

ATTACKS ON JUSTICE

A GLOBAL REPORT ON THE INDEPENDENCE
OF JUDGES AND LAWYERS

2002

11TH EDITION



EDITOR:
IAN D. SEIDERMAN

WITH
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INTERNATIONAL
COMMISSION
OF JURISTS

CENTRE FOR THE INDEPENDENCE
OF JUDGES AND LAWYERS
OF THE INTERNATIONAL
COMMISSION OF JURISTS

GENEVA
SWITZERLAND

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**CENTRE FOR THE INDEPENDENCE OF
JUDGES AND LAWYERS
OF THE INTERNATIONAL
COMMISSION OF JURISTS**

**GENEVA
SWITZERLAND**

TABLE OF CONTENTS

Acknowledgements	7		383
Introduction	9	30. Pakistan	383
1. Algeria	17	31. Palestinian Autonomous Areas	391
2. Argentina	23	32. Peru	400
3. Austria	42	33. Portugal	415
4. Azerbaijan	52	34. Russian Federation	427
5. Bahrain	62	35. Saudi Arabia	445
6. Belarus	69	36. Sierra Leone	455
7. Brazil	85	37. Solomon Islands	465
8. Chad	97	38. Spain	477
9. Chile	106	39. Sudan	487
10. China	118	40. Togo	497
11. Colombia	133	41. Trinidad and Tobago	506
12. Côte d'Ivoire	160	42. Tunisia	511
13. Congo, Democratic Republic of	170	43. Turkey	519
14. East Timor	177	44. Venezuela	536
15. Egypt	183	45. Yugoslavia, Federal Republic of	546
16. Fiji	193	46. Zambia	567
17. France	207	47. Zimbabwe	581
18. Gibraltar	223		
19. Guatemala	228	Annexes	
20. India	248	1. United Nations Basic Principles on the Independence of the Judiciary	603
21. Indonesia	265		
22. Iran, Islamic Republic of	277	2. United Nations Basic Principles on the Role of Lawyers	607
23. Israel	292		
24. Italy	303		
25. Jamaica	315		
26. Kenya	321		
27. Malaysia	338		
28. Mexico	355		
29. Mongolia	373		

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INTRODUCTION

The present edition of *Attacks on Justice*, the eleventh to date produced by the Centre for the Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists (ICJ), may well make for dispiriting reading to those looking afresh at the global state of the judiciary and legal profession. Yet, in many respects, the report documents a disappointingly familiar global situation.

As in previous editions, the report uncovers a broad range and variety of impediments and threats - some systematic, some aberrant - to the functioning of an independent and impartial bench and a free bar. The report evaluates the state of the law and policy in the 47 countries featured and exposes individual cases of judges and lawyers that have come under some form of attack resulting from the performance of their professional duties. The report covers the period from 2000 through October 2001, although in a few instances it was possible to revise information to include developments in November and December 2001.

There was no single overarching criterion drawn upon in determining the countries to include in the report. Rather, a number of factors had to be taken into account. First, the inevitable constraints on resources meant that only one-fourth out of the more than 190 existing countries could be considered for analysis. Secondly, there had to be *prima facie* indicators giving cause for concern regarding the conditions of the bench and bar before a country could be selected for inclusion. Such concern might arise from a relatively minor deficiency in legislation regulating the conditions of employment of judges, or it might be considerably more serious, such as a sustained pattern of physical attack against a substantial number of jurists. A third element to be factored in was geographic representation. In seeking to produce a report of global dimension, the ICJ sought to maintain at least rough proportional coverage from all regions of the world. Finally, barriers to access to information somewhat narrowed the roster of candidate countries. Much of the information derives from our network of local sources and it is often difficult to cull reliable information from countries where contacts are languid or altogether lacking. Regrettably, some of the countries which presumably might give rise to the greatest causes of concern vis-a-vis the independence judges and lawyers are also among those most closed to independent research and therefore necessarily excluded from consideration.

PERSECUTION AND HARASSMENT

Threats to judges and lawyers related to their professional functions were manifest throughout all the regions of the world. The present report catalogues the cases of at least 315 jurists who suffered reprisals for carrying out their professional duties from January 2000 until November 2001. Among this group, 38 jurists were killed, 5 disappeared, 44 prosecuted, arrested, detained and/or tortured, 23 physically attacked, 67 verbally threatened and 109 professionally obstructed and/or sanctioned. The ICJ/CIJL also received reports of an additional number of jurists who suffered reprisals in 2000-2001, but was unable conclusively to confirm those reports.

In Colombia, over the past two-and-a-half years, some 12 courts had to be relocated geographically owing to threats by members of armed opposition groups or paramilitary organisations supporting the Government. At least 18 Colombian jurists, including judges, were murdered. On 10 May 2001, the Colombian Ombudsman urged the Government to take measures to prevent the forced displacement of prosecutors and judges as a consequence of threats by armed groups. On 18 September 2001, the Presidents of the Colombian High Courts jointly requested that the President take urgent measures to protect judicial officers.

In Zimbabwe, following judicial rulings, including by the Supreme Court, unfavorable to the position of the Government and relating to land seizures and electoral processes, President Mugabe and certain ministers publicly criticized several judges and characterized certain of them as "relics of the colonial era." Self-styled "war veterans", acting with the support or acquiescence of the Government, invaded the premises of the Supreme Court and threatened judges and both Supreme Court and High Court judges received death threats. The Chief Justice, Anthony Gubbay, came under direct Government pressure, as a consequence of which he assumed early retirement.

In Spain, the separatist group ETA has carried out a campaign of violent attacks, resulting in the killing of three judges during the period under review. In October 2001, some 79 judges and nine prosecutors were reported to be on a list of targets drawn up for attack by ETA. Judges serving in the Basque region were particularly vulnerable to threats and attacks.

Among the many lawyers who encounter persecution, those acting in human rights cases tended to constitute especially vulnerable targets. On 19 October 2001, Digna Ochoa, a prominent Mexican human rights lawyer was murdered, following a campaign of death threats directed against her over the course of several years. The reluctance of the Government to undertake adequate investigations into the threats may well have contributed to this tragic

end result. The Inter-American Court of Human Rights and several mechanisms of the UN Human Rights Commission had made appeals to secure her protection.

In Tunisia, human rights lawyers have been increasingly targeted in recent years. The forms of harassment suffered include the severing of phone lines, close surveillance, intimidation of clients, the initiation of frivolous legal proceedings, defamatory press campaigns, pressure by police, restrictions on freedom of movements and confiscation of documents.

In Guatemala, attacks against jurists have increased, with the UN Human Rights Committee, the UN Committee against Torture and the Inter-American Commission of Human rights each having expressed concern at death threats intimidation and killings directed against lawyers related to the carrying out of their professional functions. At least 13 lawyers were killed during the period under review. On 6 August 2001, the ICJ expressed its concern to the Government regarding the case of public prosecutor Leopoldo Zeissig, who had been prompted to flee the country after receiving public death threats. Mr. Zeissig had successfully prosecuted members of the Guatemalan armed forces in connection with the 1998 murder of Bishop Juan Gerardi Conedera two days after the cleric had released a report bringing to light the involvement of the military in human rights violations during the civil war in Guatemala.

CONDITIONS FOR JUDICIAL INDEPENDENCE

There are a number of preconditions to a fully independent judiciary, the most rudimentary of which are enunciated in the UN Basic Principles on the Independence of the Judiciary (*see Annex I*). Judges must be personally autonomous and insulated from pressures and influences and inducements from the political branches or other external sources. They should be appointed on the basis of objective criteria and should receive adequate and fixed remuneration established by law and not reduced during their tenure. They should serve for life or for a long fixed term, and should not be suspended or removed from office except for reasons related to their capacity to carry out judicial functions. Judges must also have institutional independence regarding administration of courts and assignments of judges.

The present report exposes numerous instances in which these conditions were lacking. For example, in the Democratic Republic of the Congo, the executive was said to carry out the administration of justice *de facto*. The

President enjoyed the power to dismiss and replace judges, magistrates and officials of the Public Office, pursuant to a petition of the Supreme Council of the Judiciary. However, the Council had not been functioning and the ruling political party effectively exercised the Council's powers.

In Venezuela, which has been undergoing a process of judicial reform, some 90 per cent of judges were serving without security of tenure. The processes for appointment were being carried out in an irregular manner during the transitional period.

ACCOUNTABILITY AND CORRUPTION

The integrity of the judicial system requires that the judiciary be not only independent, but also impartial. While judges may bring to the bench varying jurisprudential approaches, it is imperative that they decide cases according to the law, as opposed to extrinsic influences and sources. An ICJ/CIJL meeting of experts convened in February 2000 produced a Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System. It stressed that "corruption... occurs when instead of procedures being determined on the basis of evidence and the law, they are decided on the basis of improper influences, inducements, pressures, threats, or interference."

In respect of Belarus, reports were received indicating a widespread practice "telephone justice", whereby executive and local authorities would dictate to judges the outcome of trials in which they have an interest.

In Indonesia, corruption in the judiciary appears to be systematic, including at the Supreme Court level. The ICJ received information according to which judges in a number of cases had received financial rewards as consideration for favorable judgements. The low scale of judicial remuneration was said to constitute a substantial factor giving rise to judicial corruption.

In China, corruption in the judicial system is endemic. The Government was, however, continuing a self-proclaimed "unprecedented internal shake-up" of the judiciary, intended to combat corruption and improve efficiency, which it had begun in 1998.

In Kenya, a Parliamentary committee composed of members of the ruling party and the opposition published a report concluding that "corruption exists at every level of Kenyan society, but it is strongest in the civil service, the provincial administration, the local authorities and the judiciary."

SPECIAL COURTS AND MILITARY TRIBUNALS

In certain countries, special courts and military tribunals have been established that lack independence or serve to undermine the role of the judiciary. In Chile, military tribunals maintain jurisdiction to deal with all cases involving prosecution of military personnel and, in certain instances to conclude cases that commenced in the civilian courts. These limitations on civilian jurisdiction contribute to the impunity which military personnel may enjoy against prosecution for serious human rights violations.

In Turkey, military courts may hear cases in which civilians are alleged to have impugned the honor of the armed forces or undermined compliance with the draft. The State Security Courts are concerned with the adjudication of political cases and serious criminal cases deemed threatening to the security of the state. Most of these offences relate to the use of violence, drug smuggling, membership of illegal organisations or espousal or dissemination of prohibited ideas. In Egypt, an elaborate exceptional court system exists in parallel to ordinary court system, assuming jurisdiction over a wide range of offences, such as of possession and use of arms and explosives, bribery and embezzlement of public funds.

In Iran, judges of the Revolutionary Courts, established by the Revolutionary Council to adjudicate offenses regarded as "threatening to the Islamic Republic", are reportedly chosen on the basis of ideological commitment rather than judicial competence. The Revolutionary Courts, as well the Special Court for the Clergy and Press Court, were said to be systematically abusive of certain basic elements of due process.

THE JUDICIARY AND THE UNITED STATES RESPONSE TO TERRORISM

The present edition of *Attacks on Justice* was completed largely prior to the tragic events of 11 September in the United States. The terror attacks and the subsequent response by the United States and several other states immediately gave rise to questions regarding the legally permissible bounds of response consistent with state obligations, although it did not become apparent until two months after the attacks that the role of the judiciary would be called into question, most particularly in the United States itself. Thus, while no entry appears in the text for the United States, a few comments are in order regarding the judiciary and the rule of law in that country.

On 13 November 2001, United States President George W. Bush issued an Executive Order authorising the establishment of military commissions to try persons accused of terrorist activities. The order, which gave the appearance of having been conceived in haste and without adequate consideration to the state's domestic and international law obligations, gave short shrift to the most fundamental principles of due process. Under its terms, where "there is reason to believe" that a person "is or was a member of ...al Qaeda" or "has engaged in, aided or abetted, or conspired to commit acts of international terrorism", that person, unless a United States citizen, would be subject to the jurisdiction of a military commission. Some glaringly problematic features of the tribunals, as set forth in the Executive Order, are:

- Lack of recognition of the right of detainees to be afforded access to legal counsel
- Lack of recognition of the right for detainees to be informed of charges against them
- Lack of recognition of the right of detainees to be brought before a judicial authority in order to determine the lawfulness of their detention
- No requirement that trials and other proceedings be open and public
- No requirement that judgements or records of proceedings be publicised
- Lack of recognition of the right of accused persons to be provided with the evidence against them
- The accused does not necessarily enjoy the presumption of innocence
- No evidentiary standard, such a "proof beyond a reasonable doubt", is necessary to secure convictions
- There is no role whatsoever provided for the judiciary in any phase of process
- The only appeal available is to the Executive
- The accused may be convicted by a mere two-thirds majority and may be subjected to the death penalty.
- No notice as to the particular offenses to be covered by the Executive order. (The Order mentions only "acts of international terrorism", without specifying the particular acts may consist in or in what sources of law they are to be found.)
- Jurisdiction is assumed pursuant to an exercise of discrimination on grounds of nationality of the offender. (United States nationals are exempt from jurisdiction.)

On 5 December 2001, the ICJ addressed a letter to President Bush expressing deep concern that the establishment of military commissions could serve to undermine the very principles they are aimed at protecting. The ICJ pointed out that if the military commissions came into operation, as outlined in the Executive Order as it stood, the United States would be in clear violation international standards relating to due process and fair trial, enshrined in both human rights law (the ICCPR) and humanitarian law (Geneva Conventions).

The ICJ/CIJL has had occasion all too frequently to question the independence of military tribunals, both in structural terms, and as they function in practice. The putative US military commissions have yet to come into operation and the regulations defining some of their essential attributes, the promulgation of which is left to the province of the Secretary of Defense, have yet to be issued. Nonetheless, the prospect of the commissions give *prima facie* cause for alarm. In the first instance, the commissions may be constituted of persons bereft of judicial training. In addition, military judges are subject to command discipline and lack basic protections that insulate ordinary judges from undue influence, such as security of tenure. In addition, the proceedings of the commission may be closed, thus precluding scrutiny and review not only by the judiciary, but also by the public. In this regard, it should be stressed that it is a hallmark of a judiciary, operating under the rule of law, that it not only be independent, but be seen to be independent. This end no doubt will be difficult to achieve when those sitting in judgment are not seen at all.

