successor, HADEP. In recent years, Mr. Kaplan has represented persons before the European Commission and the European Court of Human Rights. In 1989, a bomb exploded in front of his home and one person was killed in the explosion.

The explosion occurred around the same time Mr. Kaplan had negotiated a settlement for clients in a case the European Commission of Human Rights had deemed to be justified; his clients' village had been attacked by the military forces. After practising in Diyarbakir for 13 years and receiving ongoing death threats, he was forced to move to Istanbul in 1991.

In 1996, Mr. Kaplan was tried on the charge of insulting judicial institutions. He had been indicted on 18 May 1995 after he was quoted as saying that he and other lawyers representing HADEP members did not want to be co-conspirators in a trial that was being held only to fulfil formal requirements. As in other cases against lawyers, the approval of the Minister of Justice to try Mr. Kaplan was not obtained although it is required by Article 58 of the Law on Lawyers. At the end of 1996, the CIJL had not received any information that the trial had been concluded.

Metin Narin (Lawyer): In 1996, Mr. Narin faced charges for threatening the court. The charges stemmed from an incident which occurred on 10 October 1994 when Mr. Narin, removed his robe and left the court room when the gendarmes started to beat the defendants. Mr. Narin said that such illegal measures and those engaging in them would some day end up on history's garbage dump.

Selim Okcuoglu (Lawyer, member of the IHD, the Contemporary Lawyers Association and founding member of the Socio-Legal Research Foundation): Mr. Okcuoglu has represented numerous clients before the State Security Courts. He is also co-owner of the publishing house *DOZ* which publishes research on the "Kurdish question". In 1993, he was convicted under Article 8 of the Anti-Terror Law and served five months in Gemlik prison in connection with publication of the book "Westernization, Modernization, Development-Bankruptcy of a Paradigm".

In 1996, he continued to face charges as a result of his participation in a panel discussion on Turkish Television wherein the "Kurdish question" was discussed. During the course of the discussion, Mr. Okcuoglu criticised the military action against the Kurdish population. He and several others on the panel were arrested and charged under Article 8. The matter has been heard by the State Security courts on several occasions but by mid-1996, no decision had been rendered. Given that there are several high-profile defendants, it was rumoured that the court has deferred its decision until after a decision has been made concerning Turkey's application to the European Union.

Hüsnü Öndül (Lawyer, leading member of the IHD): Mr. Öndül has been arrested and charged numerous times for, among other things, co-publishing a book entitled "A Cross-section of the Burned Villages" (see *Attacks on Justice, 1993-1994* and *1995*) and under Article 8 of the Anti Terror Law for an article he published in the Human Rights Bulletin. In 1994, he was convicted at trial on the latter charge and on appeal in March 1995, his sentence of six months imprisonment was confirmed. In December 1995,

his sentence was commuted pursuant to the amendment to the Anti-Terror Law.

In the beginning of 1996, there were six other actions outstanding against Mr. Öndül. In 1996, he was sentenced to and served a three months in prison, although he had appealed to the Supreme Court.

Hasan Hüseyin Reyhan {Lawyer}: Mr. Reyhan was detained by the police on 7 December 1994 in Istanbul. On 15 December 1994, he was charged under Article 168(2) of the Turkish Penal Code with membership in the PKK and with attending the Kurdish National Congress in Iraq in 1993. He has been held in Konya E Type Prison, where it was alleged he was tortured. His trial was scheduled for 14 June 1995 but was adjourned. On 1 February 1996, Mr. Reyhan was sentenced to 12 and a half years in Konya Prison.

Hulya Sarsam {Lawyer from the Ankara Bar}: Ms. Sarsam is the lawyer for Yilmaz Odabasi who was charged under Article 159 of the Turkish Penal Code and Article 8 of the Anti-Terror law. The charges related to a book Mr. Odabasi wrote and which contained statements that were considered by the security apparatus as eroding the principle of "indivisibility of the State" and harming the Government institutions.

In the defence of her client, on 6 March 1997, Hulya Sarsam declared before the Ankara State Security Court: "we are now at the point where, let alone ordinary people, even judges and prosecutors think that the legal system is not independent". She also stated that "in order for judges to guarantee their own credibility, they should investigate claims of criminality within the State instead of punishing those who make such claims". Ms. Sarsam also alleged that the prosecutor who opened the case against Mr. Odabasi had not even read the entire book but only pp.3-5 which had been sent to him as containing criminal elements.

On the same day, Ms. Sarsam was charged before the Ankara First State Security Court of insulting the State Security Court prosecutor and the Turkish judicial organs. A copy of the court declaration was sent to the Ankara Bar so that a disciplinary action could be started against her. Moreover, the Ankara First State Security ordered the public prosecutor to begin proceedings against her.

Huseyin Umit {Lawyer and member of the Board of the Turkish Human Rights Association (HRA)}: On 29 March 1996, Mr. Umit was reportedly detained without an arrest warrant. While he was detained, his house and the offices of the HRA were searched. Mr. Umit was released several hours later but thereafter, received death threats.

On 7 May 1996, the UN Special Rapporteur on the Independence of Judges and Lawyers wrote to the Government of Turkey asking for information concerning Mr. Umit's detention. On 8 July, the Government responded to the Special Rapporteur and indicated that on 27 March 1996,

the security forces had found evidence that Mr. Umit had provided financial assistance to the PKK. The Special Rapporteur, in his report, noted that no such evidence had been found in the search of Mr. Umit's home or in the offices of the HRA.

Esber Yagmurdereli {Lawyer, writer and human rights activist (see *Attacks on Justice 1995*)}: Mr. Yagmurdereli, who is blind, was initially convicted on 24 June 1994 and sentenced to 20 months in prison in connection with a speech he gave in December 1992. His conviction was reaffirmed in May 1995. After the amendment to Article 8 of the Anti-Terror Law, his case was reviewed and he was sentenced to one year in prison. He appealed the sentence before the Supreme Court and was released pending his appeal which had not been heard at the end of 1996.

The outcome of the appeal is of particular concern as if the conviction is confirmed, the life sentence that Mr. Yagmurdereli received in 1985 for being a member of an illegal armed organisation will be reimposed. Despite his life sentence, Mr. Yagmurdereli had been released in 1990 after Amnesty International had concluded that his trial had failed to conform with internationally recognised standards of a fair trial. However he was only released on the condition that he avoid further convictions. Consequently, a conviction under the Anti-Terror will require him to serve his life sentence.

THE UNITED KINGDOM & NORTHERN IRELAND

A monarchy, the United Kingdom officially has no written constitution; the rule of law is maintained through tradition. In 1996, the absence of a written bill of rights continued to pose particular problems in Northern Ireland, where comprehensive emergency legislation continued to erode individual liberties.

Executive power is vested in the government of the day. Legislative power is vested in a bicameral parliament comprised of the House of Lords, the upper chamber and the directly elected House of Commons, the lower chamber. The House of Lords is appointed, partly on a hereditary and partly on a life-long, non-hereditary basis. The House of Lords also includes senior judges and bishops of the Church of England.

Prime Minister John Major and the Conservative Government governed for most of 1996 without a majority and was widely expected to lose the elections called for 1 May 1997.

THE JUDICIARY

The system of Governance in the United Kingdom is based on the supremacy of parliament. The independence of the judiciary is protected through tradition. The Act of Settlement of 1701, for example, provides that judges are to be appointed during good behaviour and their salaries ascertained and established. However, upon the address of both Houses of Parliament, it may be lawful to remove them. Historically, and despite this provision, the guarantee of judicial tenure has not been altered and it is regarded as a fundamental constitutional principle.

In England and Wales, the most senior judges are appointed by the Prime Minister on the advice of the Lord Chancellor, the Government's chief law minister. All other judges are appointed directly by the Lord Chancellor. The Lord Chancellor is actually permitted to sit in the House of Lords, the highest court of the land, but by convention he or she does not sit on cases involving the Government.

JUDICIAL AUTHORITY AND DISCRETION

Tension continued to build between the judiciary and the Home Minister in 1996. Two events which heightened the tension were the introduction of the Police Bill and that of the Crime (Sentences) Bill.

Criminal (Sentences) Bill

In October 1996, the proposals of Home Secretary Michael Howard concerning mandatory sentencing were set out in the Criminal (Sentences)

Bill. The Bill proposed to extend mandatory life sentences (currently only imposed for murder) to second offences of rape or serious violence and impose mandatory minimum sentences for repeat offences involving drugs and burglary. The issue created a fierce debate and judges objected to the Bill on the basis that such rules would affect their independence.

The CIJL reported on this issue in *Attacks on Justice, 1995*. The Government replied to the CIJL, stating that the responsibility for setting the statutory framework for sentencing lay with the Parliament and that there was nothing new about mandatory penalties. It further indicated that the courts would have discretion to set aside the mandatory penalty "in genuinely exceptional circumstances".

In October 1996, Lord Chief Justice Bingham, in his first media conference since his appointment in May 1996 insisted that "[t]he judge who tries a case...who is by professional training and experience alive to all the many and complicated issues which affect determination of sentence, should not be told he has to do this, that or the other willy-nilly". On 27 January 1997, the CIJL publicly called upon the House of Lords to ensure the judiciary would retain its discretion in judicial sentencing and thus, its independence.

The Criminal (Sentences) Bill became law in March 1997. The Bill was amended before it became law to permit some judicial discretion. In particular, "the Court shall have regard to the specific circumstances which – a) relate to any of the offences or to the offender; and b) would make the prescribed custodial sentence unjust in all the circumstances".

Police Bill

The original draft of the Police Bill effectively would have permitted police to break into private premises for the purpose of bugging without judicial authority. The Government's spokesperson in the House of Lords confirmed on 19 November 1996 that even solicitors' premises would not be exempt from the provisions of the Bill. Specifically, the spokesperson stated, "[w]e would not, for example, wish to make statutory exceptions for solicitors' offices, as this would create loopholes which criminals would be sure to exploit by setting up their own front companies. There may be occasions when a corrupt lawyer is involved in money laundering and where the police might wish to carry out surveillance on his office premises".

The Government argued that the Bill was intended to simply put into law what had been permitted by a 1984 Home Office circular (although it was not thought that the circular had permitted the bugging of solicitors' offices and barristers' chambers.) Under the authority of this circular, 2,000 listening devices were reportedly installed in premises in 1995. The circular did not provide legal immunity in the case of damage or trespass by the police and it was alleged that the Bill had been drafted to protect the police from law suits.

After significant lobbying by the political parties, the Bill was amended to require authorisation from a Commissioner before the police could wire-tap habitable premises, including those of lawyers, doctors and journalists. Other areas, such as garages would not require approval. "Commissioners", as defined in the Bill were "persons who hold or have held high judicial office within the meaning of the Appellate Jurisdiction Act, 1876". On 11 February 1997, the CIJL publicly expressed its concerns regarding the Bill, as amended. *Inter alia,* the CIJL highlighted the following concerns.

- The Commissioner, as envisaged, does not provide judicial authority. First, the Commissioner may be a judge or a *former* judge and therefore not in fact, a member of the judiciary at all. Second, the Commissioner is to "hold office in accordance with the terms of his appointment." Those terms of appointment may not be compatible with those of a judicial appointment. Third, the requirement that the Chief Commissioner is to report to the Prime Minister makes it clear it is not a judicial function. Fourth, if the Commissioner is a judge who reports to the Prime Minister, then the appointment or the acceptance of the appointment is incompatible with the commission of a judge. According to a recent decision of the highest court of Australia, a judge cannot be appointed to a function where the appointment is incompatible with the commission of a judge. To do so is to undermine the integrity of the judicial branch. (*Wilson et al v. Minister for Aboriginal and Torres Strait Islander Affairs and another*, High Court of Australia, 6 September 1996.)

- Of considerable concern are the provisions of the Bill which permit the same Commissioner who authorises the measures to review his or her own authorisations and investigate any complaints made concerning those authorisations. This clearly requires the Commissioner to perform conflicting functions.

- The Government's concession that judicial approval must be required prior to bugging premises involving lawyers, doctors and journalists continues to be lacking. Principle 22 of the 1990 UN Basic Principles on the Role of Lawyers specifies that "Governments shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential." The Government's decision to permit lawyers premises to be bugged, even with judicial approval, violates this most fundamental and sacrosanct principle. If the Government intends to proceed with this proposal, it must ensure that the conditions under which lawyers premises may be bugged are restricted to the most urgent and serious of circumstances.

- The Bill specifically excludes the decisions of the Chief Commissioner from appeal or review by *any* court. This provision clearly violates Article 3 of the United Nations Basic Principles on the Independence of the Judiciary which requires the judiciary to "have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide

whether an issue submitted for its decision is within its competence as defined by law.