The authority and competency of the judiciary in the United States stands to be eroded substantially should the plan to constitute military commissions to prosecute terrorist offenders be effectuated. The Executive Order provides that the military shall have exclusive jurisdiction with respect to offenses enumerated and that no remedy shall be available in any domestic or international tribunal. This restriction would eviscerate even such venerable principles as *habeas corpus* and the right to appeal. Almost farcically, the only appeal available to a detainee is to the executive, in the person of the Secretary of Defense or President, the very official organ that will have initiated the prosecution.

A second aspect of the United States response that threatens to usurp the function of the judiciary is the disinclination of the Government to apply to detainees alleged to be members of the Afghan Taliban forces or el-Qaeda the provisions of the Third Geneva Convention of 1949. Many of these detainees were being held at the United States military base at Guantanamo Bay.

Article five of the Third Conventions provides that any doubts as to whether detainees are entitled to protection under the Convention are to be resolved by a competent tribunal, i.e., not by the President or members of his executive cabinet. In addition, the fundamental guarantees under human rights law apply to any persons under a State's jurisdiction. Therefore, detainees retain the full range of due process and fair trial rights, including the rights to be brought before a judicial authority, to be accorded the services of a lawyer and to challenge the basis of their detention.

As expressed by the ICJ/CIJL group of experts in the above-mentioned Policy Framework for Prevention and Eliminating Corruption and Ensuring the Impartiality of the Judicial System, "the integrity of the judicial system is central to the maintenance of a democratic society. Through the judicial system the rule of law is applied and human rights protected." When the actions of state officials, especially those which may potentially infringe the rights of individuals, are rendered beyond judicial review, the damage to the democratic fabric and the rule of law within that state is liable to be considerable.

Ian D. Seiderman

Editor

February 2002

ALGERIA

Judges and public prosecutors are not fully independent. Political manipulation over the judiciary remains a principal concern. The judicial system does not provide for fair trials. Lawyers suffer continuous harassment by the executive. A draft amendment to the 1991 legal profession law was proposed by the Government in 2001. This prospective amendment would serve to place lawyers under the full control of the public prosecutor, thereby undermining their independence.

Algeria is a republic, with the President as head-of-state. According to the Constitution, the President has the capacity to appoint and dismiss the Prime Minister, and may dissolve the Parliament. Although the Constitution provides for Cabinet Ministers to be designated by the Prime Minister, in practice the President has exercised substantial influence in respect of such appointments. The legislature is bicameral, consisting of a popularly elected lower chamber, the National Popular Assembly, and an upper chamber, the National Council. One third of the National Council members are appointed by the President, and the other two thirds are elected by and from among the local Assemblies.

Abdelaziz Bouteflika, benefiting from widespread support by the military, was elected President in April 1999. The 1992 state of emergency has remained in force under Mr. Bouteflika's presidency, undermining many constitutional provisions aimed at protecting the rights of citizens.

HUMAN RIGHTS BACKGROUND

Although there have been notable improvements in the human rights situation, serious abuses have persisted in a number of areas, and the overall human rights record of the country has remained poor. The Government has indicated that it is treating allegations of human rights abuses seriously, yet has failed to undertake meaningful and adequate investigations into many allegations of extra-judicial killings, torture, ill-treatment and disappearances involving security forces.

The National Observatory on Human Rights, established by the Government in 1999, was replaced in March 2001 by the National Consultative Commission for the Promotion and Protection of Human Rights. This institutional modification appeared to bring no fundamental change in the mission and policy of the organ. No information in respect of the former human rights body's nine-year action has thus far been made publicly available.

State officials have continued to benefit from a long-lasting impunity. The 1999 Law on Civil Harmony (*Concorde Civile*) and the January 2000 general Amnesty Law have effectively extended impunity to members of armed opposition groups. These laws provide insufficient clarity as to the requirements for benefitting from the amnesty and fail to provide for an independent mechanism investigating individual cases. The legislation is aimed toward a policy of reconciliation and has undermined the rights of victims to seek redress for crimes committed by armed opposition groups. Although the authorities have not provided precise figures as to the number of persons amnestied or exempted from prosecution, government sources have indicated that some 5,500 members of armed groups had surrendered between July 1999 and 13 January 2000 alone. (For a detailed background on Algerian amnesty laws, see *Attacks on Justice, 10th edition.*)

There was apparently some decrease in the number of extra-judicial killings committed by security forces during 2000. However, killings by armed groups increased by some 20 percent compared with 1999, resulting in the deaths of more than 2,500 persons, many of whom were civilians. New cases of enforced disappearance were also reported in 2000. The involvement of the security forces in the approximately 4,000 disappearances committed since 1994 has yet to be clarified, despite pledges by President Bouteflika to take action to solve such cases. In May 2000, the Ministry of Justice claimed that 1,146 disappearances had been clarified, but the Government has declined to provide a list of those cases. No security force member has been prosecuted for involvement in disappearances.

Despite constitutional and the legislative prohibitions on torture and other cruel, inhuman, or degrading treatment, security forces continued to resort to such practices when interrogating criminal suspects and persons accused of involvement in violent activities. The security forces frequently arbitrarily arrested and detained suspects incommunicado. The Government and judicial authorities were also reportedly implicated in the operation of secret detention centers. Under the 1992 Anti-terrorist Law, suspects may be held

in detention for up to 12 days without charge, instead of the usual 48 hours, and police are not required to have a warrant when making an arrest.

Although the Constitution prohibits discrimination based on sex, many women continued to suffer legal and social discrimination. The 1984 Family Code, essentially based on *Shari'a*, institutionalises a lawful status of inequality for women in family issues. President Bouteflika took a positive step towards improving the status of women in the workplace in August 2000 when he increased the number of courts led by female judges. Women remained specific targets for armed groups. Armed opposition forces were said to have engaged in the practice of kidnapping women and holding them captive for the purpose of rape and servitude.

A 1992 state of emergency law and government practice has served to severely restrict the rights of assembly and association. Political groups and non-governmental organisations have often been refused legal registration and permission to hold outdoor demonstrations. The Government repeatedly has prevented public gatherings and has used force to disperse unauthorised rallies. In June 2001, an indefinite ban on demonstrations was imposed in Algiers, in response to widespread unrest. Following the killing of a young boy in a police station near Tizi Ouzou, the capital of Greater Kabylia, a wave of sometimes violent demonstrations took place in April 2001. Security forces broke up the demonstrations brutally, killing dozens of citizens and injuring more than 1,300 persons.

Independent newspapers appeared to cover politically sensitive issues. However, self-censorship was widespread among journalists, in particular with regard to criticism of the army. The Government continued to exert influence on the press through its monopoly over both printing and advertising companies. Broadcast media remained under State control. In June 2001 the Government adopted an amendment to the Penal Code strengthening prison terms and increasing fines for press offences. Under the new amendment, a person who uses an expression deemed "offensive, insulting or defamatory" to the President (article 144 bis) may be sentenced to imprisonment of three to twelve months. (The sentence may be doubled in the event of a subsequent offence.) These sanctions may also be applied in cases of defamation against "the Parliament, or one of its two houses, the National Popular Army" and any "other institution or constituent body." The 1966 Penal Code amendment law also stipulates that anyone offending the Prophet and "*les envoyés de Dieu*" or denigrating Islam may be sentenced to a term of 3 to 5 years imprisonment (Article 144 bis 2).

JUDICIARY

The Government does not fully respect the independence of the judiciary provided for under the Constitution. In August 2000, the commission set up by President Bouteflika in November 1999 to review the functioning of the judiciary presented a report, which has not been made publicly available. Following the submission of the report, the President replaced 80 per cent of the heads of lower courts and 99 per cent of those of higher courts. This measure appeared to be aimed mainly at creating the appearance of good will on the part of the Government, although no essential reform was planned to improve the judiciary. In practice, the judicial system remained slow and inefficient.

JUDICIARY STRUCTURE

The Judiciary is composed of a Supreme Court, three Courts of appeal and a system of lower courts divided among civil, criminal and commercial courts. The jurisdiction of the military courts was previously limited to cases of members of the military forces, but problematically has now been extended to include cases of civilians accused of state security crimes under the state of emergency law.

The Supreme Court regulates the activity of courts and tribunals and the State Council (*Conseil d'Etat*) regulates that of the administrative courts. Conflicts over jurisdiction between the Supreme Court and the State Council are reviewed by the Tribunal of Conflicts. A Constitutional Council examines the constitutionality of treaties, laws and regulations and has the capacity to nullify unconstitutional acts.

JUDGES AND MAGISTRATES

Under legislation dating from 1989, the High Judicial Council is responsible for the appointment, promotion and transfer of magistrates. However subsequent decrees have curtailed the independence of the High Judicial Council and reinstated broad powers to the Minister of Justice in respect of the career of magistrates. Thus, judges and prosecutors have been subjected to the will of the political organs and security of tenure is no longer provided. The Algerian magistrature thus remains strongly influenced by the Government. The resulting manipulation of magistrates has served to undermine the right of individuals to a fair trial.

The Government has issued orders according to which judges have been unable to discharge and release suspects, even temporarily. Judges and prosecutors expressing their disapproval over judicial functioning or political manipulation of the judiciary have been subjected to disciplinary sanctions, suspension or transfer. Some judges were reportedly arrested and detained following declarations or decisions contradicting government policy or instructions.

Security forces frequently handled the cases of armed opposition suspects in a violent and summary manner, thus preventing judicial due process. When a suspect is brought to court, magistrates typically allow manifest irregularities, such as prosecution based on a declaration made under torture and summary investigation.

LAWYERS

The capacity of lawyers to carry out their professional responsibilities in court was strictly circumscribed by the authorities. Lawyers referring to human rights, torture or manipulation of the judiciary were frequently subject to severe sanctions. Government officials applied pressure to lawyers through a range of measures aimed at hindering their work.

The legal profession is regulated by law 91-04 adopted in 1991. Following the submission of recommendations to the Government by the National Commission for Judicial Reform, a proposal to amend the 1991 law was drafted. If adopted, this text would clearly undermine the independence of lawyers by placing them under the absolute control of the public prosecutor. The proposed amendment provides for a judicial and police inquiry to be undertaken prior to any inscription to the Bar. The powers of the prosecution would increase substantially, in particular through the role of the public prosecutor in disciplinary complaints lodged against lawyers. Contravening the United Nations Basic Principles on the Role of Lawyers, the draft amendment (by modification of article 48) empowers the public prosecutor to institute proceedings against barristers with the Disciplinary Council of the Order of Barristers. Moreover, the 13 Presidents of the Algerian bars would be required to inform the public prosecutor of the decisions of disciplinary councils draft article 53), and the state prosecutor would be able to appeal against the decisions (draft article 54). The 1991 law had restricted transmission of disciplinary-related information and the right to appeal disciplinary decisions to the Justice Ministry and the offending lawyer.

The provision requesting the President of a bar to be present when police search the office of a lawyer would be removed from article 80 of the 1991 Law, opening the door to further abuses of professional secrecy. The draft text also severely curtails the right of lawyers to freedom of expression. Lawyers would not have the right to communicate any case-related information to the general public (draft additional article 79 bis). Moreover, they would be prohibited from boycotting or withdrawing from a court hearing (draft additional article 87 bis). It was reported that sanctions to punish the violation of this provision would include sentences of imprisonment.

The adoption of this draft amendment would seriously damage the independent functioning of the legal profession and overall administration of justice in Algeria. On 30 June 2001, the President of the National Union of Algerian Bars addressed the Justice Minister in order to express the concern of the Bar over the threats posed by the draft amendment to the legal profession law.

CASE

Sofiane Chouiter [lawyer, member of the Algerian League for the Defense of Human Rights (*Ligue algérienne de défense des droits de l'homme*)]: Mr. Chouiter has been subject to harassment since 24 February 2000. Police officers have been following him on a routine basis, thus severely restricting his ability to carry out his professional duties.

ARGENTINA

Although the military's position has become less tolerant, some judges took steps to bring to justice persons responsible for human rights violations that occurred during the rule of the military juntas. The judiciary from Buenos Aires province found itself under political pressure from the provincial executive in the context of increasing criminality. Following the same trend, new laws granting enhanced powers to the police were adopted in order to combat crime. The judiciary has not been able to exercise a proper judicial control over cases of police brutality. The Law of Defence of Democracy, which denies the right to appeal, continued to be in force. The Federal Prosecution has adopted additional elements of an adversary system.

BACKGROUND

The Federal Constitution, most recently amended in 1994, provides for a constitutional, representative and federal republic. Each of the 23 Argentinean provinces and the capital Buenos Aires has its own constitution. The President, who is elected by popular vote for a four-year term and allowed to stand for re-election only for one additional period, exercises the Federal Executive power. The President is chief of State, head of the Government and responsible for administration.

A bicameral Congress exercises the federal legislative power. The legislature has been in transition since the adoption of a 1994 constitutional amendment. The Chamber of Deputies is constituted of 257 deputies, who are elected for a renewable four-year term. Half of the Chamber of Deputies is replaced every two years. The 72-seat Senate is elected for a six-year term. Every two years one third of the Senate is renewed. Those elected to the Senate in the 2001 were assigned at random to serve either a two-year, four-year, or full six-year-term, beginning a rotating cycle under which one third of the body is renewed every two years. The administration of justice is reserved to a court system.

President Fernando de la Rúa assumed power in December 1999, leading the Alliance (*Alianza*), a centre-left coalition between the Radical Civic Union (UCR) and the Front for a Country with Solidarity (FREPASO)

parties. In October 2000, the Vice-president, Carlos Alvarez, resigned following differences with President de la Rúa over how to handle a Senate bribery scandal, which allegedly involved some of the members of the cabinet. However, his FREPASO party remained loyal to the Alliance. On 29 December 2000, a federal judge issued a lack of merit ruling related to the charges against the senators. In October 2001, Congressional elections were held in Argentina. The Peronist opposition party became the largest party both in the Senate and in the Chamber of Deputies. The new composition in the Federal Congress would possibly reduce the Government's power to carry out further economic reforms.

The Argentinean economy continued a three-year slump, during which unemployment has risen to 15 per cent. The Government undertook efforts to assure investors it could make payments on its US\$ 130 billion debt. In June 2001, President de la Rúa presented a plan, the second since December 1999, for cutting spending and increasing taxes in order to reduce the country's budget deficit. Despite initial opposition to reductions in state pensions and salaries from the Peronist party, the reforms were approved on 30 July 2001. Large popular demonstrations throughout the country ensued and threats of debt default, devaluation and flight of capital from the country persisted.