The CIJL called on the House of Commons to amend the Police Bill to, *inter alia* :

- require judicial approval to be given in all cases by a High Court Judge in the normal course of his or her judicial duties and by a judge who is protected by the normal guarantees of judicial independence;
- explicitly exclude the premises of barristers and solicitors from the purview of the Police Bill or alternatively, set out strict conditions under which their premises can be interfered with;
- provide for judicial review of any first instance decision.

The Bill became law in March 1997.

Political appointment of judges in Northern Ireland

Concerns have been raised that political appointments are being made in Northern Ireland. This was illustrated by the appointment in 1996 of the reputedly conservative Chief Justice Carswell. Justice Carswell's appointment was reportedly made without consultation with the Government of Northern Ireland. Although legally there is no obligation on the British to consult Dublin concerning judicial appointments in Northern Ireland, it has been the practice. The 1985 accord between the two Governments provides that Dublin may put forward views on the composition and membership of bodies under the "direction and control" of the Northern Ireland Secretary. Although these criteria do not include judges who are under the control of the Lord Chancellor's office in London, as stated above, the issue had been so sensitive during the negotiations of the 1985 accord that the British Government did consult on judicial appointments. For instance, the previous Chief Justice was appointed only after consultation with the Government of Northern Ireland and after a period of time for open debate had passed. Calls for information concerning Judge Carswell's memberships, including whether or not he was a member of the Orange or Masonic Orders, went unanswered with the Lord Chancellor's office saying that judicial candidates are not required to declare membership in any lawful organisation.

Lawyers

Closed visits

On 20 June 1995, Home Secretary Michael Howard, announced that all visits to "exceptional high risk prisoners (re: escape)" in Special Secure Units will be "closed", a condition which requires a glass screen to be installed between prisoners and lawyers which has resulted in obstructed

communication between lawyers and their clients (see *Attacks on Justice, 1995*). There is no published criteria for what makes a prisoner an "exceptional high risk", allowing such designations to be made arbitrarily. In 1995, two applications for leave for judicial review of this decision were brought. Leave was granted but judicial review of the application for leave to appeal was denied. The application was renewed before the Court of Appeal and leave was granted on 3 October 1996. The cases were listed for hearing on 3 February 1997 and judgment was reserved.

Judicial review of the emergency legislation in Northern Ireland

Concerns continued in Northern Ireland regarding the Northern Ireland (Emergency Provisions) Act, 1991 (EPA), originally enacted in 1973 and which provides security forces with extensive powers of search and seizure. When the EPA was re-enacted on 25 August 1996, some of its provisions were actually extended to apply to all of the United Kingdom.

Further, the 1989 Prevention of Terrorism Act (PTA) originally enacted in 1973 was also renewed in 1996. The PTA, provisions of which have been found to be in violation of the European Convention on Human Rights, restricts movement and allows suspects to be detained and interrogated for up to seven days without being brought before a court (see *Attacks on Justice, 1995*).

In response to concerns expressed by the CIJL in *Attacks on Justice, 1995*, the Government stated it had ensured "that the emergency law achieves a proper balance between public safety on the one hand and the safeguarding of individual rights on the other". The Government said the emergency legislation would remain in place only for as long as it was needed.

In 1996, Section 14(1)(b) of the PTA was the specific focus of a number of court challenges. It permits the police to ...arrest without warrant a person whom he has reasonable grounds for suspecting to be:

> (b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this section applies.

Section 14(1)(b) was challenged by several detainees, including Christopher Hanley who was arrested on 23 January 1996. His lawyers, Madden & Finucane were refused permission to be present at his interrogation. After the refusal, Madden & Finucane brought an application for leave for judicial review which was heard at 4:00 pm on 24 January 1996.

Just prior to the hearing, the RUC delivered a letter to Madden & Finucane in which it was conceded that the request to be present had not been considered on the merits. The RUC invited Madden & Finucane to make a new request. It was thought that the letter was delivered to disprove the applicant's theory that the RUC had adopted a fixed policy of always

excluding solicitors from being present during interrogations conducted under the EPA instead of using their discretion in each case.

After this case, defense lawyers began to ask for access to their clients during interrogations. It was reported that the RUC responded throughout 1996 in the following or a similar format: "I have examined fully your client's background including amongst other matters his medical condition....and his considerable history of being interviewed by the Police...On the basis of these and other relevant factors relating to Mr. (name), I must on this occasion refuse your request".

The Hanley application for judicial review was ultimately joined with that of Charles Begley, Michael Russell and others and heard on 26 and 27 of June 1996 by the High Court of Justice of Northern Ireland.

Chief Justice Hutton considered two questions:

a) if, under Section 14 of the PTA, a terrorist suspect has the right to have a solicitor present when interviewed by the police; and

b) if the "police did exercise a discretion in these cases in deciding whether to permit a solicitor to be present at interview and, if so, whether the discretion was properly exercised".

Concerning the first question, the applicants argued, *inter alia*, that there is nothing in the PTA which precludes a suspect's solicitor from being present during the interview, that the presence of a solicitor is widely recognised as a basic and fundamental right, and that in England and Wales, the police permit a terrorist suspect's solicitor to be present during interrogation.

Chief Justice Hutton followed prior decisions of the Court of Appeal which had confirmed that a terrorist suspect has no right to a solicitor present during interrogation. He stated that he considered the general intent of Parliament to be that "a solicitor acting for a terrorist suspect should not be present when he was interviewed by the police after arrest ... Therefore, having regard to the general intent of Parliament, the courts cannot construe the relevant section or exercise their discretion so as to defeat the will or Parliament".

In his decision, Justice Hutton also considered the applicants reliance on the case of *Murray v. the United Kingdom,* heard by the European Court of Human Rights (ECHR) on 8 February 1996. In that case, the ECHR considered the effects of Section 45 of the EPA which permits police to deny a request for access to a lawyer in light of the 1988 Criminal Evidence (Northern Ireland) Order which permits an adverse inference to be drawn from the accused's decision not to remain silent. In that case, the ECHR held that

> ...the scheme contained in the Order is such that it is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police

> interrogation. It observes in this context that, under the Order, at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of interferences being drawn against him.
>
> Under such conditions the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation. To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6.

The ECHR concluded that "there has been a violation of Article 6 §1 in conjunction with §3(c) of the European Convention as regards the applicant's lack of access to a lawyer during the first 48 hours of his police detention ...". However, the ECHR also acknowledged that "...this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing". Citing this portion of the ECHR's decision, Justice Hutton held that the *Murray* decision fell "short of holding that in every case where a terrorist suspect is interviewed without the presence of his solicitor, there will be a breach of Article 6 of the Convention".

With respect to the issue of discretion, Chief Justice Hutton held that as the "applicants did not have a right to have their solicitors present at interview, I consider that a decision by the Chief Constable to permit the presence of a solicitor would only be made where there were some special circumstances relating to a suspect which would provide a valid reason for an exception to the general course intended by Parliament - for example where the suspect was young and immature".

Chief Justice Hutton denied the application for judicial review and at the end of 1996, an application for leave to appeal to the House of Lords was pending.

Patrick Finucane

The civil action commenced by Mr. Finucane's widow against the Ministry of Defence and Brian Nelson and her application to the European Commission for Human Rights, claiming a violation of the right to life remained pending at the end of 1996. Mr. Finucane was killed at his home

in Belfast, in the presence of his wife and three children in 1989. Prior to his death, he had, on behalf of clients, successfully sued the Royal Ulster Constabulary for assault and false imprisonment and lodged an application of *habeas corpus* before a court which determined detention to be unlawful when the police mistreated the detainee. He had also lodged two applications with the European Commission on Human Rights.

Evidence of possible official collusion in Mr. Finucane's assassination surfaced in 1992 after which the Director of Public Prosecutor commissioned an inquiry into Mr. Finucane's death. The report of the inquiry was never made public, although it was rumoured that it contained recommendations to prosecute four members of the security forces for collusion with loyalist paramilitaries (see *Attacks on Justice, 1995*).

UNITED STATES OF AMERICA

In accordance with Section I of the Constitution of the United States of America, Legislative power is vested in a Congress of the United States, which consists of a Senate of 100 members and House of Representatives of 435 members. The Senate is composed of two senators from each state who are chosen by the corresponding state legislature for six years. Members of the House of Representatives are elected every second year.

Executive power is vested in an elected president who may hold office for two terms of four years each. The president is also the commander-in-chief of the army and the navy of the United States. Democratic President Bill Clinton was elected to a second term in office in November 1996.

JUDICIARY

FEDERAL COURT JUDGES

Article III (1) of the Constitution vests the judicial power of the United States in "one supreme court and in such inferior courts as the Congress may from time to time ordain and establish." Federal Court judges are appointed for life by the President on approval of the Senate. Judges hold their offices during good behaviour and shall receive a compensation "which shall not be diminished during their continuance in office". Supreme Court decisions based on the Constitution may only be overridden by constitutional amendment, giving the Supreme Court an effective, indirect veto over legislation and executive actions. Any constitutional amendment requires the approval of a two-thirds majority of the House of Representatives and the Senate and of three-quarters of the states.

According to the Law on the Organisation of Courts, the Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, six of whom shall constitute a quorum. The Courts of Appeals consist of thirteen judicial circuits. Eleven circuits are composed of courts in various states. For example, the First Circuit Court of Appeal sits in Main, Massachusetts, New Hampshire the Territory of Puerto Rico, and Rhode Island. The President shall appoint, a specified number of judges for each circuit, "by and with the advice and consent of the Senate".

District Courts exist in each of the 50 states, the District of Columbia, the Virgin Islands, Puerto Rico, Guan, and the Northern Mariana Islands and sit in designated judicial districts within these geographic areas. The President appoints a specified number of judges in each judicial district, again by and with the advice and consent of the Senate.

All federal judges appointed to hold office during good behaviour are entitled to retirement at an age determined by the length of service

completed and are to receive an annuity equal to the salary at the time of retirement. A judge may also retire if permanently disabled.

Discipline procedure for federal judges

The procedure by which a judge is disciplined is complex. Any person is entitled to file a written complaint with the clerk of the Court of Appeals for the relevant circuit. Upon its receipt, the clerk shall promptly transmit the complaint to the chief judge of the circuit and to the judge who is the subject of the complaint. The chief judge, may, on written reasons, dismiss the complaint if it is directly related to the merits of a decision or if it is frivolous. The chief judge may also conclude the proceeding if he or she finds that appropriate corrective action has already been taken. Otherwise, the chief judge must appoint him or herself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint and provide written notice to the judge who is the subject of the complaint. The committee will then conduct an investigation and file a written report with the Judicial Council of the relevant circuit. The report is to contain the committee's findings and recommendations.

The Judicial Council must then conduct any additional investigation it considers necessary and take such action "as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit...". Such action may include a dismissal of the complaint, certification of the judge's disability, a request of voluntary retirement, a temporary order of suspension of the assignment of cases to the judge, a private or public censure or reprimand or any other action it considers appropriate. The Judicial Council is *not* however, able to remove any judge appointed to hold office during good behaviour. If the Judicial Council does not believe it is appropriate for it to conclude the case, for example, in cases where the judge is accused of having engaged in treason, bribery, other "high crimes" or misdemeanours, or if the Judicial Council believes it cannot, in the interests of justice conclude the case, the Judicial Council may refer the case to the Judicial Conference of the United States.

The Judicial Conference is comprised of the chief judge of each judicial circuit, the chief judge of the Court of International Trade and a district judge from each judicial circuit. The district judge is appointed to the Judicial Conference by the circuit and district judges of the circuit to a three year term.

Upon referral from the Judicial Council, the Judicial Conference shall make any additional investigation it considers appropriate and by majority vote may take the action determined by the Judicial Council. If it concurs with a recommendation of the Judicial Council to remove the judge in question, or if it so decides itself, the Judicial Conference must certify its decision and transmit it and a record of the proceedings to the House of

Representatives. Upon receipt of the decision from the Judicial Conference, the House of Representatives must make the decision and reasons for it available to the public.

In the course of their investigations, both the Judicial Council and the Judicial Conference have the power of subpoena. Either the judge or the complainant may petition the Judicial Council to review a final order of the chief judge. Either of them may also petition the Judicial Conference to review a final order of the Judicial Council. Otherwise, all orders made shall be final and not subject to judicial review on appeal or otherwise. The judge subject to the proceedings must be afforded an opportunity to appear at proceedings conducted by the investigating panel and be permitted to present oral and documentary evidence, compel the attendance of witnesses or production of documents, cross-examine witnesses and present argument orally or in writing. Complainants are permitted to be present at any proceedings if the panel concludes that they could offer substantial information.

Appointment of State Judges

In 11 of the 50 states, judges are appointed by the Governor to varying terms and on the advice and/or consent of a Judicial Commission, the Senate, Legislature or Governor's Council. In the District of Columbia, the President selects judges, on the advice and consent of the Senate, from a list of names recommended by a commission to 15 year terms. In three states, judges are elected by vote of the state legislature. In 29 states, judges must run in contested elections at some point, either during the initial selection or after being appointed by the State Governor. In 13 states, judges or justices must face an uncontested "retention election". In nine states, judges actually run under party affiliations. The success of the political party often is a significant determinant of the constitution of the judiciaries in these states.

The election of judges casts serious doubt on the ability of judges to be independent. Elections necessitate campaigns which in turn require financial contributions. Those contributions inevitably come from members of the public - i.e. lawyers and litigants, the very parties appearing before the courts. Elections also invite judges to decide in accordance with public opinion.

In recent years, the judicial election process has been inherently linked to the "war on crime" and in those states that permit it, the death penalty. In 1986, Governor George Deukmejian warned two justices of the Californian Supreme Court that he would oppose their "retention election" unless they upheld more death sentences. He had already opposed the "retention election" of a third judge because of her decisions on the death penalty. The Governor did in fact, oppose the justices "retention election" and each of them lost in the next election. In 1994, after the Texas Court of Criminal Appeals reversed a conviction in a well-publicised case, Republicans called for the voters to take control of the courts and Republican judges swept the next elections. The issue carried so much weight that one of the Republican

judges was elected in January 1995 to a six year term although it was widely known that he had misrepresented his experience, had been fined for practising law without a license and had virtually no experience in criminal law.

The pressure to apply the death penalty has reached such a fever pitch that it is generally thought that judges who decline to pass death sentences will not be re-elected in the 32 states that allow capital punishment and require judges to run for election. In the course of its research for a Mission in 1996 to the United States concerning the death penalty, the ICJ found evidence of the pressure to apply the death penalty in the four states which permit judges to override the advisory verdict of a jury. In Alabama, judges have replaced the life sentences recommended by juries with the death penalty 47 times, but have only replaced a recommended death penalty with a life sentence five times. In Florida, between 1972 and 1992, trial judges replaced 134 jury sentences of life imprisonment with the death penalty but only replaced the death penalty 51 times.

The UN Human Rights Committee, in its conclusions on the report submitted by the United States pursuant to Article 40 of the International Covenant on Civil and Political Rights remarked on the election system:

> The Committee is concerned about the impact which the system of election of Judges may, in a few states, have on the implementation of the rights provided under Article 14 of the Covenant (that is, the right to a fair trial).

Immigration and Nationality Subchapter: Anti-terrorism and Effective Death Penalty Act, 1996.

On 24 April 1996, the Federal Government enacted the "Anti-terrorism and Effective Death Penalty Act of 1996". It affects the discretion of the judiciary and therefore its independence on at least two fronts.

Section 104(3) prevents a Federal District Court from issuing a writ of habeas corpus with respect to any claim adjudicated on the merits in State court unless the decision reached was contrary to, or involved an unreasonable application of established Federal Law, as determined by the Supreme Court. It has been suggested that this section may limit independent judgments rendered by Federal Courts in cases involving questions of law and questions of mixed law and fact. However, President Clinton, on announcing the enactment of the law stated that he expects that "the courts, following their usual practice of construing ambiguous statutes to avoid constitutional problems, will read Section 104 to permit independent Federal court review of constitutional claims based on the Supreme Court's interpretation of the Constitution and Federal laws".

The Act also amends the federal immigration laws, although it is questionable how these amendments relate to fighting terrorism, as was admitted

by President Clinton when he announced the signing of the Bill. For example, it bars children of illegal immigrants from public schools and retroactively applies restrictions to immigrants who were lawfully admitted in the last five years.

The amendments to the federal immigration laws attack the discretion of the judiciary. They limit the power of judges to grant voluntary departure after exclusion or deportation proceedings have commenced, leaving those aliens who assert their right to a deportation hearing to meet more restrictive criteria than those who relinquish that right.

The most striking restriction is the elimination of judicial review of many decisions of the Immigration and Naturalization Service (INS). Section 440(a) of the Act amends Section 106(a)(1) of the Immigration and Naturalisation Act. Paragraph 1105a(10) provides:

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offence covered in section 1251(a)(2) (A)(ii), (B), (C), or (D) of this title, or any offence covered by section 1251(a)(2)(A)(ii) of this title for which both predicate offences are covered by section 1251(a)(2)(A)(i) of this title, *shall not be subject to review by any court* (emphasis added).

Only the Supreme Court of the United States will have the jurisdiction to review these cases. The Director of the American Civil Liberties Union National Immigrants' Rights Project stated in a paper given in 1996 that this "total elimination of judicial review achieves the indefensible result of insulating the INS from judicial oversight for egregious errors, abuses of discretion and manifestly illegal conduct".

This section was challenged before the United States Court of Appeals, First Circuit in the case of *Kolster v. INS* on 6 September 1996. Kolster had petitioned the court for review of the decision of the Board of Immigration Appeals that Kolster was ineligible for discretionary relief from deportation. Kolster argued that "Section 440(a)'s preclusion of judicial review of final orders of deportation based on the commission of certain crimes violates both the Due Process Clause and the principle of separation of powers embodied in Article III" of the Constitution. The INS took the position that the section is "clearly a constitutional exercise of Congress' well-established power to provide or withhold jurisdiction from statutorily-created courts, as well as its plenary power over matters of immigration and naturalisation".

On 4 December 1996, the Court of Appeals held that because the INS acknowledged "that some avenue for judicial review remains available to address core constitutional and jurisdictional concerns," the petition did not raise a constitutional issue and accordingly, the Court of Appeals had no jurisdiction to consider the petition.

The legislation also restricts the role of lawyers. It mandates that the rights of an alien to be represented by counsel, which has, in the past, only been permitted if it is "at no expense to the government", is now only permitted so long as it does not "unreasonably delay" the proceedings.

Judge Lorin Duckman

In the 1995 Judge Lorin Duckman of the New York City Criminal Court made some controversial remarks when hearing a case concerned with domestic violence. The defendant, Mr. Benito Oliver, a felon with convictions for rape, witness tampering and weapons possession, attacked his former girlfriend three times in 1995. Oliver was arrested in early 1996 for beating and threatening her with a knife, and then for violating a protective order issued to protect the girlfriend. During Mr. Oliver's bail hearing, Judge Duckman stated: "[t]here is no actual physical injury, is there, other than bruising? ... I am not suggesting that bruising is nice, but there is no disfigurement". Judge Duckman then proceeded to weaken the protective order and released the defendant on his own recognisance. A few days later the defendant shot and killed his girlfriend at her place of work (see *Attacks on Justice, 1995*).

Mayor Rudolph Giuliani of New York demanded the removal of Judge Duckman from the bench by an impeachment trial or through the New York State Commission on Judicial Conduct. In February 1996, Governor George Pataki of New York filed a complaint with the New York State Commission on Judicial Conduct, claiming that Judge Duckman has an anti-prosecutorial bias and believes that cases of domestic violence should not be handled as criminal matters. Governor Pataki claimed that Judge Duckman's actions constituted misconduct and threatened to refer the complaint to the State Senate for review under Article 6§23 of the New York State Constitution.

In April 1996, the Judicial Commission issued formal charges of misconduct against Judge Duckman on several of the grounds cited in the complaint filed by Governor Pataki. While the hearing was pending, Judge Duckman was reassigned to hear civil cases in New York County. At the end of 1996, the hearing had not been completed.

"Three Strikes, You're Out" Law

The Californian so-called "Three Strikes, You're Out" Law, was passed in 1994 and provides that a defendant with one prior conviction must receive twice the sentence he or she would otherwise receive and a defendant with two prior convictions shall be sentenced to life imprisonment, or a minimum of 25 years or three times the normal sentence. Similar legislation exists in Texas, Washington and the federal courts (see *Attacks on Justice, 1995*).

In 1995, in the *People v. Romero*, Judge William D. Mudd refused to sentence the defendant to life imprisonment although he had two previous

convictions. Instead, Judge Mudd agreed to consider striking the prior felony conviction allegations if Romero pled guilty, although the prosecutor argued that Judge Mudd had no power to do so - the legislation only provides for the "prosecutor to move to strike prior felony conviction allegations 'in furtherance of justice pursuant to section 1385' ". Judge Mudd disagreed and reasoned that to interpret the legislation in this way would violate the constitutional doctrine of separation of powers. His endorsement read that the "[c]ourt finds [Penal Code section 667] unconstitutional and violates separation of powers and strikes the [prior felony conviction] allegations". On sentencing, the court reaffirmed its decision to strike the prior felony conviction allegations and imposed a sentence of six years instead of the life sentence which would have been required by the "Three strikes" law.

The District Attorney petitioned for a writ of mandamus requiring the Superior Court to vacate its order striking the prior felony conviction allegations and to resentence the defendant. The Court of Appeal concluded the trial court had no power to dismiss prior felony allegations on its own motion and ordered a writ be issued requiring the trial court to vacate the sentence and to permit the defendant to withdraw his plea.

On 20 June 1996, the Supreme Court of California decided that Section 1385(a) of the legislation which permits "a trial court to dismiss a criminal action 'in furtherance of justice' on its own motion, also permits a court to dismiss factual allegations relevant to sentencing, such as the allegation that a defendant has prior felony convictions". To interpret the law otherwise would result in the court having to seek the prosecuting attorney's consent to terminate criminal actions, thereby creating serious separation of powers problems.

The Superior Court also held that although the court has discretion to strike prior felony conviction allegations, it abuses that discretion if it dismisses a case, or strikes a sentencing allegation, solely "to accommodate judicial convenience or because of court congestion". It also abuses its discretion by "dismissing a case, or a sentencing allegation, simply because a defendant pleads guilty". Judge Mudd had not set forth his reasons for striking the prior felony conviction allegations and accordingly, the Superior Court returned the case to the trial court.

LAWYERS

In 1974, the US Federal Government enacted the "Legal Services Corporation Act" which established a private, non-profit corporation, to be independent from political pressures and directed by a bipartisan board of directors appointed by the President and confirmed by the Senate. Its authorising legislation requires the Legal Services Corporation (LSC) to provide equal access to high quality legal assistance to those who face an economic barrier to adequate legal counsel.

The LSC receives a significant portion of its funding from the Federal Government, although it receives funding from state and local governments as well as private charities. It is directly accountable to the Congress for the federal funds it receives to ensure it provides "the most economical and effective delivery of legal assistance to persons in both urban and rural areas. In 1996, more than 130,000 private lawyers volunteered their time to serve LSC clients. These and staff lawyers handle family law matters (33% of all cases), housing (22%), income maintenance (17%) and consumer finance (11%).

Since the 1980's, the LSC has suffered from several attempts to reduce its funding, including one by President Ronald Regan after the LSC successfully challenged his administration in lawsuits brought on behalf of migrant farm workers when he was the Governor of California. In 1995, the Republicans called for the elimination of federal funding within two years. Federal funding was reduced in 1995 and again in 1996, when it was reduced by $278 million, a cut of approximately 30% from the original 1995 level.

In addition to the reduction of funding, the Federal Government imposed restrictions on legal services programs, prohibiting their lawyers from, among other things:

a) bringing class actions;

b) communicating with local, state or federal officials or regulators concerning proposed or current legislation, although they may use *non-LSC funds* to respond to written requests from officials;

c) representing clients in constitutional challenges to welfare reform measures;

d) representing prisoners or certain categories of aliens; and

e) collecting attorney fees for securing a verdict on behalf of their clients to which they would otherwise be entitled by law.

A further reduction in funding was approved by the House Appropriations Committee for the 1997 budget.

Cases

Judge Harold Baer {Judge of the U.S. District Court} On 22 January 1996, Judge Baer rendered a decision in the case of *United States v. Carol Bayless* suppressing evidence after holding that 80 pounds of cocaine and heroin had been illegally seized. In March 1996, it was reported that President Clinton's spokesperson, Michael McCurry stated that if Judge Baer did not change his ruling, the President would call for his resignation.

In a letter dated 14 May 1996, replying to an intervention written by the American Association for the International Commission of Jurists on 3 April 1996, Associate Counsel to President Clinton stated that "...some confusion was caused by the President's spokesman when he was asked during his daily press conference to respond to a letter from 150 members of Congress demanding that the President ask Judge Baer to resign". The Associate Counsel continued to say "[a]s soon as it became clear that these comments had been interpreted by the press as an implicit threat to call for the Judge's resignation if he did not reconsider his opinion, counsel to the President, Jack Quinn, released a letter affirming the President's commitment to judicial independence and emphatically rejecting the suggestion by Members of Congress that the President ask the judge to resign".

It was also reported that then Senator Bob Dole called for Judge Baer's impeachment and 150 members of Congress demanded his resignation with the Speaker of the House, Newt Gingrich calling the ruling a "shocking and egregious example of judicial activism".