HUMAN RIGHTS BACKGROUND

On 8 February 2001, Argentina ratified the treaty for an International Criminal Court.

Extrajudicial killings, torture and disappearances carried out by the police were reported throughout the period, some of these resulting in the death of the victims. Cases of killings and disappearances involving police officers were also reported. In August 2000, Guillermo David San Martín, President of the Buenos Aires provincial Supreme Court, asked the Minister of Security to take measures to stop the torture of minors in police stations. According to a report by the government adviser for minors in San Isidro, allegations of beatings of minors in police stations doubled in the first seven months of 2000, reaching a total of 159 cases.

Police used violence against demonstrators on several occasions during this period. On 19 April 2000, members of the Federal Police reportedly attacked a demonstration against labour reforms, wounding 35 demonstrators. In 2000, in Salta and Corrientes provinces, provincial police efforts to break up demonstrations resulted in the death of three demonstrators. A number of

attacks and threats were made against journalists, especially in the Santiago del Estero Province. A fake bomb was placed under the car of a journalist of the periodical *El Liberal*, which had accused the provincial government of Carlos Juárez (Peronist - currently ruling the province for a consecutive fifth term) of trying to ruin it. The newspaper *La Voz del Interior* also reported that his correspondent in Santiago del Estero received threats indicating that he should desist from criticizing the Governor.

In September 2001, fifteen former police officers and five others went on trial, accused of abetting the 1994 bombing of the AMIA, an Israeli-Argentinean association, in Buenos Aires, which claimed 86 lives. The suspects are accused of supplying the stolen car used in the attack and face a list of other charges, although none of the suspects is suspected of direct involvement in the bombing. Those facing the most serious charges could get a maximum of 25 years if convicted. Heading the list of defendants is Juan José Ribelli, a former Buenos Aires provincial police chief, who is accused of directing a remarkably profitable band of police officers.

RECOMMENDATIONS OF THE HUMAN RIGHTS COMMITTEE

In October 2000, the UN Human Rights Committee (HRC) examined Argentina's third periodic report on its implementation of the International Covenant on Civil and Political Rights. CCPR. The HRC highlighted, among others, as subjects of concern:

- The uncertainty over the status of Covenant rights in domestic law. The Committee recommended clarification on the State Party's statement that the Covenants are applied in a manner that is "complementary" to the Constitution.
- The fact that many persons who are covered by the amnesty laws continue to serve in the military or in public service, with some having enjoyed promotions.
- Severe overcrowding, poor quality of basic necessities and services, including food, clothing and medical care, and abuse of authority render prison conditions an impediment to meeting the Covenant's standards.
- Allegations of practice of torture and ill treatment by police officials and the fact that this phenomenon is not adequately addressed by the State.
- Attacks on human rights defenders, judges, complainants, participants in peaceful demonstrations and members of the media.

IMPUNITY

Beginning in 1973, a progressive deterioration of the rule of law took place with the fight against violent guerrilla organisations operating at the time serving as the pretext for the decline. State policies involving gross, systematic and widespread human rights violations were conducted through criminal actions by the organisation known as AAA (the Argentinean Anti-Communist Alliance). Targets of these actions included dissident labour unions and universities. A number of repressive laws were adopted with many State functions being effectively ceded to the armed forces. This process culminated in the *coup d'état* of 24 March 1976. During the seven years that followed the coup, the ruling military junta was responsible for a massive number of human rights violations, which, according to some legal analysts, may have attained the level of crimes against humanity. Included among the abuses were some 8,960 cases of disappearances. Alleged members of "subversive organisations", their sympathisers, associates, relatives or anyone perceived as a potential opponent of the Government were the targets of the military junta's repressive policies. Congress was dissolved, the state of siege imposed by the previous government was renewed, legal guarantees were disrespected and formal arrests were replaced by abductions.

In 1983, the state of siege was lifted and a civilian government, headed by President Raúl Alfonsín, was installed through free elections. A number of high-level military officials, including members of the military junta, were criminally prosecuted and convicted during the 1980's for their abuses. However, most of military human rights violators were protected under broad amnesty laws adopted between 1986 and 1987, namely, the Full Stop Law (Ley 23.492) and the Due Obedience Law (Ley 23.521). A number of pardons issued by then-President Menem in 1989 and 1990 freed those who had been convicted. Although the "Due Obedience" and "Full Stop" laws have been repealed by the Parliament, the effects of the legislation have not been annulled. Investigations into amnesty-covered human rights abuses may be carried out (Truth Trials), but can not lead to criminal convictions. The so-called "Truth Trials" (*jucios por la verdad*), carried out since 1995, have as a purpose to provide relatives of victims with the truth of what happened to their family members.

Despite the amnesty laws, the Argentinean judiciary has called to account eleven former military officials, including the President of the first military junta Jorge Rafael Videla, involved in cases of disappearance of children, a crime explicitly excluded from the amnesty laws. In 2000, General (ret'd.) Santiago Riveros was placed under house arrest, having been accused of

involvement in the theft of babies born in the Campo de Mayo military hospital.

In July 2001, Jorge Rafael Videla became the first former Latin American leader to be indicted for participation in Operation Condor, the joint repressive missions carried out by the Southern Cone dictatorships in the 1970's and 1980's. Videla is accused of participating in an illicit association created to kidnap, torture, assassinate and disappear individuals and commit other related crimes. The indictment also includes an embargo of one million dollars against Videla. The former dictator's attorneys maintain that the sentence he received in 1985 immunises him from undergoing a new trial for the crimes committed by his Government. Argentine federal judge, Rodolfo Canicoba Corral posited as legal grounds in moving forward on the case the theory that "forced disappearance" is a crime that is ongoing until the fate of the victim is known. As such, it is not included among the crimes falling under the amnesty laws in Argentina. Although the personal situation of Videla may not change if he were to be found guilty in this case, the jurisprudence establishes a precedent that may be used in similar cases involving military officers who still have not been judged.

Taking into consideration that the crimes committed during the military juntas constitute crimes against humanity and that these offences also affected foreigners, several countries have started proceedings in order to bring to account military personnel allegedly involved in these crimes. Spanish, Italian, French, Swedish and German courts have issued international warrants of arrests against several former and current army officers and have asked the Argentinean Government to allow the extradition of these persons. The Government has repeatedly refused to carry out any extradition, arguing that these persons have already been judged (*ne bis in idem*) and on the grounds of territoriality.

An Argentinean judge requested that former Chilean military leader Augusto Pinochet be extradited to face investigations regarding his alleged participation in the assassination of Gen. Carlos Prats and his wife, who were killed by a car bomb in Buenos Aires on 30 September 1974. Chilean General Enrique Arancibia was sentenced to life imprisonment for the murder.

LEGAL CHALLENGE OF AMNESTY LAWS

On 6 March 2001, Federal Judge, Gabriel Cavallo, took an important step towards stemming impunity for crimes against humanity committed during

the military regime. Judge Cavallo was in charge of the case involving an eight-month girl, Claudia Poblete, who in 1978 was allegedly kidnapped by former police agents together with her parents, Gertrúdis Hlaczik and Jose Poblete. Judge Cavallo declared the “Due Obedience” and “Full Stop” laws to be “unconstitutional and invalid” and proceeded to prosecute the defendants both for kidnapping the child and for the disappearance and torture of her parents. The Federal judge decided not to apply the amnesty law by exercising the constitutional control powers that judges have within the Argentinean legal system when dealing with cases involving constitutional rights. Although Judge Cavallo's decision only directly affects this particular case, it represents an important judicial precedent in the combat against impunity. On November 9, 2001, the three-judge Federal Criminal Court (*Sala II en lo Criminal y Correccional Federal*), unanimously confirmed Cavallo's decision both in regard to the charges, which the court considered to be crimes against humanity, and with regard to the amnesty laws, which it also regarded as unconstitutional and without legal effect. As the present report was being finalised, the defendants were expected to appeal to the Criminal Appellate Court, but the Supreme Court will eventually decide conclusively on the validity of the amnesty laws. If the Supreme Court confirms the nullification of the amnesty laws, it will both invalidate the application of the law in the concerned case and also overturn rulings issued while the laws were in force.

The ICJ, together with Human Rights Watch and Amnesty International submitted to the judge of the Federal Criminal Court an *amicus curiae* (friend of the Court) on the incompatibility of the amnesty laws with international law and, particularly, with Argentina's obligation to prosecute and convict those responsible for serious human rights violations. The *amicus curiae* concluded that the full stop and the due obedience laws constitute a violation of the international obligation of Argentina to guarantee effective remedies for the victims of human rights violations and their relatives; that the judicial rulings based on these laws are not valid and cannot serve as arguments for impeding prosecutions of these crimes; that the derogation of the mentioned laws by the Argentinean Parliament does not comply with international law; that Argentina cannot use domestic law in order to avoid compliance with international obligations, since to do so would violate the *pacta sunt servanda* principle; and that the national tribunals have the obligation not only to abstain from applying the amnesty laws, but also to annul them in order to fulfil Argentinean international human rights obligations.

In October 2001, Judge Claudio Bonadio became the second magistrate to challenge the country's amnesty laws. Judge Bonadio charged a former head of the Argentine Navy with stealing property from persons who disappeared during the military regime.

ARMY'S ATTEMPTS TO STOP JUDICIAL PROCEEDINGS FOR PAST HUMAN RIGHTS VIOLATIONS

Changes in the high command of the armed forces have meant a setback regarding the attitude of the military toward human rights cases for past human rights violations. Regarding the "truth trials", the army has exercised pressure on the Government to eliminate them. In the context of these trials, many military officers have been asked to declare under oath. Due to the resistance of some army members to declare and because some testimonies have been clearly inaccurate, some army officers have been detained. The Secretary General of the Army, General Eduardo Alonso, visited the detained military officers in several provinces in order to express the army's support for them.

Another strategy of the armed forces has been to try to transfer jurisdiction over cases of disappearance of children to the military tribunals. In August 2000, the Supreme Court refused the Supreme Council of the Armed Forces' petition to transfer jurisdiction over the Santiago Riveros case, mentioned above, to the military tribunals. Furthermore, there were attempts from the Buenos Aires city judiciary to hold jurisdiction over "truth trials", apparently with the army's backing. In November 1999, in the context of a case before the Inter-American Court of Human Rights (IACHR), the Argentinean Government had agreed to guarantee the "right to the truth", to legally recognise it and to maintain the jurisdiction of federal chambers in such cases and of federal first instance judges in cases of disappearance of children. Therefore, the Army's attempts to transfer jurisdiction in these cases contravene international obligations of Argentina.

Finally, there have been attempts to establish a roundtable, *mesa de diálogo*, as an alternative to justice. Proposals for a *mesa de diálogo* were inspired by a similar body created in Chile. The Chilean roundtable is the result of an agreement between the Chilean Government and the armed forces in which the latter committed themselves to collaborate in finding information on the whereabouts of the disappeared. Anonymity was ensured to those who provided information.

JUDICIARY

The Constitution provides for an independent judiciary. However, its processes are sometimes subject to political influence and inefficiencies. Delays, backlogs, changes of judges and an inadequate administrative support were reported during the period under review.

STRUCTURE

The judiciary is organised as a federal and provincial system. Provincial constitutions must comply with the principles and guarantees provided in the federal Constitution. The federal judiciary is composed of a Supreme Court, which exercises jurisdiction throughout the territory, and appeals chambers that have jurisdiction over judicial districts. There are also judges of first instance for criminal and civil and other matters.

Each province of the Federation organises its judiciary in accordance with its own constitution. The structure of the provincial judiciaries comprises a High Court, as the highest court in the province, and lower courts. These have jurisdiction over civil, criminal, labour and fiscal matters reserved for the provinces. In several provinces, its judiciaries are subject to the political and economic influence of powerful local families and political groups. An example is San Luis province (see *Attacks on Justice 2000*, in which local institutions, including the judiciary, collapsed. In Corrientes, the federal government had to suspend local institutions, impose direct rule and appoint an intervening committee. The head of the committee temporarily suspended the security of tenure of all provincial judges and ordered a new process of evaluation of the High Tribunal of the Province. In December 2000, the President was granted authorization by the Congress to continue ruling Corrientes directly and to suspend the three branches of power in the province. Finally, in the October and November 2001 elections, new local authorities were elected and the normal institutional life of the province was restored.

In Santiago de Estero province, the lack of independence of the judiciary, due to the prolonged hegemony of a single political group, is one of the main sources for the its poor human rights record.

In Buenos Aires province, the executive power attempted to act on several occasions against the independence of the judiciary, in the context of the high criminality the province suffers. Press statements, from the Governor, Carlos Ruckauf, accused the judiciary of "having a weak attitude with regard to criminality", and "of being in favour of freeing murderers". Furthermore,

judges who contravened the provincial executive's interpretation criteria were threatened with facing eventual judgements against them. The Association of Magistrates of Buenos Aires labelled the executive's statements as "an inadmissible interference in the functions of the Supreme Court of Buenos Aires Province".

OFFICE OF THE PUBLIC PROSECUTOR AND OF THE PUBLIC DEFENDER (MINISTERIO PÚBLICO)

The Office of the Public Prosecutor (*Ministerio Público Fiscal*) and the Office of the Public Defender (*Ministerio Público de la Defensa*) are part of the Ministerio Público. The Public Ministry is an independent organ with functional and financial autonomy. The Public Prosecutor's office has the power to start criminal investigations and to participate in the prosecution of offenders. However, its powers are restricted by a code of criminal procedure that follows an inquisitorial system of criminal justice, limiting the role of the Public Prosecutor and giving the investigating judge (*juez de instrucción*) the control of the investigation stage. Article 196 of the Criminal Procedure Code provides that the investigating judge may delegate his function to the prosecutor.

Several legal reforms occurred aimed at implementing a more adversary system. Law 24.826 establishes that in cases in which an individual is captured *in flagrante*, and where in principle it is not mandatory to apply preventive detention measures, the prosecutor shall be in charge of the investigation (amending article 353 bis of the Criminal Procedural Code). Law 25.409 provides that prosecutors shall be in charge of the investigation of cases in which the author is unknown (Modifying Art 196 *bis*, *ter* and *quáter* of the Criminal Procedural Code).