Four judges of the Federal Appeals Courts responded in a public statement, noting, among other things, that "[t]hese attacks do a grave disservice to the principle of our independent judiciary and most significantly, mislead the public as to the role of judges in a constitutional democracy". The New York Country Lawyers' Association (NYCLA) issued a statement warning that "highly politicised personal attacks against a judge for doing what he perceived to be his duty undermine our judicial system". The deans of seven law schools and another 27 bar associations joined the NYCLA calling the Government statements "intemperate and personal" attacks that "diminish the independence of the judiciary".

The prosecutors appealed the decision and on 1 April 1996 Judge Baer reversed his decision, citing new evidence. He also apologised for "hyperbole" in his initial decision that may have demeaned the police.

After Judge Baer reversed his decision and admitted the evidence, the defendant, Carol Bayless filed a motion seeking to disqualify him on the grounds that he had been influenced by media attention, bringing his impartiality into question. On 16 May, Judge Baer concluded that the bias claim was "totally unsupported...no personal bias or prejudice by this Court against the defendant has been alleged". He also noted that Bayless only complained when "she was greeted with a decision she did not like". Despite his finding, Judge Baer removed himself from the case, citing potential delays if he remained seized of the matter.

In his report, the UN Special Rapporteur noted the following:

> the harsh, public criticism of a judicial decision by the Executive Branch, particularly in a politically charged environment in which prominent legislators and politicians are calling for the resignation of the particular judge who has rendered a controversial decision, can have a chilling effect on

> the independence and impartiality of the judiciary. In this regard, the Special Rapporteur notes that subsequently Judge Baer did in fact reverse his earlier decision, thus causing concern among legal circles that the same judge may have done a disservice to judicial independence by reversing his own decision under external pressure.

Judge John H. McBryde {U.S. District Court Judge}: In May 1995, Chief Judge Jerry Buchmeyer removed Judge McBryde from two cases, one involving a telemarketing scam, the other an award of money to a minor, after the District clerk and the United States Attorneys for Arizona and Texas had approached him with their concerns about Judge McBryde's handling of the cases.

In the telemarketing case, Judge McBryde ordered Justice Department officials to prosecute two Federal employees for criminal contempt after they refused to turn over certain documents in the telemarketing case, although a Federal judge in Arizona had forbid them to do so. Judge McBryde asserted that he did not believe the Federal judge's Order was of a scope which would forbid the Federal employees to co-operate in his case.

In the second case, Judge McBryde had threatened to fine the head clerk for the Northern District of Texas personally because another clerk had failed to deposit money belonging to a litigant in an interest-bearing account.

On 20 October 1995, Judge Buchmeyer's decision was upheld by the 19 member judicial council on the grounds that Judge McBryde was "intemperate" and "an impediment to the effective administration of justice."

In November 1995, Judge McBryde filed a mandamus action asking the Fifth Circuit Court, comprised of the only three judges who did not sit on the Judicial Council, to return the cases to him. On 30 April 1996, counsel for Judge McBryde argued that the Council's action had created a new and unacceptable route by which litigants could circumvent a judge and appeal their cases and that the decision was tantamount to disciplinary action rendered without due process. Judges are normally disciplined under the Judicial Conduct and Disability Act of 1980.

Evidencing the complexity of the case, a decision still had not been rendered as of 30 April 1997.

Robert T. Johnson {New York State District Attorney}: In March 1996, Governor Pataki of New York State removed District Attorney Johnson from a case in which the defendant was accused of killing a police officer. In District Attorney Johnson's place, Governor Pataki appointed another District Attorney who is, together with governor Pataki, reportedly in favour of the death penalty. The removal of District Attorney Johnson was unprecedented and legal experts questioned Governor Pataki's right to do so, absent corruption, incompetence or a conflict of interest.

José Pertierra {Lawyer, Washington, D.C.}: Mr Pertierra acts for Jennifer Harbury in her claim before the Inter-American Court of Human Rights concerning the death of her husband. Ms. Harbury has claimed that her husband's death was caused either by the Guatemalan or United States Government, or both.

In the beginning of 1996, a bomb was placed in or on the car of Mr. Pertierra in Washington, D.C. The bomb exploded around 4 am and fortunately, did not injure Mr. Petierra.

VANUATU

The Republic of Vanuatu, previously known as the New Hebrides, was, until 1980, jointly governed by the French and the British as a condominium. In 1980, it acquired its independence.

According to the Constitution of the Republic of Vanuatu, legislative authority is vested in the Parliament, members of which are directly elected. Executive power rests with the Prime Minister and Council of Ministers. Parliament elects the Prime Minister who in turn appoints the Council of Ministers. The Head of State is the President who is elected by secret ballot cast by an electoral college consisting of Parliament and the Chair of Local Government Councils. A Council of Chiefs, composed of custom chiefs elected by their peers has general competence to discuss all matters relating to custom and tradition and may make recommendations for the preservation and promotion of ni-Vanuatu culture and languages.

The Government of Vanuatu and the judiciary experienced a volatile year in 1996. The instability was largely a result of a conflict between two factions of the Union of Moderate Parties (UMP), led by Serge Vohor and Maxime Carlot-Korman. The conflict was facilitated by Chief Justice d'Imecourt, who almost single handedly paralysed the courts (see below).

Maxime Carlot-Korman had served as Prime Minister in the UMP's coalition Government from 1991 until December 1995 when Serge Vohor was elected to replace him. Only two months later in February 1996, Prime Minister Vohor announced his resignation after a motion of no-confidence had been tabled. Maxime Carlot-Korman was re-elected Prime Minister. On 30 September, the Carlot-Korman Government was dissolved following a vote of no confidence and after it had issued US $100 million in letters of guarantee to businessmen who subsequently disappeared. Serge Vohor replaced Mr. Carlot-Korman as Prime Minister and appointed a new Cabinet.

JUDICIARY

The judiciary consists of a Supreme Court with unlimited jurisdiction, a Court of Appeal and village or island courts with jurisdiction over customary and other matters. Article 49 of the Constitution requires the Supreme Court to be comprised of the Chief Justice and three other judges while according to Article 50, the Court of Appeal "shall be constituted by two or more judges of the Supreme Court sitting together".

All members of the Vanuatu judiciary, save for the Chief Justice, are appointed by the President, acting on the advice of the Judicial Service Commission (JSC). According to Article 48 of the Constitution, the JSC consists of the Minister of Justice, the Chief Justice, the Chair of the Public Service Commission and a representative of the National Council of Chiefs.

The JSC is to be free from the direction or control of any other person or body in the exercise of its functions.

The Chief Justice is to be appointed by the President after consultation with the Prime Minister and the Leader of the Opposition.

Although Article 47 of the Constitution provides that all members of the judiciary shall hold office until they reach the age of retirement, the reality is that most members of the judiciary have been given renewable short-term contracts. Article 47(5) specifically allows the appointment of acting judges. This is largely due to lack of available training for local Vanuatuans, forcing the Government to look beyond Vanuatu for trained lawyers and judges who are willing to accept only short-term contracts.

Judges are removable only by the President in the event of conviction and sentence on a criminal charge or on determination by the JSC of gross misconduct, incapacity of professional incompetence.

Judges may be promoted and transferred by the President on the advice of the JSC. The consent of the judge to the transfer does not appear to be a constitutional requirement.

The Chief Justice

In recent years, concerns have been raised regarding the independence of the judiciary in Vanuatu and specifically that of Chief Justice Charles d'Imecourt, a.k.a. Charles Vaudin. Mr. Vaudin is a native of Mauritius and fluent in both English and French, two of the official languages of Vanuatu. He was appointed Chief Justice of Vanuatu for a period of two years in 1992. His contract was originally financed by the British Government which extended it by one year. A new contract was negotiated with the Government of Vanuatu in March 1994 and provided for a significant increase in salary, which, according to Radio New Zealand, made Justice d'Imecourt the second highest paid Chief Justice in the world, after tax considerations were taken into account. On 3 February 1996, his contract was renewed again by the Vohor Government, by way of an "Employment Agreement". The Agreement was permitted by an amendment to the Official Salaries Act and was actually separate from his constitutional appointment. It provided for a salary which was more than ten times that of the Prime Minister.

In addition to the terms of the Employment Agreement, several other reports cast doubt on the independence of the Chief Justice. Among those reports were the following:

- the Chief Justice represented clients in court and heard a case in which he was a named defendant;
- the Chief Justice claimed he had been hired to advise the President and Prime Minister and he assisted in drafting legislation he was later called upon to interpret;

- the Chief Justice sought to influence decisions of other judges through the scheduling of cases or in private conversations; and
- the Chief Justice virtually paralysed the courts. In 1995 and 1996, he failed to call the Court of Appeal for more than one year, leaving many appellants, who were ultimately successful in their appeals, in prison for more than a year.

After receiving complaints, from among others, Supreme Court Judges, the Judicial Services Commission recommended to the President that the Chief Justice be suspended pending completion of its investigation of the matters raised. However, the Carlot-Korman Government reportedly requested the JSC to terminate its investigation, although Article 48(2) of the Constitution provides that it should be free from direction or control of any other person or body in the exercise of its functions. It was not until the Government changed again in September 1996 that the conduct of the Chief Justice came under review. In October, the JSC recommenced its investigation into the allegations against the Chief Justice. The Chief Justice was reportedly given an opportunity to speak to the allegations against him but instead the Chief Justice requested an adjournment to allow him to prepare for the hearing.

On 15 October 1996, the Vohor Government terminated the Employment Agreement and on 21 October 1996 declared the Chief Justice to be an undesirable immigrant and ordered his deportation. Upon learning of the deportation order, the CIJL intervened with the Vanuatan Government and asked it to ensure that the Chief Justice was granted a fair hearing.

The Chief Justice was able to delay his deportation and applied successfully to the Court of Appeal for an interim injunction. On 31 October, on the recommendation of the JSC, the President issued an order to remove the Chief Justice. The Chief Justice then reportedly called the Attorney-General, asking him to agree to an injunction, which the Attorney-General did and the Chief Justice was given leave to be heard thereafter. It was agreed that the Chief Justice would return to Vanuatu on 27 November to be heard, but he failed to do so.

The Chief Justice did pursue his claim against the Government for damages arising out of the termination of his employment agreement and the Government of Vanuatu filed a counterclaim. The matter was scheduled to be heard on 3 March 1997 but it was thought that the criminal cases listed would take priority.

Resources

The lack of adequate training of local people for judicial and magistrate positions necessitates the appointment of judges from outside Vanuatu. This often results in several judicial posts not being filled. It also usually requires

external funding, leaving the Vanuatu Government and the judiciary dependent on the goodwill of other countries.

The Court of Appeal was also not properly constituted throughout 1996, reportedly due to lack of funds but also because the Chief Justice refused to appoint the judges required to constitute the court, it was thought by some that he did not want his decisions reviewed.

French, English and Bislama are the official languages of Vanuatu. Prior to March 1995, when the proceedings in the case of *Mouton v. SELB* were conducted in French, all proceedings were held in English. All documents had to be translated into English and English-based law was applied. Prior to March 1995, there were no French speaking legal practitioners and the lack of a sufficient number of French speaking legal practitioners remained problematic at the end of 1996.

CASES

Roger de Robillard {Lawyer}: Mr. de Robillard is an Australian National and a francophone member of the New South Wales Bar, who has been appearing in the Supreme Court of Vanuatu as Counsel briefed by local Vanuatu law firms since 1991. In February 1996 he acted for members of the Vohor Government in their struggle with Maxime Carlot-Korman supporters. On 11 March 1996, the Minister of Foreign Affairs and Immigration declared Mr. de Robillard to be "an undesirable immigrant" and he and all members of his family were prohibited from entering the Republic of Vanuatu. Initially, Mr. de Robillard was not informed by the Government of its decision to prohibit him from entering Vanuatu; he received a copy of the news release indicating that he had been barred from the country from a journalist.

Mr. de Robillard reportedly suffered from additional harassment after acting for the opposition to the Carlot-Korman Government. The Chief Justice reportedly threatened to arrest Mr. de Robillard and his clients. The Attorney General advised the members of the Vohor Government to "take competent and independent legal advice before risking further costs in this matter". Two other clients, who had retained Mr. de Robillard for reasons entirely unrelated to the parliamentary elections, found their court dates changed and actions dismissed without warning.

Mr. de Robillard could also not find a local law firm to represent him and as independent counsel from Australia cannot be briefed, except through a Vanuatu law firm, Mr. de Robillard could not find legal representation to challenge the declaration that he was an "undesirable immigrant". Even if a Vanuatu law firm had been prepared to brief Australian counsel, a business licence would have to be obtained for that counsel through the very Minister of Foreign Affairs and Immigration who had banned

Mr. de Robillard. The business licence would then have to be approved by the local law council, of which the Chief Justice and the Attorney-General are two of the three members. In fact, when Mr. de Robillard attempted to retain counsel from Australia to represent him, his chosen counsel, who had appeared in Vanuatu courts previously, was denied the necessary Temporary Practising Certificate by the Chief Justice.