The Office of the Public Prosecutor is composed of prosecutors who function before the different level courts. The national executive, following ratification by two thirds of the Senate, appoints the Attorney General. Other General Prosecutors are appointed by the President and ratified by the Senate from a list of three candidates presented by the Attorney General. The Attorney General's list is integrated through a public contest. The Office of the Public Defender has the duty to exercise public defence and to carry out all actions directed toward defending and protecting human rights. It is headed by the Public Defender. The Public Defender and the officers of this agency are appointed in the same way as its counterparts in the Office of the Public Prosecutor.

Members of the Public ministry enjoy security of tenure while on good behaviour and as long as the officer is less than 75 years old. Removal procedures against the Attorney General and the Public Defender must comply with articles 53 and 59 of the Constitution. Other officers may only be removed by a Judgement Tribunal (*Tribunal de Enjuiciamiento*) due to bad performance, grave negligence and for intentionally committing crimes as stipulated under Law 24.946.

ADMINISTRATION

The 1994 constitutional amendments provided for the establishment of the Council of the Magistracy (*Consejo de la Magistratura*). In 1999, the implementing legislation passed and in the same year the Council began its work. The Council of the Magistracy is composed of 20 members elected by different constituencies: the judiciary, Congress, lawyers associations, the executive branch and the academic and scientific community. They serve for a period of four years, renewable only once. The Council has authority to appoint the Administrator-General of the judiciary, to initiate investigations and to bring judges before an impeachment jury (*jurado de enjuiciamiento*), to organise and oversee the education of the judiciary, to introduce training programmes and to select candidates for federal judgeships. The Council is divided into four sub-committees with four distinct functions: selection and training of magistrates, discipline, accusation and administration.

The Council of the Magistracy is in charge of the resources of the judiciary. A constitutional provision guarantees that judges will receive a salary as compensation for their work, which cannot be reduced while they remain in their posts. The judiciary submits a budget that is sent to parliament for final approval after having been examined by the executive.

Appointment and Security of Tenure

The President has the power to appoint the justices of the Supreme Court with the consent of two thirds of the Senate. The President also appoints judges for the lower federal courts following the submission of a list of candidates by the Council of the Magistracy. All judges enjoy life tenure until the age of retirement. In 1999, The Council started to select candidates for judicial vacancies in several parts of the country. Nonetheless, it still does not function fully; the number of judicial vacancies has increased, although some of the vacancies for first and second instance judges have been filled during the second half of 2001.

Article 13 of Law 24.937 of the Council of the Magistracy elaborates a long procedure for the selection of candidates for judgeships other than Supreme Court justice positions, including pre-selection by a jury composed of judges, lawyers and law professors, and a favourable vote by the whole council before the candidate is included in the list to be submitted to the President.

Removal Procedures

The removal of Supreme Court justices is carried out by Congress through a political trial (*Juicio Político*). The Chamber of Deputies has the power to accuse Supreme Court justices before the Senate on the grounds of having wrongly performed their functions or having committed a crime. The Senate decides on the removal of the implicated justice by a two-thirds majority (Article 59 of the Constitution). Political trials are characterised as being extremely slow.

The Council of the Magistracy has the power to initiate investigations as well as to formulate charges against judges of the lower courts before the impeachment jury (*jurado de enjuiciamiento*). The removal is decided by this jury, which is composed of representatives of the judiciary, the legislature and lawyers associations, after a procedure that affords due process to and respects the right of defence of the accused judge (Article 25 of Law 24.937). The final decision of the jury, however, cannot be challenged. Only a request to the jury to clarify its decision is permitted (Article 27). However, proceedings against judges of lower courts that started before the 1999 establishment of the Council are still carried out by Congress through a political trial (*Juicio político*), which, as mentioned above, distinguished for being slow.

During the period under review, a number of federal judges were subjected to disciplinary proceedings and some of these were suspended or dismissed from their posts, mostly on charges of misconduct. Most of these proceedings were perceived as being in compliance with constitutional provisions.

LEGAL REFORMS TO FIGHT CRIMINALITY

During the period under review, the Government passed legislation with the alleged purpose of fighting the worrying criminality rates Argentina faces. The new laws, directed at hardening the State's position with regard to

criminality, have been criticised for being an inappropriate response to a legitimate public concern.

Law 24.390, known as the “two for one” law, was modified during the period under review. The modified law was a response to the grave problem the Argentinean judiciary faced regarding the length of judicial proceedings and the fact that the prisons were full of persons who had not been sentenced. Law 24.390 provided that preventive detention should not be longer than two years, and that only exceptionally could it be prolonged for one additional year. Furthermore, the “two for one” law established compensation for those that had suffered preventive detention for more time than provided for by law. For these persons every extra day spent in preventive detention would be counted double at the moment of computing the prison term, if the defendant were found guilty. This was supposed to be a provisional and exceptional measure, however it became the general rule, as pre-trial detention continued to constitute a significant problem in the Argentinean criminal justice system. The only consequence was that sentences became shorter. As a response to the common criminality the country suffers, Law 25.390 was passed to modify Law 24.390 and eliminate the “two for one” system. The new law continued to establish two years as the maximal pre-trial detention term, however it did not provide for any consequence in case the term had not been respected.

Law 25.434 introduced substantial changes in the Code of Criminal Procedures CPPN (*Código de Procedimiento Penal Nacional*). It was also a response to the concerns arising from the criminality Argentina faces. The new law modifies article 189 of the CPPN by giving powers to police officers to ask suspects caught in flagrante for information about relevant circumstances in order to “direct the immediate continuation of the investigations” without following the formalities that are necessary in any declaration given to a judge. Although the new law establishes that these declarations will not have validity at any trial, it is possible that these declarations may be considered in the proceedings through the testimonies police officers. Law 25.434 also allows the police to carry out searches of persons without judicial warrants in any case, and not only in urgent cases, as was provided for in the former system. The same was provided regarding police powers to undertake searches of cars. Law 25.434 also broadened the power of the police to amplify or change the purpose of the search of a house if there is evidence that a crime other than the one that originated the search was committed. Several Argentinean NGOs have considered the new laws to be unconstitutional and in breach of the international human rights obligations of Argentina.

INEFFICIENT JUDICIAL CONTROL OVER POLICE IRREGULARITIES

Although there are cases in which judges and prosecutors exercise a proper judicial control, judicial investigations of brutalities committed by the police are commonly considered to be at least unsatisfactory.

Two patterns have been identified in the inefficiency of judicial control. The first involves cases in which the judiciary does not investigate evidence against police officers. Judicial officers once confronted with a case in which a person has been injured or killed as a consequence of police actions, do not carry out investigations directed toward establishing the probable responsibility of police officers. On the contrary, the police's version of the facts many times is considered to be enough. Private investigations, searches undertaken by relatives and even contradictions in the statements of the police have all highlighted the fact that probable police brutality has not been properly investigated.

Another pattern which highlights the inefficient control over police irregularities, is that judicial officers do not investigate actions by the police directed toward covering up irregularities. There have been several cases in which police officers, after having committed a crime, carry out serious irregularities and unlawful acts with the purpose of covering up their own crimes. These acts have become clear once the proceedings have started and, many times such acts are not properly investigated and punished by judges. Death threats against lawyers of the victims are one of the most common modalities of police irregularities and, as with other irregularities, generally have not been properly addressed by the judiciary.

LAW OF DEFENCE OF DEMOCRACY (LAW 23.077) AND THE DENIAL OF THE RIGHT TO APPEAL

Argentina continued to disregard its international obligations under the Inter-American Convention on Human Rights and the International Covenant on Civil and Political Rights. In its Report No 55/97, the Inter-American Commission of Human Rights (IACHR) recommended that Argentina correct the incompatibility existing between the Law of Defence of Democracy and the country's obligation under the Convention to provide the judicial guarantee of the right to appeal for persons tried under Law. 23.077. This law provides that trials should start in a second instance court, thereby impeding the fulfilment of the right to appeal. The IACHR issued this recommendation as part of its ruling in a case involving members of the "All for the Fatherland

Movement” - MPT (*Movimiento Todos por la Patria*). MPT members were judged under the aforementioned law following events of 1989 in which a group of them carried out an armed attack against military barracks of the Third Mechanised Infantry Regiment in La Tablada, Buenos Aires Province. The persons involved in these acts received sentences from ten years to life imprisonment.

During the period under review, the legislature carried out attempts to amend the law and recognise the right to appeal of the Tablada prisoners. The most important attempt was the bill presented to the Chamber of Deputies in August 2000, however these efforts have not been successful and at the moment the law continues to be in force. Following a presidential decree on commutation of sentences, most of the prisoners involved have been released on parole or freed permanently.

CASES

Carlos Varela, Diego Lavado and Alejandro Acosta [lawyers]: On 31 October 2000, the three lawyers allegedly faced harassment for having taken on two cases in which police officers were accused of killing persons in their custody. In June 2000, defamatory statements about the lawyers were distributed in the press. In August 2000, the three received threatening phone calls and on 24 October 2000, their offices were broken into and files stolen. An anonymous phone call later claimed that Mendoza police investigators were responsible for entering the office. Criminal investigations started to identify the perpetrators of these acts and the police pledged to patrol the area at night and during weekends in order to provide better security.

Matilde Bruera [lawyer]: Ms. Bruera is a lawyer in Rosario (Santa Fe province) engaged in the fight to end impunity for persons guilty of police brutality and of serious violations committed during the military junta. In July 2000, Ms. Bruera received a parcel in her office, inside of which was a hollowed-out book containing a 450-gram block of explosives, a battery, and cables. The parcel did not include a detonator, but carried the message “rest in peace”. During the investigation, the police discovered the phone number from which the death threats had come, but it turned out to be that of Mr. Daniel Luna, a colleague of Ms. Bruera. After denouncing the manoeuvre to the investigating judge, Mr. Luna received a package on 17 November 2000, with the sender’s name identified as that of Ms. Bruera. Mr. Luna called the police and a detonator and an incendiary device were found, which could have wounded him very seriously. On 7 November 2000, Ms. Bruera

also received a letter saying: "Bruera, we are going to kill you with a bullet to the head". In December 2000, Ms Bruera demanded protection from the Argentinean authorities.

Ms. Bruera ultimately denounced the campaign of threats directed at her and her colleagues, in particular death threats issued against lawyers Juan Robert Coria, Lindolfo Bertinat, Victor Garavelli, Juan Lewis and María Eugenia Caggiano, who heads the Argentine Workers' Centre (CTA) in Rosario.

María Romilda Servini de Cubría [judge]. Ms. Servini and her judicial secretary allegedly received death threats in May 2001. Apparently, the threats were related to the investigations carried out by these judicial officers regarding the kidnapping of children during the Argentine "dirty war" (1976-1983). Ms. Servini ordered the preventive detention of former navy Captain, Alfredo Astíz, in preparation for his eventual extradition to Italy. An Italian Court requested the detention of Astíz and probably will ask for his extradition for the alleged kidnapping and disappearance of three persons of Italian ancestry disappeared in Argentina in 1976 and 1977 respectively. In January Astíz publicly admitted his participation in the killing and kidnapping of people regarded as enemies of the military regime.

Mariano Mansilla [lawyer]: Mr. Mansilla is a founding member of the Argentine Committee for Legal Action. In May 2001, the High Court of Neuquén province took a decision to request the local Bar Association to sanction Mr. Mansilla. These sanctions will not allow Mr. Mansilla to exercise his profession. Harassment against Mr. Mansilla allegedly started the day after he came back from Geneva (Switzerland) where he denounced the alleged Argentine State policy of discrimination against Mapuches and immigrants. Once he returned, Mr. Mansilla gave an interview to a newspaper in which he expressed his opinion concerning cases he had handled and criticised the Government and the Neuquén judicial authorities. It is feared that the Court's decision was in retaliation against the opinion expressed by Mr. Mansilla in the newspaper.

María Dolores Gómez [Public Defender]: Ms. Gómez works as a public defender in the Judicial Department of San Isidro, in Buenos Aires province. As part as discharging her functions, she reported that prisoners were continuously beaten and put in isolation cells, known as "*buzones*". These are very small rooms that many times lack any kind of light. The conditions of these cells violated basic human rights. Public Defender Gómez denounced this situation and filed an *habeas corpus* petition, which resulted in the closing of these cells and the transfer of the prisoners located there to other locations.

Later, Ms. Gómez continued to act on behalf of prisoners who suffered torture in prison.

On 30 March 2001, two men attacked Ms. Gómez. She was punched twice, though nothing was stolen from her. Between December 2000 and February 2001, Ms. Gómez received anonymous phone calls, the person who called always hanging up as soon as the phone was answered. On 14 May 2001, Ms. Gómez received information from a prisoner, Ramón Solari, who told her that the chief of Unit 29 and an official of Sierra Chica (another prison) had intentions of doing something against her. According to Mr. Solari, he had been in Unit 29 and had heard what the chief of this unit, Mr. Barrios, had said about the Public Defender. The Unit's director started to mention the names of all the people who had been released due to the *habeas corpus* petition filed by Ms. Gómez and he insulted her. He said however that she should not be cause for worry, as she was going to receive a "little gift" in the coming days. The director added that when Ms. Gómez disappeared, everything would return to normal again. Mr. Solari also mentioned that the director of Unit 29 had a folder with pictures of the public defender leaving her house and office. The Director of U-29 also allegedly had a list of all detainees on behalf of whom Ms. Gómez had filed *habeas corpus* petitions.

On June 2 2001, the *El Clarín* and *La Nación* newspapers reported that a prisoner, Melchor Romero, had been offered early release by the director of the Prisons System of Buenos Aires (*Servicio Penitenciario Bonaerense*), Mr. Bagnasco, in exchange for carrying out an attack against one of the public defender's family members. "Just shoot him twice, do not kill him, it is just to scare him, to make the mother stop messing with the *Servicio*", was the deal offered to Mr. Romero. The Centre for Legal and Social Studies (CELS), an Argentinean human rights NGO, asked the IACHR to issue preventive measures requiring Argentina to protect Ms. Gómez. The IACHR granted these and asked the Argentinean Government to take the necessary steps to protect Ms. Gómez and her family, and to bring those responsible for these attacks against her to justice.

Ana María Careaga [judge]: Ms. Careaga was dismissed in December 1998 following an impeachment procedure that did not afford her due process of law (see *Attacks on Justice 1998 and 2000*). In December 1999, with the arrival of the newly elected government, authorities in the Interior Ministry appointed her as a member of the High Tribunal in Corrientes province. The appointment also put aside a decision barring Ms Careaga from any public posts for 15 years, thereby rehabilitating her. During the period

under review, Ms. Careaga also filed a petition before the San Luis High Tribunal asking it to review the removal decision, but this petition was dismissed. Furthermore, several criminal cases remain open against Ms. Careaga and her position in the Corrientes judiciary is expected to be come to an end soon.