These actions are contrary to Article 16 of the United Nations Basic Principles on the Role of Lawyers which requires Governments to ensure that lawyers "are able to perform all their professional functions without intimidation, hindrance, harassment or improper interference, and shall not suffer or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics. They are also contrary to Article 18 of the Basic Principles which prohibit lawyers from being identified with their clients or their clients' causes as a result of discharging their functions.

VENEZUELA

The Republic of Venezuela is a federal state comprising 20 states, two Federal Territories and a Federal District. The Constitution of 1961 provides for separate executive, legislative and judicial branches. The President, who is the head of state and the executive, is the elected directly for a five year term. Mr. Rafael Caldera Rodríguez won the most recent presidential elections on 2 February 1994. The President appoints and presides over a Council of Ministers.

Legislative power is vested in a bicameral Congress. Elections to the 44 member Senate (which also includes the former presidents as life time members) and the 201 seat Chamber of Deputies were held simultaneously with the presidential elections in 1994. The coalition Government, the National Convergence (CN) held only a minority of the seats in 1996, with the remaining seats being divided between a number of other parties. The states are ruled by executive Governors appointed by the President and each have an elected legislature.

In June 1994, President Caldera began suspension of constitutional guarantees (see *Attacks on Justice* 1993-1994). Suspensions continued until July 1995, when most constitutional guarantees were reinstated, with the exception of freedom from arbitrary arrest and detention in 16 municipalities along the Colombian border because of guerrilla activity.

Though constitutional protections for citizens' rights and freedoms were restored, human rights violations flourished in 1996. At least 146 extra judicial killings by security forces between October 1995 and September 1996 were documented. Arbitrary arrests and detention were common and detainees were exposed to abuse and torture. These practices were allowed to continue due to the failure of the police to investigate violations involving their colleagues, and biased military courts which issued lenient sentences to members of the armed forces.

The law permits police to hold persons in detention without a warrant for a maximum of eight days, but it also establishes the right to judicial review of the legality of such detention. However, in recent years, the security forces have relied on the 1939 Vagrancy Law which permits detention for five years, without warrant, trial or judicial appeal. In 1996, the law was used against persons deemed to be a danger to society, even if there was no evidence of a punishable crime. The Vagrancy Law was reportedly applied against 552 detained persons between October 1995 and September 1996.

THE JUDICIARY

In addition to the separation of powers, the Constitution establishes the autonomy and independence of the judges. Traditionally however, Venezuelan courts have been politicised.

The Supreme Court of Justice is the highest court in the constitutional structure of the judiciary. Lower courts can be found on the following levels, in ascending order: municipal, and district, followed by trial courts of first instance and superior appellate courts. There are 1,110 municipal, penal criminal and superior courts below the Supreme Court of Justice. There is also a system of military courts (see below).

In 1994, Judges of the Peace (*Juez de Paz*), were introduced, mainly as an alternative means to resolve local conflicts among the poor. They do not have to be legally trained and receive only 60 hours of basic training. The subject jurisdiction of the Judges of Peace is not clear and the ability of these judges to fulfil the required duties of a judge is questionable.

Appointment and disciplinary procedures

The Supreme Court is self-administered. Its judges are appointed by the President with confirmation by the Congress for a period of nine years, with the possibility of re-appointment. The appointment procedure leads to significant influence by the President over the Supreme Court.

Lower courts are managed by the Judicial Council, which appoints, trains, monitors, evaluates and disciplines judges. It also negotiates the budget for the courts with the executive budget office. The Judicial Council is comprised of five judges, of which three are appointed by the Supreme Court, one by the Congress and one by the President. Since all Council members are elected for five year terms coinciding with the presidential and congress elections, this presents an opportunity to each new government to appoint their own candidates and thereby sway the Council's activities.

The selection of judges is one area where this interference is particularly disturbing. According to the Judicial Career Law, judges are to be selected on their merits, which are determined by open competitive examinations. The Law on the Judicial Career (*Ley de Carrera Judicial*) requires, *inter alia,* that a person seeking to embark on a judicial career must be a lawyer and have exercised the profession for a minimum of two years. However, this procedure has rarely been followed. Members of the Judicial Council have been pressured by the political parties to appoint certain candidates. This perpetuates the tradition which existed prior to the creation of the Judicial Council, when political parties influenced the judiciary by making specific judicial appointments. Exacerbating the situation was the failure to apply the procedures established in the 1980 Judicial Career Law until 1991 and then their suspension one year later until 1994. This allowed the Judicial Council to exercise its power to appoint temporary judges, to whom no appointment criteria applied and invited political influence. The practice of appointing temporary judges became the rule rather than the exception. From 1991 to 1996, two thirds of the sitting magistrates were selected outside the process contemplated by the Judicial Career Law.

Resources

The ability of the executive to influence the judiciary becomes even more apparent when one considers that the Judicial Council must negotiate the judicial budget with the executive. No constitutional provisions establishing the size of the budget for the judiciary exist. The budget allocated in 1996 amounted to 20,000,000,000 bolivares (US$ 41,500,000), which was a manifest decrease in the resources for the proper functioning of the judiciary, after the inflation rate (which ranged between 60 to 70 percent) and even a 30 percent salary increase were taken into account. Despite the increase, judges were still underpaid. The inadequate salaries necessarily make the judges more susceptible to bribes.

Other influences

In addition to political interference and impunity, the Venezuelan judiciary repeatedly suffered from corruption and neglect, which created arbitrariness and delays in the administration of justice. Corruption was profound, wide-spread and well-known, thus eroding the rule of law and the public confidence in the judiciary. Political parties influenced the outcome of decisions important for political and economic matters. Corruption was furthermore facilitated by the structure and administration of the courts. The efficient processing of each case depended on the size of the tip added to the normal fee charged for the necessary court services such as photo-copying or processing of legal documents.

Because of serious backlogs, persons accused of crimes sometimes have to spend more time in prison before having their case tried than the actual maximum penalty they could receive as a result of their crime. More than two-thirds of the inmates in 1996 were awaiting their trial, in severely overcrowded prisons with appalling conditions and often subjected to abuse by guards. Two hundred and twenty prisoners were reportedly killed as a result of prison violence from October 1995 to September 1996.

Public Ministry

The judicial branch also comprises the Public Ministry (*Ministerio Público*), which is charged with supervising the observance of the Constitution and the laws, including human rights. The Public Ministry is headed by the Public Prosecutor (*Fiscal General*) who can investigate any alleged violation of the Constitution or the laws.

Venezuela currently has an inquisitorial system. According to the Code of Criminal Procedure (*Código de Enjuiciamiento Criminal*), criminal investigations are divided into a summary and a plenary stage. The summary procedure, which basically serves as a preliminary investigation by the court, is conducted in secret and the defendant does not have the right to participate in the proceedings. In 1996, there were several draft laws on the reform of the Code on Criminal Procedure, which *inter alia* proposed to

eliminate the summary procedure, introduce oral procedures and change from an inquisitorial to an adversarial system.

In cases involving alleged violations by public officials, the Public Ministry is responsible for requesting the court to conduct an investigation. This is done by the Public Prosecutor asking the court to open an *averiguación de nudo hecho*, a special summary procedure with the objective of establishing whether the person was a public official on active duty when the alleged violation occurred and if the act was an infringement on the law. The procedure is conducted in secret and can continue for several years (despite the actual ten day limitation for completing such an investigation). In fact, the investigation reportedly may continue until the statute of limitations for prosecuting the crime expires, allowing state agents to be shielded from prosecution during the investigation.

Military courts

A military court system also exists and continued to be governed in 1996 by the Code of Military Justice which was established in 1938 under the period of dictatorship. The code contains several provisions that are contrary to Venezuela's international obligations, such as expedited trials, limited possibilities for the accused to gather evidence and restricted access to counsel. When requested by the Inter-American Commission and Court on Human Rights to repeal some of the provisions of the Code of Military Justice, the Government maintained in February 1996 that the Code does not violate any international norms.

The Military Code tends to ignore the jurisdiction and orders of civilian courts. The law establishes that the President must review every case after the initial investigation and decide whether the case shall continue in court. This arrangement gives the executive broad powers to intervene in military cases. In cases of human rights violations committed by members of the armed forces, when tried in a military court, it is reported that perpetrators usually receive light punishments or are acquitted, perpetuating impunity of the security forces. Evidence of this is found in the fact that only a few low-ranking officers have been convicted for 684 extra judicial killings committed by the security forces since 1991.

The Venezuelan Judicial Infrastructure Project

In 1992, the World Bank approved a loan for a judicial reform project in Venezuela. Because of political and economic chaos, the reform project did not begin until 1994. Although large in sum, the reform project has been criticised by various NGOs, mainly the Lawyers Committee for Human Rights and the Venezuelan Program for Human Rights Education and Action (*Programa Venezolano de Educación - Acción en Derechos Humanos*) in their report "Halfway to Reform: The World Bank and the Venezuelan Justice System". The project was criticised for not tackling the root causes of the

deteriorated judiciary, such as political interference and corruption, and instead, focusing only on reforming the institutions and the administration of the judiciary. The World Bank itself claims to be restricted by its Charter when it comes to the scope of the reform, claiming that it can only be involved in projects where the reform will have direct and obvious implications for economic development.

The impact of the reform has furthermore been faint because of lack of Government commitment. The Government has failed to invite the participation of other entities, such as NGOs, bar associations and academic institutions, which otherwise could serve as catalysts to discuss broader reform to secure a more long-term strategy and provide for developments and changes to the judiciary beyond the limitations of the World Bank.

LAWYERS

There is a serious problem of access to justice for the poor. While public defenders are provided for by law for those who are unable to hire an attorney, there is a serious gap between the number of public defenders available and the caseload. In 1995, the average quota of cases per public defender was 348, although in some states, the average was as high as 450 cases per lawyer. The public defenders technically belong to the executive, as employees of the Ministry of Justice, but they function as an arm of the Judicial Council and often share offices with judges and court staff.

CASES

Joe Castillo and **Adrian Gelves Osorio** {Lawyers at the Human Rights Office of the Apostolic Vicariate (*Oficina de Derechos Humanos del Vicariato Postólico*)}: On 19 and 29 November 1996 respectively, charges were brought against these two lawyers before the Criminal Court of Puerto Ayacucho. The charges involved the "usurpation of functions" (*usupación de funciones*) which were brought pursuant to two letters sent by the Human Rights Office in November 1996 to Lt. Col. Manuel Antonio Bompart, General Commander of the State Police. The letters contained formal complaints concerning the death of a citizen at the hands of state police agents on 3 November 1996. Mr. Castillo and Mr. Gelves were questioned on 23 and 24 January 1997.

"Usurpation of functions" is defined in the Venezuelan Penal Code as the "unauthorised assumption or exercise of public, civil or military functions." It is one of the main tasks of the Vicariate's Human Rights Office to monitor arbitrary actions by the police and the Constitution provides for

the right to lodge a petition before any public official or entity. It appeared that the Venezuelan authorities chose to harass these lawyers for carrying out their duties as human rights lawyers.

On 19 February 1997, the CIJL sent a letter to President Caldera expressing concern for the two lawyers and the charges brought against them. The CIJL expressed its view that the charges against the lawyers constituted a serious breach of Articles 16 (a) and (c) of the 1990 UN Basic Principles on the Role of Lawyers. It urged the President to make full inquires into the issues and to ensure that Mr. Castillo and Mr. Gelves were permitted to effectively perform their duties as lawyers.

Goverment Response to CIJL

On 5 September 1997, the Permanent Mission of Venezuela to the United Nations in Geneva, responded to the CIJL's request for comments. Below is a translation into English of the Government's comments which were submitted in Spanish

> 1. Venezuela is a Federal State, since sometime before 1996, which comprises 22 States and a Federal District, which means that the two federal territories that existed before have disappeared.
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> 2. The general elections mentioned in paragraph 2 of the draft report of the CIJL took place in December 1993 and not in 1994.
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> 3. Contrarily to your affirmation in another passage of the same paragraph 2, since 1989 the States which form the territory of Venezuela have governors who are elected through democratic elections.
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> 4. Paragraph 3 of the draft CIJL report reads thus "in June 1994, President Caldera suspended constitutional guarantees". From what is written it could be deducted that the Venezuelan government suspended *all* constitutional guarantees (their number, by the way, is extremely large), when only a few of them were suspended, and for motivations and reasons which have been enshrined in the Constitution itself. Therefore, we believe that it would be more precise and objective to say that the President of Venezuela suspended at that time *some constitutional guarantees.*
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> 5. Immediately after, in the same paragraph 3 of the draft, it is mentioned how were re-established, one year afterwards, the same constitutional guarantees in the entire country, with the exception of 16 municipalities which border with the Republic

of Colombia "because of guerrilla activities", it does not appear to clearly indicate that the guerrilla in question is the *Colombian guerrilla* which for more that 40 years has been comprised exclusively of *Colombian citizens to fight against the Colombian government in the territory of Colombia*, from which, in alliance with drug traffickers, occasional incursions have been made against Venezuela, which have led to serious and continued political and military problems.

6. To say, as in paragraph 4, that violations of human rights have "flourished" in 1996, can lead, with reason, to think that that year has been particularly negative in this domain, which would not be objective. At the most it could be acceptable that in 1996 such violations continued, without it signifying that these violations were perpetrated with the will of the high government.

7. We believe that the same paragraph 4 with regard to the abuses and torture carried out in practice against detainees, major light is provided by reading the report of the Special Rapporteur on Torture, Mr. Nigel Rodley after his visit to Venezuela in the first semester of 1996.

8. The affirmation made in paragraph 6, which states that "Traditionally (...) Venezuelan courts have been politicised" is absolutely exaggerated in character. Whereas it cannot be denied that a political element has permeated the life of Venezuelan justice - as it has also in practically every country of the world, not excepting some which have developed their institutions long ago - it should be known that the claims made over the present politicisation of justice in Venezuela are one of the least important in our country compared to some of Another nature such as, for example, its unbearable slowness.

9. In paragraph 9, from a false assumption we can only arrive at a conclusion which is equally false: the judges of the Supreme Court of Justice (called "magistrates"), are appointed according to what has been expressly established by the National Constitution of 1961 which is in force, exclusively by the National Congress, in which the Government can have or not the support of a political majority, which at the present time it does not posses.

According to what has been stated, the highest court of Venezuela, the Supreme Court of Justice, is independent from the rest of the powers of the State and, in particular, the Executive. One irrefutable proof, amongst the many that can be cited, of such autonomy is constituted by the legal process

which, in 1993, led to the impeachment of the President of the Republic in exercise.

10. To arrive at a better understanding of the electoral system in the Venezuelan judiciary and of the nature of the problems related to the revenues which are allocated to it we take the opportunity of transcribing part of the information submitted by a judge of the Council of the Judiciary who was consulted on this matter:

"The judges of the Supreme Court of Justice are not [s]elected by the President of the Republic but by the chambers of Congress in joint session. The advocates who meet the requirements of eligibility established by the Constitution and who aspire to such positions, can submit their own candidature before the Commission which is designated for such by Congress.

The judges are designated by means of a *concurso de oposicion* [selection process examination] which comprises written, oral and practical parts, as provided by the Law on the judicial career. The juries on these concourses for superior courts are comprised of: two judges of the Supreme Court of Justice and a magistrate from the Council of the Judiciary, and for the other courts, by two magistrates from the Council of the Judiciary and a Superior Judge.

At present more that 400 courts of different categories are in the hands of Provisional Judges. Therefore, the Council of the Judiciary will organise a concourse in the near future to designate the judges of these courts....

One of the most critical areas for the judiciary is the budgeted deficit which has been allocated in which justice will have around 0.6% of the national budget, at a time when other Latin American countries devote between 6% and 2% of their budget to it. A consensus has recently emerged in support of providing no less that 3% to the judiciary, even at a time when the economic crises which is faced by the country does not provide the best opportunity to do so."

ZAIRE

Since he came to power in a coup in 1965, President Mobutu Sese Seko ruled the country together with his Popular Movement for the Revolution (MPR) in a single party political system. On 24 April 1990, President Mobutu announced a "transition to democracy" and established a Sovereign National Conference to regulate the transition. In December 1992, President Mobutu suspended the Conference which in turn refused to recognise the suspension. The result was the creation of two rival National Assemblies, one with members of the opposition, the other comprised of supporters of the President. Violence ensued, leading to several hundred casualties. In October 1993, the two National Assemblies agreed to draft a Transitional Constitution and created a National Assembly, the High Council of the Republic-Parliament of Transition, whose members are *Conseillers de la République* appointed by the National Sovereign Conference, the Deputies of the National Assembly elected in 1987 who participated in the National Sovereign Conference and the negotiators in the *Concertations Politiques du Palais du Peuple*.

The President is the head of state. The position of the Prime Minister, Mr. Léon Kengo wa Dondo, leader of the moderate opposition was strengthened as was that of the Cabinet in relation to the President. The Government conducts the policy of the Nation and executes the acts of the Parliament and the laws of the Republic. The Prime Minister, who heads the Cabinet, is appointed by the President on approval of the High Council of the Republic-Parliament of Transition. The Government is responsible to the High Council of the republic-Parliament of Transition. Legislative power is vested in a unicameral Parliament, the High Council of the Republic-Parliament of Transition.

Article 117 of the Transitional Constitution, promulgated on 9 April 1994, determined the duration of the transitional period to be 15 months. Although elections were to be held in July 1995, the refugee crisis from neighbouring Rwanda gave an excuse for the elections to be postponed indefinitely. Refugees fled from Rwanda when the Hutu-dominated Rwandese Government was ousted by the Tutsi-dominated Rwandese Patriotic Front (RPF) in July 1994. The genocide that followed led to an estimated one million, mainly Hutus, refugees settling in Eastern Zaire. This in turn fuelled conflicts between the Hutu and Tutsi populations (known as *Banyarwanda* or *Banyamulenge*) living in Zaire, who had in recent years formed an alliance against the political elite in Zaire which has been trying to deny them Zairian nationality. However, this apparent alliance between the Hutus and Tutsis in Zaire fragmented. Ultimately, clashes broke out in September 1996 between the *Forces Armees Zairoises* (FAZ) and Tutsi-led armed groups, the *Alliance of Democratic Forces for the Liberation of Congo-Zaire* (AFDL), led by Laurent-Désiré Kabila. Hundreds of civilians died in the conflict.

On 6 October 1996, in the midst of the violence, the High Council of the Republic-Parliament of Transition tabled a draft permanent constitution,

which provided for a federal state composed of 26 provinces, whereas under the previous Transitional Constitution there were 11 and it vested executive power in a President, whose term would be reduced from seven to five years. There was also to be a bicameral Parliament exercising legislative power. The draft permanent constitution was rejected by the opposition party, the Union for Democracy and Social Progress, saying it had not been fairly drafted.

On 29 October, the Zairian Government declared a state of emergency in the Kivu region and imposed military rule in order to "eliminate all subversive networks". On 2 November, the *Banyamulenge* and the Tutsi ADFL captured Goma, allegedly supported by troops of the Rwandan army, and took control of North and South Kivu. On 22 November, the Tutsi ADFL announced that new political and administrative authorities had been established.

With the recrudescence of the war in Eastern Zaire, according to the NGO, the African Defense for Human Rights, more than 1,680 children under the age of 15 were enlisted by the ADFL. The ultimate victims were the refugees: in mid-November, in the wake of the attack of the ADFL and Rwandan army against the *Interahmwe* (the Hutu militia) in the Mugunga refugee camp, hundreds of thousands of refugees abandoned their camps in eastern Zaire and began repatriation to Rwanda. Local humanitarian organisations estimated that refugees were crossing the border at the rate of 170 per minute and, on 18 November, the office of UNHCR reported that approximately 400,000 persons had crossed the border back to Rwanda. Within Zaire itself, the AFDL and the FAZ made use of the chaos to search for collaborators and displace whole families to be used as human shields against possible rebel attacks.

In December 1996, the constitutional referendum scheduled to endorse the new Constitution was postponed because of the ongoing violence and the term of the Transitional Constitution was extended.

The Judiciary

According to Section V of the Transitional Constitution, the Zairian judiciary is to be composed of courts, tribunals and war councils. The power of the judiciary is purported to be independent of the executive and legislative powers. The *Cour Suprême de Justice* (Supreme Court) is established by the Transitional Constitution and has the power to hear all appeals from final verdicts of lower courts and challenges to the constitutionality of laws and legislative acts, election and referendum results.

The law creates the Courts of Appeal and first instance courts. In reality, the Maniema Court of Appeal only recommenced hearing cases in February 1996 after a three year absence. The Governor of the region,

Omari Lea Sisi, member of the Mobutu's Popular Movement for the Revolution, had dismissed the judges of the Maniema Court of Appeal and other judges from the Prosecutor's Office of the County Court. The grounds were that in the course of their judgment these judges referred to the Constitutional Act drafted by the elected High Council of the Republic, and not that of the High Council of the Republic-Parliament of Transition, which enjoys the support of President Mobutu (see above, or, for further details see also *Attacks on Justice 1993-1994*).

The *Cour de Sureté de l'Etat*, a legacy from the colonial system, hears charges of political offences and is composed of ordinary sitting judges. No appeal against its judgments is provided. Moreover, there is a separate system of first instance and appellate military tribunals. Appeals against military tribunal judgments may be heard by the Supreme Court.

Article 100 establishes a *Conseil Supérieur de la Magistrature* (High Council of the Judiciary), with jurisdiction to discipline judges. The *Conseil* must be consulted for the appointment and dismissal of judges. The composition of the High Council is to be fixed by law.

Executive Interference

The court structure set out in the Interim Constitution has been virtually ignored. On 27 February 1996, at the opening session of the *Conseil Supérieur de la Magistrature*, the Minister of Justice admitted that the judiciary was in a desperate condition. He acknowledged that corruption, extortion, negligence and the inequity of judgments made the judiciary itself a factor in "the insecurity of the people and their property".

Blatant examples of direct interference with the judiciary included:

- The Government's use of the power given to the *Inspectorat des Services Judiciaires*, an administrative office created by Presidential Decree N° 87-215 on 25 June 1987 to censure and annul judicial sentences. The organisation and functions of the *Inspectorat* were determined by Ministerial Order N° 073/89 on 24 July 1989. The *Inspectorat* is composed of judges appointed and dismissed by the Minister of Justice, making every judgment effectively controlled by the Minister of Justice himself. In 1996, under the direction of Minister of Justice Mr. Nsinga Udjun, the *Inspectorat* enjoyed renewed and wide powers.
- The 19 August letter from the Prime Minister to the Ministers of Defence and Justice, ordering all judgment executions requiring public forces intervention to take place only on the order of the Minister of Defence at the explicit request of the Minister of Justice. Accordingly, judicial orders were completely subjected to the Ministers of Justice and Defence.
- The Minister of Justice continued the attacks made on the judiciary in 1995 in his speeches or letters throughout 1996 (*see Attacks on Justice, 1995*).

- The appointment and the promotion of judges were carried out by the Minister of Justice according to regional, tribal and political orientation. The appointment of Mr. Kikoka, generally known to be very close to the Minister of Justice and his political party, as *Procureur Général* of Lubumbashi by Ministerial Order N° 118 dated 27 November 1995, served as an example of such a political appointment.
- The development of a system of private administration of justice developed in 1996. In fact, several offices were created by persons close to the presidential family or by Military officers to execute judgments, including the collection of debts. These services were offered for payment, even though they used the public police to execute the judgments. The offices were staffed by members of the *Service d'Action et Reseugnement Militaires*, the *Division Spéciale Présidentielle*, the *Garde Civile* and, in a lesser number, the *Brigade Spéciale de Recherche et Signalement* and other units of the army.
- In February 1996, the Minister of Justice dismissed **28** judges and suspended **39** others from office on the charge of shameful conduct.

Military Courts and Interference

The armed forces have in many instances replaced civil institutions such as the judiciary and taken over their functions. Before the control of North and South-Kivu had passed into the hands of the rebel forces, members of the FAZ used to make arbitrary arrests and detain civilians illegally in military detention centres all over the two regions. Contrary to Zairian law, few of those arrested were subsequently transferred to the civilian jurisdiction. It was reported that there was only one judge sitting in the Military Procuracy for each of the Manama, North and South Kivu regions. The civilian procuracy, due to threats from military personnel, did not apply to transfer most civilians who spent months in military detention waiting for trial. Moreover, it has been alleged that many civil magistrates collaborated with members of the armed forces to allow arbitrary arrests of innocent civilians in order to extract payment for their release.

The judiciary under the control of the ADFL in Eastern Zaire

When the rebels took control of the regions of Eastern Zaire in November 1996, they substituted the ordinary courts with special tribunals whose judges were appointed by the AFDL itself. Those judges did not have any legal experience or education. Lawyers were not allowed to represent their clients in trials, and there was no right to appeal. Execution of the verdicts of these special tribunals was entrusted to rebel military forces.