Adriana Gallo de Ellard [judge]: Ms. Gallo was dismissed from her post as a judge in San Luis Province and barred from public service for eight years in November 1998 (see *Attacks on Justice 1998 and 2000*). During the period under review, Ms. Gallo was appointed as a member of the High Tribunal in Corrientes province. Ms. Gallo filed a petition before the San Luis High Tribunal asking for the dismissal decision against her to be revoked. The San Luis High Tribunal rejected this petition. Ms. Gallo proceeded to file a petition before the Federal Supreme Court.

AUSTRIA

Concern has arisen recently about the independence of the judiciary in Austria. An indicator of this concern was an open letter that was signed by two thirds of all judges and public prosecutors of the country. Allegations have also been brought to light about attempts of certain politicians to influence the course of justice in ongoing trials. The role played by the current Minister of Justice, Dieter Böhmdorfer, has also subject of some public debate.

Austria is a democratic republic and federal state, composed of nine autonomous states (*Länder*). Austria was annexed by Nazi Germany in March 1938 and liberated and occupied by the victorious Allies in 1945. The Provisional Government reinstated the Constitution which had been in force before the parliamentary democracy in Austria was suspended in 1933. A June 1946 agreement provided that the Austrian Government receive qualified authority over the entire country, including the right to legislate and to administer the laws. Austria's full sovereignty was restored on 15 May 1955, when the four Allied powers signed the State Treaty formally re-establishing the Austrian republic. The legislature adopted a constitutional provision on 26 October 1955 declaring Austria's "permanent neutrality." Subsequent to a referendum, Austria joined the European Union on 1 January 1995.

The Federal President (*Bundespräsident*) is the head-of-state, and is directly elected by popular vote for a term of six years. The current Federal President, Thomas Klestil, has been in office since 1992. The head of government is the Federal Chancellor (*Bundeschkanzler*). The President appoints the Federal Chancellor and the other members of the cabinet pursuant to the Chancellor's recommendation. The Federal Chancellor, in office since 4 February 2000, is Wolfgang Schüssel.

The Federal Assembly (*Bundesversammlung*) is Austria's legislative branch. This bicameral parliamentary system comprises the National Council (*Nationalrat*) and the Federal Council (*Bundesrat*). The National Council is the lower house of parliament and has 183 seats. The members are elected every four years by direct popular vote. The Federal Council is the upper house of parliament and the members are elected by the parliaments of the states (*Landtage*) for five or six year terms.

The Federal Constitution of Austria is composed of several constitutional acts and state treaties. Parts of the Constitution date back to the 1860s. The Federal Constitutional Law of 1920 forms the core of the Austrian Federal Constitution. It contains the foundations of state organisation. Fundamental rights and civil rights and liberties are contained in the Basic Law of 21 December 1867 on the General Rights of Nationals in the Kingdoms and Länder represented in the Imperial Council (*Reichsrat*). The rights guaranteed include, *inter alia*, the inviolability of property, personal liberty, the right to a lawful judge, freedom of expression, freedom of the press, freedom of conscience and of worship. The European Convention for the Protection of Human Rights and Fundamental Freedoms has constitutional status in its entirety.

For the last 13 years the Government of Austria had been made up of a coalition between the Social Democratic Party (SPÖ), which was the dominant party in the ruling coalition, and the centre-right People's Party (ÖVP). Over the past decade, the far-right Freedom Party of Austria (FPÖ) has made increasing gains in a number of regional elections. The former leader of the FPÖ, Jörg Haider, has been a figure of some controversy, who had previously praised aspects of the Nazi Regime in Germany and had been forced to resign as provincial governor of his home state Carinthia in 1991 after he had commended the "orderly employment policies" of the Third Reich.

In the elections to the lower house of the bicameral legislature (*Nationalrat*) on 3 October 1999, the SPÖ polled 33,1 percent and 65 seats and thereby registered the largest loss in the number of seats. Compared to their 38,1 per cent and 71 seats in the 1995 elections, this total represented a net loss. The FPÖ's share of the vote increased to 26,9 per cent and 52 seats from 21,9 per cent and 40 seats in the 1995 general elections, thereby allowing the party to pull even with the ÖVP, which went from 28,3 per cent and 53 seats in 1995 to 26,9 per cent and 52 seats.

The SPÖ faced difficulties trying to form a coalition government with the ÖVP. After coalition talks between the SPÖ and the ÖVP collapsed and attempts of Victor Klima, the leader of the SPÖ, to form a minority government failed, the leader of the ÖVP, Wolfgang Schüssel, formed a new coalition with the FPÖ. Due to the participation of Haider's extreme right FPÖ, the coalition agreement spurred international outrage. The 14 other member states of the European Union reacted by imposing diplomatic sanctions on Austria, on the premise that Austria was not acting in concurrence with common European values. Israel withdrew its ambassador and the United States froze all bilateral contact with Austria until November 2000.

Although having expressed disapproval with regard to its composition, President Thomas Klestil swore in the new government on 5 February 2000. The cabinet is headed by the new Federal Chancellor Wolfgang Schüssel, leader of the ÖVP and previous Vice Chancellor and Foreign Minister. The 12-member cabinet includes six FPÖ members, but Mr. Haider did not take control of a ministry. In an attempt to persuade the EU to restore full diplomatic ties with Austria, he resigned as leader of the FPÖ on 28 February 2000. Vice-Chancellor Susanne Riess-Passer took over his position. Mr. Haider nevertheless remained Governor of Carinthia and thereby kept his influence within the party and stayed in the public arena.

Despite several attempts by Mr. Schüssel and Mr. Klestil, the EU refused to lift sanctions in March and April 2000, with matters reaching a climax when the French Government invited representatives from all EU member states with the exception of Austria, for an official briefing concerning the upcoming assumption by the French Government of the rotating European presidency. The Austrian Government responded with an official protest and threatened to withhold its financial contributions to the EU. Nevertheless, the French Government announced on 25 May 2000 that sanctions would be maintained when France assumed the presidency. In reaction, Austria announced a popular referendum on the EU sanctions later that year if sanctions persisted and declared that Austria could be forced to withdraw from the EU.

On 12 September 2000 the EU formally lifted the diplomatic sanctions after an EU committee of three "wise men" (Martti Ahtisaari, Jochen Frowein and Marcelino Oreja) published their report on 8 September 2000 stating that "the measures taken by the XIV Member States, if continued, would become counterproductive and should therefore be ended." The report concluded that "the Austrian Government is committed to the common European values" and "the Austrian Government's respect in particular for the rights of minorities, refugees and immigrants is not inferior to that of the other European Union Member States." Commenting on the FPÖ, the report concluded, that "in contradiction with past FPÖ behaviour and statements made by other FPÖ officials, the Ministers of the FPÖ have by large worked according to the Government's commitments in carrying out their governmental activities so far." Nonetheless, the report did express strong criticism at the Justice Minister for its conduct in regard to the judiciary.

In February 2000 a speech delivered by the newly appointed Minister of Justice, Michael Krüger, in 1995 was published in which he had made compromising remarks concerning the definition of concentration camps. He

resigned shortly thereafter, and Dieter Böhmdorfer was appointed as the new Minister of Justice.

HUMAN RIGHTS BACKGROUND

The Government of Austria generally respects human rights. However, there have surfaced repeated allegations of police brutality. In May 1999, Marcus Omofuma, an asylum applicant from Nigeria, died while being deported. He suffocated because his hands and feet were cuffed and his mouth was taped shut allegedly to control his violent behaviour. There were reports about incidents of alleged ill-treatment of detainees and the excessive use of force by the police. Individuals who complained about such ill-treatment or who reported on them as witnesses were said to risk counter-charges, such as defamation or resisting state authority.

The FPÖ continuously ran controversial campaigns prior to elections. Prior to the Viennese local elections, the FPÖ used posters that linked the words "foreigners" and "criminality", thereby invoking xenophobic sentiments.

Jörg Haider has been repeatedly accused of using anti-Semitic rhetoric and racist language. In March 2001, 67 academics, including professors from the United States, Israel and European Universities, signed an open letter to the Austrian President Thomas Klestil. The letter was published in *Der Standard* and stated, *inter alia*,: "Haider's manipulation of racist sentiments to serve political ends lays bare the illegitimacy of his claim to be a democrat or an adherent to the basic tenets of Austrian democracy. He hides behind the democratic principle of free speech even as he reviles the democratic cornerstones of fairness and equality by invoking anti-Semitic rhetoric to further his political agenda."

This letter was prompted by a remark that Haider made about Ariel Muzicant, the head of Vienna's Jewish Cultural Community, at a Freedom party meeting in February 2001. He said: "I don't know how someone called Ariel, can have so much dirt on his hands." [Ariel is also the name of a commonly used laundry powder.] Muzicant sued Haider for this remark and several other remarks he had made on other occasions. In May 2001 a court banned Haider from repeating or making similar statements, pending a final decision on whether his comments were anti-Semitic.

The number of libel or defamation suits filed in Austria has increased substantially. Jörg Haider and other FPÖ politicians have filed many law suits

against journalists and political scientists. FPÖ members are frequently represented by the law firm still carrying the name of the current Minister of Justice, Dieter Böhmdorfer, who before his appointment regularly represented his friend Jörg Haider.

The three “wise men” in the report to the EU noted:

One of the most problematic features concerning important members of the FPÖ are attempts to silence or even to criminalize political opponents if they criticise the Austrian Government. The frequent use of libel procedures against individuals who have criticised the FPÖ or the statements of its political leaders should also be seen in this context. ... It can only be concluded that the systematic use of libel procedures to suppress criticism of ambiguous statements gives rise to very serious concern in the context of the political debate pursued by the FPÖ in Austria, in particular after the FPÖ forms part of the Federal Government.

One example is the case of Professor Anton Pelinka. He had made the following statement to the Italian television station RAI on 1 May 1999: “In his career, Haider has repeatedly made statements which amount to trivialising National Socialism. Once he described death camps as penal camps. On the whole, Haider is responsible for making certain National Socialist positions and certain National Socialist remarks more politically acceptable.” After Haider's then lawyer and now Minister of Justice Dieter Böhmdorfer had filed a suit for defamation against Pelinka, he was found guilty on 11 May 2000 and fined 60.000 ATS by the Viennese Criminal Court. Upon appeal the decision was reversed.

In another interview with CNN On 27 September 2000, Pelinka had said, *inter alia*, that Haider is “using the same prejudices, the same sentiments as the Nazis did to win popular acceptance by exploiting xenophobic racism.” Pelinka was found not guilty by a Vienna court, but Haider's lawyer has appealed the case and the outcome was still pending at the time of this writing. Jörg Haider has sued a number of prominent persons for similar statements. Among the people sued by Haider are, Peter Michael Lings from the journal *Profil* and Hans Rauscher from the newspaper *der standard*.

This exaggerated use of libel procedures to suppress criticism may serve to restrict the free speech of those who oppose the current government and it may have general adverse consequences for the respect of the right to freedom of expression.

INTERNATIONAL OBLIGATIONS

Austria has ratified the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol, the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights. Austria has signed, but not yet ratified, the two Optional Protocols to the Convention of the Rights of the Child.

THE JUDICIARY

The Austrian legal system is a civil law system with origins in Roman law. Article 82 of the Federal Constitutional Law provides that jurisdiction is a federal not a state, function. According to Article 83 of the Federal Constitutional Law, the Constitution and competence of the courts are laid down by Federal law. It follows from these articles that the states cannot create their own provincial courts. The constitution stipulates in Article 94 that judicial and administrative powers shall be separate at all levels of proceedings.

A special feature of Austria's legal system is that the Federal Constitutional Law, in Article 91, stipulates that the people shall participate in the jurisdiction. In crimes entailing severe penalties and in all cases of political felonies and misdemeanours a jury brings the verdict. Lay judges (*Geschworene* and *Schöffen*) take part in the administration of justice in certain criminal proceedings.

THE COURT STRUCTURE

Austria has 191 local, 21 regional, and 4 regional higher courts. The highest courts in Austria are the Supreme Court, the Administrative Court and the Constitutional Court. The Supreme Court is the last instance in civil and criminal suits. The Administrative Court is the court of supervision over the administrative branch, and the Constitutional Court deals with constitutional matters. It is competent to strike down state laws and federal laws as unconstitutional and to decide on individual human rights complaints against the Executive power. Besides these three judicial organs, the European Court of Human Rights and the European Court of Justice are also recognised by Austria.

The local courts are the courts of first instance for civil cases for which damages do not exceed 130.000 *Schilling*. In addition, they have jurisdiction in first instance over certain civil matters specified by law, particularly matters relating to family law and tenancy law. In criminal matters, they have jurisdiction of first instance over cases that are only punishable by a fine or with a prison term that does not exceed one year.

The regional courts are courts of first instance for all civil and criminal matters that do not fall under the jurisdiction of the local courts. They are also the appellate courts of the local courts. The regional higher courts are the appeal courts in criminal and civil matters for decisions originating in the regional courts. Each of the presidents of the four higher regional courts is the head of the administration of the judiciary in the respective region and in this function, the presidents are only accountable to the Minister of Justice.

The Court of Audit (*Rechnungshof*) examines the administration of public funds by the federal state, the states, the municipalities (*Gemeindeverbände*) and other public legal entities.

OMBUDSMAN

In Articles 148 a to 148 j, the Federal Constitutional Law establishes the People's lawyer (*Volksanwaltschaft*), charged with the main function of examining individual complaints of maladministration by a public administrative body. This independent body is composed of three People's lawyers, which are nominated by the three largest parliamentary parties and elected by the National Council. The People's lawyer submits an annual report to the National Council. When this body investigates individual complaints, it has the right to inspect the relevant documentation and to recommend the necessary action to the public authority. The states can declare in their Constitution that the People's lawyer is also competent within the state administration or they can create agencies in the sphere of the state administration with similar tasks.