Resources

Although Article 97 of the Constitution provides for the independence of judges and states that they are subject only to law, the desperate financial

condition of the judiciary led to far-reaching corruption within the judiciary. In April 1996, the average judges' salary was *increased* to $US 21 per month. A Deputy Public Prosecutor, who occupies the lowest level of the judiciary, earns a monthly wage of $US 13.30, although there is usually a delay of three or four months before he or she actually receives it. In most cases, judges did not even have their offices in the tribunal building and they were obliged to work at home. The County Court of Kinshasa/Gombe, for example, with more than 20 judges, has only an office of 2m by 3.5 m for all the judges. The conditions were so miserable, that in the offices, even paper for typing the verdicts was lacking. Neither the *parquets* and the Tribunals, nor the *Cour Suprême* have a library or archives. Obviously, such conditions invited corruption; trials were generally won by the party which could pay more.

The absence of resources often denies access to justice. Less than 15% of the Zairian population lives in towns, where more than 70% of judges and 95% of lawyers work. In rural areas, the executive authorities administer justice. In Mbandaka, a town in the region of Equateur, the *Cour d'Appel* has not functioned for more than two years because the judges left due to the conditions and no one could be found to replace them.

Cases

Ngola Monaga Ambele {First President of the Court of Appeal and Secretary General of *Syndicat Autonome des Magistrats du Zaire* (SYNAMAZ)} and **Ntumba Katshinga Mukoma** {First President of the *Cour de Surêté de l'Etat* and President of the Autonomus Trade Union of Judges of Zaire (SYNAMAZ)}: On 12 January 1996, Mr. Ambele and Mr. Mukoma were suspended from exercising their functions by the Minister of Justice Singa Udjuu, reportedly because they had denounced, within the SYNAMAZ, the system of appointing judges according to political orientation. In a sweeping assault on the judiciary, all the magistrates who directed SYNMAZ were transferred and SYNMAZ was prohibited from functioning.

Delphin Banza {Lawyer}, **Mbungu Bayanama**{Lawyer}; **Mbune Letang** {Lawyer, President of the National Bar Association}, **Manzila Ludum** {Lawyer}, **Mbuyi Mbiye** {Lawyer, President of the Kinshasa Bar Association}, **Lukusa Mutobola** {Lawyer}, **Matadi Nenga** {Lawyer}, **Kabasele Nfumu** {Lawyer}, **Tchyombo Nkongolo** {Lawyer}, **Tshibangu Tshiasu** {Lawyer}, **Kaudi wa Malenga** {Lawyer}: During 1996, a dispute developed between the Barrister bench of Kinshasa, in the person of its President and the *Ordre National des Avocats* (the National Bar Association), concerning the Kinshasa's Bar Association membership's contribution to the National Bar Association. The conflict paralysed the daily work of the Bar Association of Kinshasa. It also gave the judicial and governmental authorities the occasion to involve itself in the internal affairs of the Bar Association. In fact, on 30 October 1996, the First President of the Supreme Court requested these lawyers desist from filing court documents or appearing in court until the dispute was resolved.

Beya and **Luvungu Nkenge** (Judges): These judges were two of the 28 dismissed and 39 suspended by the Minister of Justice in February 1996 (see above).

Kabudji (Judge of the Court of Appeal in Lubumbashi), **Kaniki** (Judge in the Court of Appeal in Lubumbashi) and **Mayindji** (Procureur de la République): It is reported that in 1996 both these judges and the Procureur were transferred without their consent to the office of the *Advocat Général* because they were suspected of providing information to local non-governmental, human rights organisations.

Emmanuel Lubala (Lawyer and President of *Héritiers de la Justice*, a church-based human rights and conflict resolution group based in South-Kivu): Mr Lubala was forced into hiding in Kinshasa after fleeing from Eastern Zaire. He reportedly feared being arbitrarily arrested or extra judicially executed because his human rights and professional activities on behalf of Tutsis had made him appear pro-Tutsi.

Mr. Mahingi (Judge in Lubumbashi): It was reported that in 1996, Mr Mahingi, holding the office of public prosecutor, was transferred to the office of the Attorney-General, because he was suspected of collaborating with local human rights non-governmental organisations.

Benjamin Lukamba Muganza (Lawyer in Kinshasa): Mr. Muganza was assaulted by Mr. Imbanga, an officer of the judicial police of the *Garde Civile* while Mr. Muganza was going to the office of the *Garde Civile* for a hearing. On 18 December 1996, Mr. Muganza lodged a complaint against Mr. Imbanga.

Jean Claude Muyambo (Lawyer in Lubumbashi and Assistant-Director of the Centre for Human Rights and Humanitarian Law (CDH)): In early 1996, Mr Muyambo was reportedly threatened by Judge Vangu, the regional Inspector of Judicial Services and by the Attorney-General at the Court of Appeal in Lubumbashi. The threats followed the publication of a CDH report on the situation of justice in Katanga.

Kumbu Phazu (Judge) and **Musuakala Sheba** (Judge): On 16 April 1996, the Autonomus Trade Union of Judges of Zaire (SYNAMAZ) advised that Judges Phazu and Sheba had been arrested and detained in the central prison of Makala, because of an "old dossier of 1993". Prior to his arrest, Judge Sheba had refused to order the release of a member of the Prosecutor General's family from prison. It was reported that Judge Phanzu was accused of buying a computer which had been stolen in 1993 and for insubordination. He was convicted and sentenced to a two month suspended sentence.

ZAMBIA

On 2 August 1991, the adoption of a new Constitution introduced a multi-party system and put an end to the monopoly of the United National Independence Party (UNIP), in power since December 1972. In October 1991, the first multi-party presidential and legislative elections were won by Frederick Chiluba and his Movement for Multi-party Democracy (MMD).

Executive power is vested in the President, elected directly by universal suffrage for one renewable term of five years. The President appoints the Ministers of his Cabinet from amongst the members of the National Assembly and they are collectively accountable to the National Assembly. The legislative power is vested in the Parliament, which consists of the President and the National Assembly. The National Assembly is composed of 150 elected members, not more than eight nominated members and the Speaker. The nominated members are appointed by the President, whereas the Speaker is elected "by the members of the Assembly from among persons qualified to be elected as members of the Assembly, but are not members of the Assembly".

The year of 1996 was filled with tension between the Government and the judiciary, the bar association and the press. It began on 25 January, when Vice-President Godfrey Miyanda criticised, in Parliament, a decision rendered by the Supreme Court on 10 January. The Supreme Court nullified the provisions of the Public Order Act, which required police permits before holding public meetings. Mr. Miyanda maintained that the Supreme Court had not taken into account the violent nature of the Zambian political scenario, which, according to the Vice-President, required the provisions of the Public Order Act. He added that " the courts should have cast their nets wider and looked at the wider implications of their judgments". Shortly thereafter, an article published in *The Post*, reportedly one of the few newspapers not controlled by the Government, chastised the Vice-President for interfering with the judiciary. On 20 February 1996, the Speaker of the National Assembly accused Fred M'membe, Bright Mwape and Lucy Sichone, respectively managing director, managing editor and columnist of *The Post*, of "publishing inflammatory and contemptuous remarks which lowered the authority and the dignity of the house".

On 22 February, the Standing Orders Committee, an internal committee of the National Assembly, found the three journalists guilty of contempt of Parliament and sentenced them to indefinite detention. This determination was made, despite the Parliamentary Powers and Privilege Act which requires the compulsory involvement of the Director of Public Prosecutions before instituting a prosecution for contempt of Parliament. On 26 February, the Speaker of the National Assembly issued a warrant for each of the journalists' arrest. It is reported that Mr. M'membe was held in Lusaka central prison and Mr. Mwape in Mpina prison in Kabwe, while Ms. Sichone remained in hiding. The three journalists did not have any legal representation, and they were not given any notification of the proceedings, so that they

could not even appear in front of the Committee to reply to the charges and defend themselves.

In its fifty-sixth session in April 1996, the U.N. Human Rights Committee expressed its concern regarding this case and, in general on the "use of the criminal process to ensure accountability of the press for the veracity of its reports". It continued to find that this use is "not compatible with" the right to freedom of expression in Article 19 of the International Covenant on Civil and Political Rights.

In March, President Chiluba began introducing sweeping reforms to the 1991 Constitution. Of significant concern was a proposed amendment, which, if adopted would have seriously undermined the independence of the Supreme and High Courts. Article 98 of the Constitution (Amendment) Bill proposed to give the President the power to dismiss judges of High Courts and of the Supreme Court for "gross misconduct". Article 98(5) vaguely defined gross misconduct as "the taking into account in the making of a decision in any case, extraneous considerations whether political, personal or otherwise, which have the effect of causing gross misapplication or misinterpretation of the law resulting in gross injustice to an individual or the State or to the general welfare and good governance". The dismissal of judges in such circumstances was to be subject only to the ratification of the National Assembly, without any involvement of an independent judicial tribunal to safeguard the independence of the judiciary, as provided for in the case of removal for inability, incompetence or misbehaviour.

On 29 March, the Law Association of Zambia (LAZ) met and voted to reject the proposed provision. Mr Timothy Katenekwa, Deputy Registrar at the High Court and chairman of the Magistrates and Judges Association, maintained that "the clause [took] away any semblance of security of the tenure of judges and [was] totally unacceptable and incompatible with the rule of law". President Chiluba bowed to the strong public opinion led by the LAZ, the Magistrates and Judges Association and prominent academics. He withdrew the amendments in May.

At the same time the LAZ was condemning the proposed amendment to the Constitution, it was reported that the Government sponsored a Lusaka lawyer and an official from the Ministry of Legal Affairs to contest the elections for the positions of Chair and Vice-Chair of LAZ which were held during its Annual General Meeting on 30 March 1996. The Government was also said to have paid the practising certificate fees for some of its own lawyers to enable them to attend the Annual General Meeting and vote in the elections. Despite the Government's efforts to influence the leadership vote, the former vice-chair, **George Kunda** (see below) was elected chair.

On 28 May 1996, President Chiluba issued a bill amending the Constitution, which required that "a person shall be qualified to be a candidate for elections as President only if (a) he is a Zambian citizen; and (b) both of his parents are Zambian by birth or descendent". The amendment

had the direct effect of excluding former President Kaunda, whose parents were Malawian, from standing in the presidential elections due to take place in November. In protest against the amendment, two Ministers of the Cabinet resigned and Western donors decided to suspend financial aid to Zambia, asking for a referendum or a constituent assembly representing all parties and interest groups to ratify the amendment. On 22 June, however, President Chiluba declared that only Parliament could change the Constitution and that presidential elections would be held under the amended constitutional provisions.

On 12 August, LAZ took out a full page advertisement in the newspaper, *The Post,* to object to some of the provisions of the Constitution of Zambia (Amendment) Bill introduced in May and to condemn accusations being made against judges by various politicians. For example, on 7 July 1996, the then Minister of Legal Affairs told journalists in Lusaka that "as a member of various security organs in the country, I [was] aware of a lot of goings on in the judiciary which if revealed would result in almost the entire judiciary being left vacant". Opposition parties and civic organisations also made statements in support of the judiciary. The LAZ noted in its advertisement that such accusations "...tended to erode the autonomy, impartiality and tenure of the judges".

In its advertisement, the LAZ also criticised, among other things, the Constitutional amendment requiring the Zambian citizenship of the parents of every candidate for the presidency. LAZ further pointed out that because the Constitution provided that the office of the President terminated upon dissolution of the National Assembly, a "presidential vacuum" would be created when the National Assembly was dissolved and elections called. Despite the protests concerning the amendments, President Chiluba declared that only Parliament could change the Constitution and the Bill was passed into law in August. In October, when the National Assembly was dissolved and elections were called, the LAZ argued President Chiluba could not continue in office as "the presidential term is tied up with the life of the National Assembly". Deputy Minister Paul Tembo accused the LAZ of embarking on a campaign of misinformation to disrupt the elections.

On 24 October, former President Kaunda announced that his UNIP would boycott the elections and engage in a campaign of civil disobedience. His protest was largely a result of the amendment to the constitution which precluded him from standing for the Presidency again because his parents had not been born in Zambia. On 18 November 1996, legislative and presidential elections confirmed the Government of President Frederick Chiluba and his MMD. The voter turnout was approximately 40%, likely due to the UNIP boycott. Several monitoring groups raised allegations of electoral irregularities, and the leaders of two of the monitoring groups were arrested on 24 November. On 28 November, amidst calls for his dismissal and for fresh elections to be held, President Chiluba dissolved the Cabinet and placed the military on alert. On 2 December, a new Government was

appointed by the President, without substantial changes save for a new Foreign Minister. The protests which followed the general elections continued until the year's end and on 1 December, former President Kaunda gave President Chiluba three months to step down from power and install a new interim government.

The Judiciary

Structure of the courts and the appointment procedures

Supreme Court

The structure of the judiciary is created by Part VI of the Constitution of the Republic of Zambia. At the apex is the Supreme Court, which is the final court of appeal and the superior court of record. It is composed of the Chief Justice, the Deputy Chief Justice and seven, or more if prescribed by an act of Parliament, Supreme Court Judges. Judges who have specified prior experience may be appointed by the President to the Supreme Court, subject to ratification by the National Assembly. The requirements of prior specified experience and ratification by the National Assembly were included in the Constitution to address previous concerns that there was no objective appointment criteria. However, appointment by the President and the National Assembly cannot constitute an independent appointment procedure. Further, the Constitution allows the President to dispense with the requirement that a judicial candidate have the specified prior experience.