JUDGES

The Federal Constitutional Law stipulates in Article 87 (1) that judges are independent in the exercise of their judicial office. Judges are assigned cases in advance for a certain period stipulated by the law on the organisation of the courts. The removal of a matter allocated to the jurisdiction of a judge is governed by Article 87 (3) of the Federal Constitutional Law. That

provision requires a decree of the judiciary's administrative authorities and provides that this can only be done if the judge is prevented from the discharge of his/her responsibilities or he/she is unable to cope with his/ her duties within a reasonable time due to the extent of the duties.

APPOINTMENT

Article 86 of the Federal Constitutional Law stipulates that judges are generally appointed by the Federal President pursuant to the proposal of the Federal Government. The Federal President may also authorise the competent Federal Minister to appoint judges. Prior to the appointment, the Federal Government or the Federal Minister shall obtain proposals for appointment from the chambers competent under the law on the organisation of courts. Provided a sufficient number of candidates is available, the proposal shall comprise at least three names and, if there is more than one vacancy to be filled, at least twice as many names as judges to be appointed.

The President, the Vice-President, and the other members of the Administrative Court are appointed by the Federal President on the proposal of the Federal Government. With regard to the appointment of the President and the Vice-President, a plenary session of the Administrative Court submits a list of three candidates for each vacancy to the Federal Government, which then makes its recommendations on that basis.

The Constitutional Court consists of a President, a Vice-President, twelve additional members and six substitute members. The Federal President appoints the court President, the Vice-President, the six additional members and three substitute members on the recommendation of the Federal Government. The Constitution stipulates that these members shall be elected from among judges, administrative officials and professors holding a chair in law. The remaining six members and three substitute members are appointed by the Federal President on the basis of recommendations by the National Council and the Federal Council, each listing three candidates for each vacancy.

For judges of the Supreme Court, the Administrative Court and the Constitutional Court, the Federal Constitutional Law provides that they cannot be members of the Federal Government, a state Government, or a popular representative body. For the President and Vice-President of the Supreme Court, the Administrative Court and the Constitutional Court, this limitation applies for the four years prior to their election.

Candidates eligible to be appointed to the Administrative Court and the Constitutional Court must have completed their studies in law and political science and must have held a professional position requiring the completion of these studies for at least ten years prior to their appointment.

TRAINED EMPLOYEES ACTING IN THE CAPACITY OF JUDGES

Article 87a Federal Constitutional Law provides that Federal law can assign the performance of certain kinds of cases, which fall within the jurisdiction of a civil court of first instance, to specially trained employees of the federal state who are not judges. However, the judge competent in accordance with the allocation of business of that court can at any time reserve or take over the discharge of that business. These employees are only bound by instructions from the competent judge and, according to Article 20 (1), only bound in so far as compliance with that instruction would not infringe the criminal code.

DISCIPLINE AND REMOVAL - SECURITY OF TENURE

The law on the organisation of the courts prescribes that judges must retire when they reach the age of 65. Article 88 (2) of the Federal Constitutional Law stipulates that judges may only be removed from office or transferred against their will or superannuated in the cases and ways prescribed by law and by reason of a formal judicial decision. However, this Article provides that this does not apply to transfers and retirements which become necessary through changes in the organisation of the courts. A judge can only be temporarily suspended from office by decree of a senior judge or the higher judicial authority and the matter has to be simultaneously transferred to the competent court.

The Federal Constitutional Law stipulates that judges of the Administrative Court shall retire when they reach the age of 65 and that the term of office of judges of the Constitutional Court ends when they reach the age of 70.

LAWYERS

Currently, there are approximately 4,000 practising lawyers in Austria. Each state has its own Bar Association. All lawyers, whose headquarters are in that state are members of that State Bar Association. These Associations are corporations of public law and represent the professional interests of the

lawyers. Matters that are relevant on a federal level are coordinated by the Austrian Bar Association.

INDEPENDENCE OF THE JUDICIARY IN AUSTRIA

Recent developments in Austria have raised concerns among judges and public prosecutors in the country with regard to the independence of the judiciary. In December 2000, some 1,300 judges and state prosecutors, a number representing about two-thirds of all such jurists, signed an open letter publicly condemning all attempts at influence by the authorities in the operation of the courts.

INCIDENTS LEADING TO THE OPEN LETTER

In February 2000, a 1995 speech by the newly appointed Minister of Justice, Michael Krüger, was published. In this speech he made some compromising remarks about the definition of concentration camps. He resigned shortly thereafter due to health reasons, and Dieter Böhmdorfer was appointed as the new Minister of Justice.

Currently Minister of Justice, Dieter Böhmdorfer was previously the lawyer of his friend Jörg Haider and of the FPÖ. In that role he was active in bringing frequent libel procedures against individuals critical of the FPÖ, which were the subject of concern expressed by the three "wise men" in their report to the EU (see *Human Rights Background*). Mr. Böhmdorfer's former law firm still carries his name and continues to represent FPÖ members frequently. Furthermore, Mr. Böhmdorfer was the only Minister of the Government of Austria who was singled out by the report of the three "wise men" to the EU. The authors concluded in the report that "(they) have gained the impression that the overall performance of the Ministers of the FPÖ in Government since February 2000 cannot be generally criticised. Some actions of the Minister of Justice have caused concern."⁷⁶

Dieter Böhmdorfer's appointment spurred a public debate about the appointment of a candidate as Minister of Justice who openly associates himself with a party. After the appointment, various media alleged that the judiciary would be inappropriately influenced by the Minister of Justice.

This constellation as such does not threaten the independence of the judiciary and it cannot necessarily be concluded that Dieter Böhmdorfer would influence the course of justice in cases involving the members of the FPÖ.

However, concerns have been voiced that he may lack the neutrality and independence necessary for a Minister of Justice. While the President of the Association of Austrian Judges, Barbara Helige, has repeatedly expressed the aforementioned opinion concerning the lack of a threat to judicial independence per se, she has also remarked in this regard, that she was concerned Böhmdorfer's engagement in favour of Jörg Haider and the FPÖ would damage public confidence in his independence.

Another incident that added to the suspicion of lack of independence of the current Minister of Justice was the so called "spy affair" (*Spitzelaffäre*). In the fall of 2000, a former policeman, Josef Kleindienst, alleged that Haider and 17 other high-ranking members of the FPÖ had bribed police officers to give them confidential police files on their political opponents in order to spy on them. There were also allegations that Böhmdorfer himself had used such confidential documents in earlier court cases when he was still representing members of the FPÖ in court. According to reports by the magazine *Falter*, in its issue of 25 October 2000, Böhmdorfer had a surprising degree of insider knowledge in some cases. Nevertheless, Austrian prosecutors dropped an inquiry into the alleged misbehaviour by Haider and Ewald Stadler, a senior FPÖ member, in February 2001. Investigations against Hilmar Kabas, the leader of the FPÖ in Vienna, continued.

While the investigation into the spy affair of the public prosecutor Michael Klackl was ongoing, Böhmdorfer said in a public interview that the innocence of his friend Jörg Haider was beyond all doubt. This comment was widely criticised because, though this might have been his personal opinion, he made the remark while being interviewed as the Minister of Justice. As the Minister of Justice, he exercises ultimate authority over the public prosecutors of Austria and has the final right to give instructions (*Weisungsrecht*) to them. Although Böhmdorfer publicly announced that he would refrain from giving instructions in this case, the future career of the investigating prosecutor depended on him. Böhmdorfer ignored repeated calls for his resignation after this incident.

Most of the cases arising out of the "spy affair" have been dismissed, despite overwhelming evidence of impropriety.

The open letter was finally triggered by remarks by Peter Westenthaler, FPÖ Vice-Chair and Parliamentary Group Leader. He called for the suspension from office of the public prosecutors and of the judge, Stefan Erdei, investigating the alleged misconduct by party officials in the spy affair. Among others, Barbara Helige, the President of the Association of Judges of Austria and Erwin Felzmann, the President of the Supreme Court of Austria,

criticised these attempts by the FPÖ politician to influence an ongoing judicial investigation. The following is the text of the open letter:

OPEN LETTER FOR AN INDEPENDENT JUDICIARY

We, approximately 1,300 judges and public prosecutors, are concerned about public statements about the judiciary made recently by leading politicians. These remarks would suggest that commitments to the independence of the judiciary are often mere lip service.

The justice system should not serve personal interests but rather exists to enforce the law regardless of one's position in society. Independence and the separation of powers are in danger when ongoing trials can be influenced by barely veiled political pressure.

Therefore, all representatives of this republic are called upon to take a stand against attempts to make the justice system a tool for politics. We, the undersigned judges and public prosecutors, strongly oppose such attempts and call upon all public actors to guard and to respect the rule of law.

AZERBAIJAN

Despite irregularities during elections in November 2000 and January 2001, Azerbaijan was admitted to the Council of Europe in January 2001. While having adopted several laws aimed at strengthening civic freedoms and acceding to a number of international human rights treaties, Azerbaijan's human rights performance remained poor. Concerns persist about the independence of judges. A new Law on Advocates preserved the monopoly of the Collegium of Advocates in criminal cases.

Azerbaijan has remained a republic since it became independent from the Soviet Union on 30 August 1991. President Heydar Aliyev and his supporters continue to dominate the government and the multi-party 125-member Parliament.

The conduct of parliamentary elections held in November 2000 showed some progress over the flawed 1995 general and 1998 presidential elections. However, numerous serious irregularities were manifest and, according to the Organisation for Security and Cooperation in Europe (OSCE), the election process did not meet international standards. By-elections for seats in the legislature were held on 7 January 2001 in 11 constituencies where results of the November 2000 general election had been declared invalid. Observers from the OSCE and the Parliamentary Assembly of the Council of Europe (PACE) reported that although the elections did not meet international standards, they had constituted an improvement over the flawed November 2000 ballots.

The Constitution, which came into force in November 1996 following a referendum, provides for the protection of a full range of human rights, and for a system of government based on a division of powers among a strong presidency, a legislature with the power *inter alia* to approve the budget and impeach the president, and an independent judiciary.

The President is head-of-state and the Prime Minister is the head of the government. The Cabinet consists of a Council of Ministers who are appointed by the President and confirmed by the Parliament.

Azerbaijan has engaged in prolonged inter-ethnic conflict with neighbouring Armenia over the status of the Nagorno-Karabakh region, although a cease-fire has been complied with since 1994. In the first half of 2001, a

number of meetings took place under the auspices of the OSCE Minsk Group, aimed at resolving the dispute over Nagorno-Karabakh. As a result of the conflict, there are a large number of displaced persons both in Armenia and Azerbaijan.

HUMAN RIGHTS BACKGROUND

Azerbaijan has acceded to many of the major UN human rights treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention for the Elimination of All Forms of Racial Discrimination, the Convention for the Elimination of Discrimination Against Women, the Convention Against Torture and the Convention on the Rights of the Child.

On 25 January 2001, Azerbaijan was admitted to the Council of Europe. Reports on the conduct of the recent by-elections (see above) were thought to have influenced Azerbaijan's admission. In June 2000, the Council of Europe's Parliamentary Assembly had recommended membership on the understanding that Azerbaijan would fulfil a number of commitments within a stated time frame. These commitments included ratification of the European Convention on Human Rights and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment within a year of accession; adoption of a law on an ombudsperson within a year of accession; and adoption, within two years of accession, of a law on an alternative to compulsory military service, in compliance with European standards. Among other commitments, Azerbaijan also undertook to allow unrestricted access to prisoners by the International Committee for the Red Cross; to release or grant a new trial to political prisoners; and to prosecute members of law enforcement bodies suspected of human rights violations, in particular torture. A formal invitation of membership was issued in November 2000, although additional conditions were set in connection with the instances of fraud and irregularities reported during the November parliamentary elections.

Although the Government thus adopted or was in the process of adopting several laws aimed at strengthening civic freedoms, and despite its constitutional human rights provisions and its accession to international human rights treaties, Azerbaijan's human rights record remained poor. Some observers considered as premature the PACE recommendation of accession to the

- Council of Europe.

Opposition political parties continued to report harassment and intimidation, especially outside the capital and in the run-up to the November parliamentary elections. As the pre-election cycle heated up, the authorities allegedly used arbitrary licensing laws, fines, and trumped-up tax charges to intimidate the opposition media. A new media law from February 2000, although an improvement over the previous law, in many respects fell short of international standards.

On the positive side, President Aliyev issued a decree on 11 March 2000 regarding measures to be taken to address the issue of torture and ill-treatment, following a report by the UN Committee against Torture. Also in March 2000, the Supreme Court provided instructions to lower courts specifying, among other things, that the term "torture" should be understood in accordance with the definition in the UN Convention against Torture; reminding courts of their obligations to initiate investigations whenever defendants allege torture or ill-treatment; reiterating that evidence obtained in violation of the law is inadmissible; and repeating the 1999 decision of the Constitutional Court that those detained under administrative procedures are entitled to a lawyer. The UN Special Rapporteur on torture visited Azerbaijan in May 2000 at the invitation of the government. In spite of these positive moves, however, there were continuing reports of ill-treatment during 2000, not least from opposition parties.

In June 2000, President Aliyev issued a decree providing amnesty to many political prisoners, and, in October, dozens were released by presidential pardon. However, human rights groups claimed that hundreds of political prisoners remained in custody, chiefly those convicted on charges related to terrorism, alleged coup attempts, and abuse of office. At the end of September, prison authorities reportedly charged many of these prisoners with disciplinary offenses in what prisoners said were trumped up accusations intended to justify arbitrary confinement in punishment cells or transfers to harsher prison regimes. Significantly, under a new penal code, many prisoners with good records would have been eligible for early release.

THE JUDICIARY

The Constitution stipulates that judicial power is implemented through the Constitutional Court, the Supreme Court, the Economic Court and general and specialized courts. Courts of general jurisdiction may hear criminal, civil and juvenile cases. The Supreme Court also may act as the court of first

instance, depending on the nature and seriousness of the crime. District and municipal courts try the overwhelming majority of cases.

Azerbaijani citizens over 30 years of age, who have a university degree in law and a 5-year working experience in the sphere of law may become judges. Judges cannot hold another elected or appointed position and cannot be engaged in business or any other paid activity. In April 2000, qualifying exams for judges were administered for the first time. Over half of the approximately 1,000 persons tested passed the written portion of the exam, which international legal observers said was conducted fairly. However, there were numerous reports of fraud during the oral portion of the test, where many positions were allegedly bought and sold.

APPOINTMENT AND DISMISSAL

While the Constitution provides for an independent judiciary subordinate only to the Constitution and the laws of the Azerbaijan Republic, judges do not in practice function independently of the executive branch. The President appoints Supreme, Economic and Constitutional Court judges, subject to confirmation by the Parliament. The President directly appoints lower level judges with no requirement for confirmation.

The judges of the Constitutional Court, the Supreme Court and the Economic Court have immunity, but can be dismissed "upon commitment...of crimes" on the initiative of the President, and after the parliament has voted for dismissal with a majority of 83 votes. The lower judges can be dismissed with a majority of 63 votes.

Pro-President members dominate the Parliament and, therefore, the career of judges depends almost entirely on the President. The presidential power regarding appointment and dismissal constitutes a serious threat to the impartiality of judges, especially in politically sensitive cases. Additionally, it is reported that the judiciary is widely perceived to be corrupt and inefficient.

SECURITY OF TENURE

Judges in Azerbaijan do not have security of tenure and, as reported in *Attacks on Justice 1999*, the Government has been criticised by the UN in this regard. The UN Committee against Torture, during the discussion of Azerbaijan's initial report in November 1999, expressed concern about "[t]he absence of guarantees for independence of the legal profession, particularly with reference to the judiciary, appointed to a limited renewable term of

years.”

RECENT DEVELOPMENTS

During the year 2000, the Constitutional Court (formed in 1998) issued a number of decisions, which demonstrated a more independent body. In February, it re-registered the opposition Azerbaijan Democratic Party, following a long and drawn-out appeal by the party. In August, it decided to declare unconstitutional the retroactive application of a clause in the election law that required parties to be registered six months in advance of the announcement of the elections. In November, it voided the results of the Parliamentary elections in four additional districts.

LAWYERS

Azerbaijan has traditionally had three types of professionals who provide legal services: 1) attorneys or barristers, known as “advocates”, who may represent clients in criminal court and who are members of the Collegium of Advocates, (which bears rough equivalence to a bar association); 2) jurists or solicitors, persons with legal training who may represent clients in civil proceedings only and can provide legal advice, but who cannot act as a defense lawyer in criminal cases; and 3) notaries, who authenticate signatures and prepare contracts in family and real estate law.

Also relevant to the protection of human rights is a fourth type of legal practitioner, not necessarily legally trained, known as the public defender, who makes statements on behalf of a client. A public defender can attend a court proceeding on behalf of an NGO, but he or she cannot represent defendants during pre-trial investigation or visit them in detention.

A much-anticipated Law on Advocates and Advocate Activity (the Law) entered into force on 27 January 2000. The Law sets out the framework for the functioning of the legal profession. The dominant feature of the Law is the entity called the Collegium of Advocates, or official bar association, a remnant of the Soviet legal system that continues to maintain control over the legal profession, leaving little if any room for independent lawyers and legal associations.

Article 4 of the Law separates lawyers into two categories, roughly corresponding to the first two categories listed above. The first class of “advocate” or attorney provides the full spectrum of legal services, including criminal

defense work. Members of this class must belong to the Collegium of Advocates. The second class consists of all those who do not have status of "advocate" or attorney and, importantly, are not members of the Collegium of Advocates. Members of this group are therefore only permitted to deal with "other matters of attorneys", precluding the defense of the accused in criminal cases, meaning access to clients in pre-trial detention and defense of them before criminal courts of law. Thus, the first class of advocates, who are all members of the Collegium, maintains a monopoly on criminal cases.

Article 9 of the Law provides that the Collegium is independent of the Ministry of Justice and any other state control, and Article 1 prohibits any interference with, or influence on, advocates or their professional associations by any governmental bodies. However, it has been alleged that like most semi-public institutions in Azerbaijan, the Collegium is *de facto* under the influence of the executive branch. Although the Ministry of Justice does not micromanage the day-to-day operations, the Collegium leadership is said to give high consideration to what is politically acceptable to the Presidential Administration and the Ministry of Justice.

Despite the apparent formal independence of the Collegium, other branches of Government retain influence over the membership through the Qualification Commission of Advocates. This Commission is formed pursuant to Article 13 of the Law in order to "determine the professional preparedness of candidates to become advocates". Six of the nine members of the Qualification Commission, which selects Collegium members, are chosen by the executive branch and by the judicial branch respectively, which in turn, is reportedly influenced substantially by the executive authorities.

Advocates working within the Collegium are influenced by the organization's direct control over their work and pay. The Collegium controls the flow of casework from the criminal justice system. It requires lawyers to turn their fees over to the Collegium's accounting offices, from which they are then returned a percentage. Through its monopoly on criminal cases, advocates are dependent on the Collegium for their livelihood, as the majority of cases in Azerbaijan are criminal cases.

Lawyers report that the Collegium presidium rarely interferes directly in an individual advocate's work, but that typically a lawyer's Collegium supervisor monitors the lawyers under him or her and exerts pressure through more subtle means, such as failing to secure cases to assign to a lawyer who shows too much independence.

The Collegium's monopoly on defending criminal cases deprives defen-

dants of the opportunity to file suits or defend themselves independently, which is a violation of the UN Basic Principles on the Role of Lawyers. Moreover, attempts to practice as a non-member have been all but unthinkable. Article 158 of the Criminal Code of Azerbaijan punishes performance of services without a license by up to five years of imprisonment. It is not known if this article has ever been invoked, but lawyers are intimidated by believing it could apply to them.

The Law only allows members of the Collegium to found private law firms (Article 5). This provision adds to the Collegium's monopoly on the main parts of the legal profession. The part of Article 5 that restricts the founding of law firms to members of the Collegium was apparently not included in the draft version of the law, but was instead added just prior to adoption.

While until 1998 advocates practiced law exclusively through the Collegium of Advocates, there was a period prior to the January 2001 Law, during which there was some uncertainty as to whether other lawyers could take on criminal cases as defense lawyers. A 1997 presidential decree and a 1998 Council of Ministers' resolution gave licensed lawyers the right to engage in some of the same activities as their advocate counterparts, including taking on criminal cases. Presidential Decree No. 637 "On Confirming the List of Activities which Require Special Permission (Licenses)" from October 1997 listed all the types of fee-paid services for which license would be required, and among the activities was provision of paid legal services. The process of applying for and receiving a license was relatively routine, although the cost of some 350 dollars (one Million Mantas, an amount equivalent to many months of a typical lawyer's salary) could be prohibitive. Thus, an independent, private, fee-paid bar operating outside of the Collegium was suddenly a possibility. However, Article 4 of the Law now unequivocally states that only individuals who have been accepted as a member of the Collegium can be defense lawyers in criminal cases. Some human rights observers have called the monopoly of Collegium members on criminal cases a "significant step backwards".

There does not appear to be a coherent rationale for limiting other licensed lawyers from engaging in criminal defense. In fact, the requirements for obtaining a license are very similar to those required for Collegium members, as set out in Article 8 of the law. (Candidates must have a higher legal education and two years legal experience, and must pass an exam offered by a body to be determined by the Ministry of Justice). In the absence of any apparent reason for the distinction, there may be political motivations

behind the decision to retain complete control over advocates, who differ from licensed lawyers only in that they take on criminal cases.

THE ASSOCIATION OF LAWYERS OF AZERBAIJAN

As reported in *Attacks on Justice 1999*, the Association of Lawyers of Azerbaijan (ALA), a non-profit, non-governmental organisation which sought to unite primarily jurists, applied three times for registration as an organisation, and each time was refused registration by the Ministry of Justice. The ALA, which in the meantime had managed to attract more than 40 members and set up a modest operation, finally did obtain official registration on 15 February 2000, nearly three years after it first applied. The reason for this success was likely twofold. First, the Council of Europe had been applying pressure on the Government to register a series of organisations, including the ALA. Second, just days before the ALA obtained registration, Aslan Ismailov, one of the founders of the organisation, was told by an official from the Ministry of Justice that the ALA would continue to have difficulty as long as he remained one of the founders. He thus withdrew his name from among the list of founders, and the organisation was registered shortly thereafter.

THE AZERBAIJANI ASSOCIATION OF ADVOCATES

The Azerbaijani Association of Advocates (AAA) was created with the intention of bringing together advocates. The organisation unites about 40 lawyers, who had previously been engaged in advocate activities on the basis of a license from the Ministry of Justice. Since the adoption of the Law on Advocates and Advocate Activity, they have no longer been able to practice law on the basis of a license. Two original members, who were also Collegium members, have since withdrawn, fearful of their own status in the Collegium. Shortly after the entry into force of the Law on Advocates, the AAA submitted its registration documents for the third time, although it has yet to receive a response from the Ministry of Justice.

CASES

Aslan Ismailov [lawyer]. The situation of Aslan Ismailov, a respected lawyer who had served repeatedly pro bono or for a nominal fee as legal counsel in human rights cases that had met with government resistance, was

reported in some detail in the 1999 edition of *Attacks on Justice*. He was a member of the Collegium of Advocates until his dismissal in 1999, following a ten-day visit to the United States on invitation from the International League for Human Rights. Since then he has been unable to practice criminal law.

The Collegium provided two reasons for his dismissal: 1) he had failed to notify the Collegium of his trip to the United States and 2) he had engaged in illegal entrepreneurial activity which violated the 1980 Provisions on the Advokatura by establishing a law firm which provided paid legal services and which obtained the Ministry of Justice's license in June 1998. In subsequent correspondence with the CIJL, the Government of Azerbaijan insisted that Mr. Ismailov's dismissal from the Collegium was not related to his trip to the United States.

With the passing of the Law on Advocates and Advocate Activity in January 2000, Mr. Ismailov is prone to further difficulties. Now that he is no longer a member of the Collegium, his law firm Viza could potentially be closed by the authorities. This could also be the case for nearly a dozen other law firms which were founded by licensed lawyers (not Collegium members), who had practiced advocate activity on the basis of a license. It seems unlikely that the authorities would take such a drastic step, although the fact that the current legislation puts these law firms at potential risk is a matter of concern.

Vidadi Mahmudiv [lawyer]. On 30 August 2000, Vidadi Mahmudov, a member of the Collegium of Advocates of Azerbaijan and one of the three attorneys representing the recently arrested editor-in chief of *Yeni Musavat*, Rauf Arifoglu, was issued a stern warning in the General Prosecutor's office not to disseminate any information affirming his client's innocence. The following day, 31 August 2000, the warning was repeated in written form. Mr. Mahmudov was also accused of "divulging information concerning the investigation", although the prosecutor provided no details about this claim and Mr. Mahmudov had not violated his client's confidentiality nor revealed any information about the course of the investigation other than to claim his client's innocence. The fact that the lawyer represents the editor of an opposition magazine suggests the political nature of the harassment. The treatment of Mr. Mahmudov is a violation of international standards of civil and political rights as well as on the protection of human rights defenders established by the United Nations. These standards are found in the 1998

Defenders Declaration of the General Assembly and the 1990 UN Basic Principles on the Role of Lawyers. As of this writing, Mr. Makhmudov has been able to practice law as a result of the postponement of the lawyers' re-qualification exam.

BAHRAIN

With his accession to power as Amir in March 1999, Sheikh Hamad began an unprecedented process of political reform. In a 2001 open national referendum, the population voted overwhelmingly in favour of a new National Charter calling for the establishment of a constitutional monarchy, respectful of the principles of separation of powers and the rule of law, and the establishment of a Constitutional Court. The National Charter also provides for a legislative system consisting of two chambers, including one with legislative attributes, to be elected directly and freely by the citizens by 2003. The most remarkable development related to the judiciary in Bahrain was the abolition of both the Decree Law on State Security Measures and the State Security Court Measures. In 2000, a Supreme Council of the Judiciary was established for the first time.

BACKGROUND

The State of Bahrain consists of an archipelago of islands in the shallow waters of the central Arabian Gulf, with a population of some 700,000 inhabitants, about one third of them expatriate workers. The hereditary rule of the Al-Khalifa extended family, exercised since the latter eighteenth century, is endorsed by article 1 of the 1973 Constitution. In 1975, the Government suspended some provisions of the 1973 Constitution, including those articles providing for an elected legislature, which was dissolved and never reinstalled. Following unrest in 1996 (See *Attacks on Justice 1999*), the political situation has returned to a state of general calm.

POLITICAL REFORM

With his accession to power as Amir in March 1999 following the death of his father, Sheikh Hamad began a process of political reform. In an open national referendum on 14-15 February 2001, the population overwhelmingly endorsed the Amir's proposed National Charter. The National Charter calls for the establishment of a constitutional monarchy respectful of the principles of separation of powers and the rule of law, and elevates the ruler's title by

constituting him as the country's first king. It provides for a legislative system consisting of two chambers. The first chamber, which will come into existence by 2003, is to consist of members directly and popularly elected. The second chamber, *Majlis al-Shura*, will have members appointed by the Amir and is to include citizens and experts competent to give advice on matters of state and policy. The Charter guarantees the rights of male and female citizens to participate in public life and to vote. The endorsement of the principle of universal popular political suffrage may serve as an example for the rest of the Persian Gulf region. As will be discussed in the section on the judiciary, the Charter endorses the principle of the independence of the judiciary and provides for the establishment of a constitutional court.

The National Charter will not replace the 1972 Constitution. Rather, the Preamble of the Charter recognises that "implementation of some of the essential ideas included shall require constitutional amendments" and specifies, in particular, those articles connected with the composition of the legislative power. The vagueness of the provisions, especially in regard to the eventual role and powers of the legislature, have led to concern as to whether genuine reforms will in fact proceed. The Charter is silent as to the number of members of either chamber and fails to indicate how disputes between them will be resolved. Although it commits the Government to promote division between executive, legislative, and judicial branches, it also provides that the Amir is the head of all the branches, with the power to appoint and dismiss the Prime Minister. Finally, it is not clear as to what power, if any, will be accorded the legislature.

HUMAN RIGHTS ISSUES

The National Charter guarantees most fundamental human rights, including, *inter alia*, the principle of equality and non-discrimination, personal freedoms, freedom from torture and degrading and inhuman treatment, freedom of religion and conscience, and freedom of expression. Particularly notable in this regard is the Charter's endorsement of women's rights and the State's commitment to consolidate the rights of women and to issue necessary legislation to protect the families. Another quantum advance is the Charter's provision that "personal freedoms are guaranteed in accordance with the law. No person shall be arrested, detained, imprisoned, searched, confined to a residence, or have his freedom of residence or movement impounded, except in accordance with the law and under the supervision of the judiciary". The Charter establishes religious equality between Sunni and Shia Muslims,

thereby ending restrictions on access for Shia to the military, security forces and senior positions in politically sensitive government departments. However, instead of defining human rights by reference to internationally acknowledged standards, the Charter defines them by reference to national law, which poses a risk of a diminution of international human rights standards.