High Courts and Judicial Service Commission

The High Court, split into such divisions as are determined by Parliament, enjoys unlimited and original jurisdiction to hear and determine any civil and criminal proceedings, except for the proceedings falling within the jurisdiction of the Industrial Relations Courts (see below). It also has the power to hear and determine any question concerning the fairness of elections and supervisory jurisdiction in any civil or criminal proceedings before any subordinate court or court martial. The Chief Justice is *ex-officio* judge of the High Court, whose other 20 judges are appointed by the President on the advice of the Judicial Service Commission (JSC) and ratification of the National Assembly.

The JSC is to have "functions conferred on it by this Constitution and such other functions and powers, as may be prescribed by or under an Act of Parliament". The JSC is composed of the Chief Justice as Chair, the Attorney General, the Chair of the Public Service Commission, the Secretary to the Cabinet, a Judge nominated by the Chief Justice, the Solicitor General, a member of the National Assembly appointed by

the Speaker, a member of the Law Association of Zambia, the Dean of the Law School of the University of Zambia and one member appointed by the President. Although the JSC members now include a member of the LAZ, the majority of its members continue to be Government appointees, putting its independence in question.

In addition to the judges, any number of part-time High Court Commissioners could be appointed to supplement the work of the High Court Judges. The Commissioners were however, also legal practitioners, undermining the impartiality and independence of the judiciary. Furthermore, the appointments were extended to full-time Commissioners, who served a "probation" period before being appointed as High Court Judges which would have served as an effective screening device for the Government.

Subordinate Courts

The structure and competence of subordinate courts are established by the Subordinate Court Act. The jurisdiction of a subordinate court depends on its class rating and the type of Magistrate sitting. In every District of the Republic, there is a Magistrate Court which has original jurisdiction in some criminal and civil cases. In every Provincial Headquarters, where there is an office of a High Court, there is also a District Registry managed by a Principal Resident Magistrate or a Senior Resident Magistrate designated as District Registrar. It is reported that this superimposition of offices carried out by the same person caused delays both at the Magistrate Courts and at the High Court level. It was proposed by a number of magistrates and lawyers to separate the functions and appoint different persons to them.

In theory, the Government's Legal Aid Department should provide free legal aid to those appearing before the Magistrate's Court, but practically, it is unavailable to most who are entitled to it. In 1996, the office had 14 attorneys to service the entire country.

Local and customary courts

Local and customary courts are involved in most civil cases at local levels. The Local Courts Act divides these courts into Grade A and B which determines the court's jurisdiction. Their jurisdiction entails issues of marriage, divorce, inheritance and other civil matters, together with some minor criminal offences. The customary laws applied in the local courts vary significantly throughout the country. There are few formal procedures and Section 15 of the Local Courts Act prevents legal practitioners from appearing in these courts. Prominent local citizens play the role of presiding judges and they enjoy a wide latitude in invoking customary law. The judgments are often not in accordance with the Penal Code and it is reported that they tend to discriminate against women.

The Industrial Relations Court

Act N° 36 of 1990 established the Industrial Relations Court, which enjoys exclusive jurisdiction in labour matters, pursuant to the Industrial Relations Act. The Court is composed of a Chair, a Deputy Chair and not more than seven members. A bench is constituted by the Chair, the Deputy Chair and two other members. The Chair and the Deputy Chair of the Industrial Relations Court are appointed by the President on the recommendation of the Judicial Service Commission, whereas the other members are appointed by the Minister of Labour. All the members must be persons with knowledge and experience in labour affairs.

Previously, there was no right of appeal against verdicts of the Industrial Relations Court. The 1990 Act provides for the right of appeal by the Supreme Court, but it will only be able to be invoked after the Minister of Labour makes the appropriate declaration by statutory instrument.

Director of Public Prosecutions

Article 56 of the Constitution provides for the establishment of a Director of Public Prosecutions (DPP), with the powers of instituting and undertaking criminal proceedings against any person before any court, apart from a court-martial. The DPP may also continue or discontinue such proceedings instituted or undertaken by any other authority at any stage before the judgment is delivered. The DPP is appointed by the President and may be removed from office only for incompetence or inability to perform his functions and for misbehaviour. It is important to notice that the provisions concerning the DPP are governed by Part IV of the Constitution, which concerns the executive and not the judiciary.

Disciplinary procedures

All the judges of the Supreme Court and of the High Court may only be removed from office for inability to perform the functions of office, incompetence or misbehaviour. If the President considers an investigation into the conduct of a judge is necessary, he or she shall appoint a tribunal consisting of a Chair and not less than two other members who hold or have held high judicial office. The tribunal must inquire into the matter, report on the facts to the President and advise the President if the judge should be removed. If the tribunal advises the President that the judge should be removed for inability, incompetence or misbehaviour, the President must remove the judge from office. Supreme and High Court Judges are to retire at the age of 65, although the President, on the advice of the Judicial Service Commission may enable a judge to continue in office to conclude his or her duties or extend the appointment for a maximum of another seven years.

Resources

The judicial budget depends on the allocation of resources made, on Parliamentary approval, by the Ministry of Finance to all Government institutions. The failure to allocate appropriate resources to the judiciary has resulted in a backlog of cases, poor administration, delays in both criminal and civil appeals and prolonged trials. It is reported that approximately 2,000 detainees were awaiting trial in Zambian jails. In some cases, defendants have been waiting trial for 10 years.

Cases

George Kunda {Lawyer, Chairman of the Law Association of Zambia}: Mr. Kunda was elected Chair of the LAZ at the March 1996 Annual General Meeting and was an adamant opponent of the proposed amendments to the Constitution which would allow judges to be removed after making politically unpopular decisions (see above). After Mr. Kunda attacked the amendments, newspapers reportedly controlled by the Government alleged that he had a personal interest in opposing the Presidential Citizenship clause, because it was probable that his mother was, in fact, Malawian. Due to those allegations, Mr. Kunda, his wife and his parents were investigated by the Immigration Department. When Mr. Kunda commenced a libel suit against one of the newspapers that had made allegations concerning his origins, an apology was issued by the newspaper.

In a press release dated 6 October 1996, Mr Kunda reported that the Government had been attempting to intimidate him in order to divert his attention from his work as chairman of the Law Association of Zambia (LAZ).

Mathew Ngulube {Chief Justice of Zambia} and **Ernest Sakala** {Judge of the Supreme Court}: Chief Justice Ngulube ordered an inquiry to be held in July 1996 into the conduct of former Minister of Legal Affairs, Dr. Remmy Mushota and Mr. Patrick Katyoka, then member of Parliament. The inquiry was called under the Parliamentary and Ministerial Code of Conduct Act N° 35 of 1994 in connection with an attempt to cash a Government cheque for 210 million Kwachas (approximately 160,280.00 $US). Each of Justices Ngulube and Sakala, among others, sat on the tribunal hearing the charges against Dr. Mushota. In the course of the inquiry, Dr. Mushota and Mr. Katyoka reportedly made allegations of corruption and political bias against Chief Justice Ngulube and claimed that the tribunal members were foreigners and sympathisers with the opposition. However, Dr. Mushota and Mr. Kaytoka failed to lead any evidence to support those allegations and declined to cross-examine those persons they had alleged were involved in the corruption. Both Dr. Mushota and Mr. Katyoka lost their positions as a result of the inquiry.

After the inquiry, Dr. Mushota and Mr. Katyoka again accused Judge Sakala of being a UNIP supporter and a member of the Green Mamba Group. On 8 July 1996, a Government spokesman stated that the Government had no information concerning the allegations by Mr. Patrick Katyoka. On the same day, a police spokesman said the police were not aware of the existence of the Green Mamba Group.

In September 1996, the *Confidential Newspaper,* reportedly a newspaper sympathetic to the Government, accused Chief Justice Ngulube of having raped a 30 year old widow who worked as a cleaner at the offices of the Chief Justice. It was believed by many in the legal community that the allegations of corruption and rape against the Chief Justice were made in an effort by some members of the Government, and in particular by Dr. Mushota, to oust the Chief Justice from his position and replace him with someone predisposed to the Government's position. After the allegations of rape, the Acting Chief Administrator of the Supreme Court announced in a press release, that no one by the name of Charity Chanda, the woman alleged to have been raped, had ever worked at the courts.

The LAZ expressed its support for the Chief Justice in a press release dated 16 September and denounced the accusation as part of a Government strategy to destroy "the entire judiciary and [subverting] the constitutional functions of the Chief Justice". The Zambian Chapter of the Commonwealth Judges and Magistrates Association confirmed that the court records revealed that the courts had "never employed a cleaner by the name of Charity Chanda over the last 15 years". The Association condemned the manoeuvres as a "total fabrication", allegedly orchestrated by Dr. Mushota to discredit the Chief Justice.

No formal charges were laid and the Chief Justice, who maintained his innocence, continued to hold his office and perform his functions. A team of lawyers agreed to represent him voluntarily and obtained an injunction against further accusations. The Chief Justice himself reported the matter to the police and commenced an action for libel. In early 1997, the civil and criminal proceedings against those involved in making the accusations against Chief Justice Ngulube were still pending.

ANNEXES

ANNEX 1

THE 1985 UN BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

The Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985 adopted the Basic Principles on the Independence of the Judiciary by consensus.

The Congress documents were "endorsed" by the UN General Assembly (A/RES/40/32, 29 November 1985) which later specifically "welcomed" the Principles and invited governments "to respect them and to take them into account within the framework of their national legislation and practice" (A/RES/40/146, 13 December 1985).

Whereas in the Charter of the United Nations the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas the organisation and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixty United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the Judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all government and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or communication by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of Expression and Association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, Selection and Training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointment for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.

11. The terms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointment or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional Secrecy and Immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law,

judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, Suspension and Removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

ANNEX 2

THE UN 1990 BASIC PRINCIPLES ON THE ROLE OF LAWYERS

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Havana, Cuba, from 27 August to 7 September 1990 adopted by consensus Basic Principles on the Role of Lawyers.

In its resolution 45/121 of 14 December 1990, the General Assembly "welcomed" the instruments adopted by the Congress and invited "Governments to be guided by them in the formulation of appropriate legislation and policy directives and to make efforts to implement the principles contained therein... in accordance with the economic, social, legal, cultural and political circumstances of each country." In resolution 45/166 of 18 December 1990, the General Assembly welcomed the Basic Principles in particular, inviting Governments "to respect them and to take them into account within the framework of their national legislation and practice."

Whereas in the Charter of the United Nations the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language, or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights recalls the obligation of States under the Charter to promote universal respect for, and observance of , human rights and freedoms,

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safeguards guaranteeing protection of those facing the death penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and co-operation with governmental and other institutions in furthering the ends of justice and public interest,

The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

Access to Lawyers and Legal Services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall co-operate in the organisation and provision of services, facilities and other resources.

4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special Safeguards in Criminal Justice Matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

Qualifications and Training

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognised by national and international law.

10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.

11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

Duties and Responsibilities

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

13. The duties of lawyers towards their clients shall include:

    (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;

    (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;

    (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognised by national and international law and shall at all times act freely and diligently in accordance with the law and recognised standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.

Guarantees for the Functioning of Lawyers

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics.

17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

18. Lawyers shall not be identified with their clients or their clients causes as a result of discharging their functions.

19. No court or administrative authority before whom the right to counsel is recognised shall refuse to recognise the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

22. Governments shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

Freedom of Expression and Association

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

Professional Associations of Lawyers

24. Lawyers shall be entitled to form and join self- governing professional associations to represent their interests, promote their continuing education and training protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

25. Professional associations of lawyers shall co-operation with Governments to ensure that everyone has effective and equal access to

legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognised professional standards and ethics.

Disciplinary Proceedings

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognised international standards and norms.

27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.

29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognised standards and ethics of the legal profession and in the light of these principles.

Centre for the Independence of Judges and Lawyers

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CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

The eighth edition of Attacks on Justice, the annual report of the Centre for the Independence of Judges and Lawyers (CIJL) analyses legal structures and their effects on the independence of the judges and lawyers in 49 countries. It catalogues the cases of at least 572 jurists who suffered reprisals for carrying out their professional duties. Of these, 26 were killed, 2 disappeared, 97 were prosecuted, arrested, detained or even tortured, 32 physically attacked, 91 verbally threatened and 324 professionally obstructed and/or sanctioned This represents 25% increase over the number of cases we reported last year. The publication also includes the responses of 21 governments to these concerns.

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