Another positive development is the Charter's endorsement of the right to set up NGOs. Thus, the Charter provides that "in order for the society to benefit from all potentials and from civilian activities, the State guarantees the right to set up private, scientific, cultural, and vocational associations and syndicates on a patriotic basis, for legal purposes and through peaceful means in accordance with conditions and situations stated by the law. No person shall be coerced into joining, or remaining in, an association or a syndicate". On 3 March 2001, the Bahraini Association of Human Rights (BAHR), Bahrain's first independent human rights group, gained legal status.

A number of additional extraordinary developments have occurred since the beginning of 2000 in respect of human rights. All political prisoners and detainees were released, and hundreds of Bahraini citizens returned following years in forced exile. The Bahraini authorities invited the United Nations Working Group on Arbitrary Detention to visit the country between 25 February and 3 March 2001. Amnesty International visited the country in March 2001.

JUDICIARY

Chapter IV of the Constitution concerns the judicial branch of power. Article 101(a,b) provides: "(a) The honour of the judiciary and the integrity and impartiality of judges are the bases of rule and a guarantee of rights and liberties. (b) In the administration of justice judges shall not be subject to any authority. No interference whatsoever shall be allowed in the conduct of justice. The law shall guarantee the independence of the judiciary and shall state the guarantees and provisions relating to the judges". Despite these provisions, the Bahraini judiciary has typically been subject to inappropriate Governmental influence. In the past, some attorneys and family members involved in politically sensitive criminal cases have argued that the Government intervenes in court proceedings to induce the result or to obstruct rulings from being carried out. There are also occasional allegations of corruption in the judicial system.

The most recent remarkable development related to the judiciary in Bahrain is the abolishment of both the Decree Law on State Security Measures and the State Security Court Measures (see *Attacks on Justice 1999*).

STRUCTURE

Legislative Decree No. 13 of 1971, regarding the organisation of the judiciary establishes courts of first instance (lower and higher courts and courts of enforcement, higher civil courts of appeal and the Court of Cassation). There are two classes of courts: Civil courts, which have jurisdiction over civil and criminal cases, and the *Shari'a* courts, which rule on issues of personal status.

The *Shari'a* courts, which are subdivided into Sunni and Jaafari branches, have the power to adjudicate on personal status conflicts relating, *inter alia*, to marriage, divorce, inheritance and child custody. These courts rule on matters of personal status in accordance with the rules of law of the particular branch of Islam to which the concerned individual belongs. Disputes among Muslims in this regard are adjudicated by the *Shari'a* courts, while those between members of other religions are judged under civil courts.

There is no administrative court system in Bahrain, and, according to the Judiciary Act of 1971, courts are forbidden to review acts of State. However, the Court of Cassation has ruled that the civil courts are competent to hear petitions against administrative decisions. Any citizen may also submit a complaint against administrative authorities with their senior officials, including the competent Ministers. Another administrative remedy is that any citizen has the right to submit a complaint personally to the Amir, the Prime Minister or the Crown Prince, during the weekly audiences held by these authorities to receive citizens and others.

The Bahrain Defence Force maintains a separate court system for military personnel accused of offences under the Military Code of Justice. Military courts do not review cases involving civilian, criminal, or security offences. However, article 102 (b) of the Constitution provides for the possibility to extend such jurisdiction "during the time of martial law and within the limits determined by law."

ADMINISTRATION AND SECURITY OF TENURE

Judges are appointed by the Amir upon recommendation of the Ministry of Justice and Islamic Affairs, headed currently by a member of the ruling

Al-Khalifa family. Article 102 (d), which has been suspended since 1975, provides for the establishment of a Supreme Council of the Judiciary, which shall supervise the functions of the courts and the offices relating thereto. "The law shall specify the jurisdiction of the said Council over the functional affairs of both the judiciary and the public prosecution". At the beginning of 2000, Decree Law No. 19/2000 set up for the first time a Supreme Council of the Judiciary and the body, headed by the President of the Court of Cassation, began to function in September 2000. The Supreme Judicial Council's mandate includes the supervision of the good functioning of the courts, the promotion and transfer of judges and other issues relating to the welfare of judges. However, the Council is not empowered to appoint judges, but only to look into nominations made by the Ministry of Justice and Islamic Affairs relating to the appointments to judicial positions. Moreover, the Council does not have its own independent budget. Its work falls under the budget of the Ministry of Justice and Islamic Affairs, a condition which raises serious questions about the extent of its independence. Additionally, the Supreme Judicial Council has no authority over the Public Prosecution, which remains under the control of the Ministry of Interior, also headed by a member of the Khalifa ruling family.

Concerns have arisen that, in the absence of constitutional accountability, the recently established Council will not adequately protect the security of tenure needed in Bahrain to achieve a fully independent judiciary. Many of the high-ranking judges in Bahrain are either members of the ruling family or non-Bahrainis (mainly Egyptians) with 2-year renewable contracts. To secure renewal of these contracts, judges may be prone to consider it necessary to take decisions not unfavourable to the wishes or interests of the Government.

ABOLITION OF STATE SECURITY MEASURES AND STATE SECURITY COURTS

The most encouraging recent development related to the judiciary in Bahrain is the abolition of both the Decree Law on State Security Measures and the State Security Court Measures (See *Attacks on Justice 1999*). On 18 February 2001, the Amir of Bahrain, issued Decree 11 of 2001 abolishing the Decree Law on State Security Measures, in force since 1974, which empowered the Minister of the Interior to detain individuals without charge or trial for up to three years.

In another decree (No. 4 of 2001) signed the same day, the Amir removed the power of the High Civil Court of Appeal, in its capacity as a State Security Court, to consider offences relating to internal and external state

security. The State Security Courts, which were established in 1975, maintained procedures that fell short of international standards of fair trial. Detainees judged before the State Security Court were denied access to legal counsel from the moment of arrest until they were brought to court. Furthermore, defence lawyers were not granted access to court documents before trial and, even after the first session, defence lawyers had only limited access to their clients. Trial hearings were often held *in camera*. During the case, the State Security Court was not obliged to convene witnesses to give evidence or for cross-examination. Defendants could be convicted solely on the basis of unverified confessions given to police or security officials, even in cases in which the eventual final outcome was the death penalty, and even when there was credible indication that such "confessions" had been obtained through torture. Finally, there was no right to appeal to a higher tribunal against conviction and sentencing by the State Security Court. The defendant could only request clemency from the Amir.

NATIONAL CHARTER AND THE JUDICIARY

As noted above, the Charter does not replace the Constitution, but rather establishes the foundations of a new political framework to be concretised by the authorities through subsequent constitutional amendments and with the legitimacy granted by the popular referendum. It is still not clear whether the necessary amendments will be carried out by the eventually partly elected legislature or whether they will be carried out through Amiri decrees.

Chapter II of the Charter provides for the separation of powers between the three branches, which nevertheless co-operate among themselves. While the Charter stipulates that democracy is the system of rule in Bahrain and that the people are the source of all powers, it also establishes the Amir as the head of the three branches. In this context, Chapter II (6) of the National Charter states: "The sovereignty of the law is the basis of ruling in the State, and the independence and the immunity of the judiciary are two essential warranties to protect rights and liberties. The State is entrusted with completing the judiciary commissions stipulated by the Constitution and with appointing the judicial authorities that have jurisdiction over disputes on the constitutionality of the laws and regulations"

This provision of the National Charter should be read in the light of Chapter IV of the 1973 Constitution of the Bahrain, which describes the judiciary as being independent and provides for the establishment of a Supreme Council of the Judiciary and a body "competent to decide upon disputes relating to the constitutionality of laws and regulations and [which]

shall determine its jurisdiction and procedure. The law shall ensure the right of both the Government and interested parties to challenge the constitutionality of laws and regulations before the said body. If the said body decides that a law or a regulation is unconstitutional it shall be considered null and void”

In addition to the Supreme Council of the Judiciary, described above, the Charter refers to a body with powers equivalent to a Constitutional Court, which would control the actions of the Government and be open for the use of the Government and “interested parties”. Currently, the Court of Cassation exercises this mandate. Although not mentioned in Chapter II of the National Charter, in the final communiqué the Amir expressed “the ambition to achieve (...) the establishment of the constitutional court”. Such a Court is necessary not only to rule on the constitutionality of laws and official acts but also to resolve constitutional conflicts.

CASES

Abdul Amir Al-Jamri [former judge]: In July 1999, the Amir pardoned Mr. Al-Jamri, who had been in detention since 1996. Following his release, the Government monitored Mr. Al-Jamri's movements. Since January 2001, the Government has ceased conducting surveillance of his residence. A former member of the dissolved National Assembly and a judge of the Bahrain courts, he had been suspended from duty in July 1988. He was then arrested on 1 April 1995 and subsequently released again on 21 January 1996. His detention seemed to be related to the fact that he had supported pro-democracy petitions calling mainly for the restoration of the National Assembly and all constitutional provisions relating to parliamentary life. (see *Attacks on Justice 1999*)

BELARUS

The 1996 Constitution of Belarus, which was adopted by unconstitutional means, remains in force. The President has excessive power and continues to rule the country by presidential decree. The independence of the judiciary is seriously threatened by the poor conditions of service and the influence of the President on the appointment and dismissal of judges. Individual lawyers face improper influence and harassment. President Lukashenko won the presidential elections on 9 September 2001, thereby securing another five year term, in a process clearly flawed.

After the collapse of the Soviet Union, Belarus declared its independence on 25 August 1991, and later joined the Commonwealth of Independent States (CIS). In March 1994, the Supreme Soviet adopted a new Constitution that provided for a democratic form of government and a directly elected president as head of Government and State. On 10 July 1994 Alexander Lukashenko was elected as the first president of Belarus for a term of five years. The members of the 13th Supreme Soviet (parliament) were elected in 1995.

The 1994 Constitution was amended on 24 November 1996 in a referendum, that was marked by substantial irregularities in procedure. The referendum had been called by the President after the Supreme Soviet refused to pass the extensive constitutional changes suggested by President Lukashenko. This referendum was held despite a ruling by the Constitutional Court on 4 November 1996 that the Constitution could not be amended in this way. President Lukashenko annulled the ruling by decree and the then-Prime Minister, Mikhail Chigir, resigned in protest. The current political system is therefore based on a Constitution that was adopted by unconstitutional means.

As a result of the 1996 referendum the President of Belarus has greatly expanded powers and Mr. Lukashenko's term as President was extended for 2 years as from July 1999. The last presidential elections were held on 9 September 2001. The country's official Central Electoral Commission announced that Alexander Lukashenko had won 75,6 per cent of the vote, whereas his main opponent Vladimir Goncharik, who was the candidate of a broad coalition of opposition parties, only won 15,4 per cent of the vote.

There were numerous allegations of manipulation and vote-rigging and hundreds protested in Minsk against this landslide victory.

The Organisation for Security and Cooperation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the Parliamentary Troika composed of the OSCE Parliamentary Assembly (OSCE/PA), the Parliamentary Assembly of the Council of Europe, and the European Parliament sent a joint International Limited Election Observation Mission (ILEOM) to the presidential elections. In its Preliminary Conclusions the ILEOM stated that "(t)here were fundamental flaws in the electoral process, some of which are specific to the political situation in Belarus...". Among the flaws enumerated were a legislative framework that fails to ensure the independence of election administration bodies, the integrity of the voting results tabulation process, lack of free and fair campaign conditions, and excessive restrictions imposed upon campaigning and observers. In addition, the process was marked by intimidation directed against opposition activists, domestic observation organisations, opposition and independent media, and a smear campaign against international observers. The ILEOM concluded that "(t)he 2001 presidential election process failed to meet the OSCE commitments for democratic elections...".

Chapter 3 of the new Constitution of Belarus gives the President extensive powers. The powers listed in Article 84 include, *inter alia*, to determine the structure of the Government of the Republic of Belarus; to appoint and dismiss the deputy Prime ministers and ministers; to take decisions on the resignation of the Government; to appoint and dismiss judges at all levels (see below); to appoint the leading officials of bodies of state administration; to abolish acts of the Government; to exercise supervision directly or through specially formed bodies of observance of laws by local organs of administration or self-government; and to suspend decisions of local councils of deputies. In addition, Article 85 of the Constitution gives the President the authority to issue mandatory decrees and orders in certain instances as determined by the Constitution.

Article 101 of the Constitution stipulates that the Parliament may adopt a law delegating legislative powers in a wide range of areas to the President. It also provides that in instances of necessity, the President may temporarily pass decrees which have the power of law. These decrees are then submitted within three days to the Parliament and become valid if they are not rejected by a majority of two thirds of votes of both chambers in their full composition. President Lukashenko has interpreted this provision broadly and has ruled by decree ever since he became President.

On 18 February 2000 President Lukashenko dismissed the Prime Minister, Syargey Ling, and nominated Uladzimir Yaarmoshyn. The House of Representatives approved the nomination on 14 March 2000. Since the policies of the Government are mainly dictated by the President the change of the Prime Minister was not expected to bring about any significant changes.

The Constitution of Belarus provides for the separation of powers in Article 6. However, in practice, the system of checks and balances among the executive, legislative and judicial powers has been distorted, and now all branches are under the President's effective control.

The opposition called for alternative presidential elections on 16 May 1999, in conformity with the abolished 1994 Constitution. A Central Electoral Commission (ECE) was formed to organise the elections. In the period leading to the alternative elections, several opposition leaders were harassed and arrested and some disappeared. The ECE ruled the election results invalid due to irregularities that were, *inter alia*, caused by the hostility of the authorities.

As a further result of the 1996 referendum, the Supreme Soviet was dissolved and replaced by a new bicameral legislature. This new parliament was not directly elected. The 110-member lower house was formed out of the membership of the existing Supreme Soviet. The 64-member upper house was created by a combination of presidential appointments for one third of its members and elections for the remaining seats. The Council of the Republic is the upper chamber and the House of Representatives the lower chamber. Several deputies of the Supreme Soviet belonging to opposition parties have refused to accept this new parliament.

In October 2000, the first Parliamentary elections since the 1996 referendum were held. The elections were boycotted by some opposition parties. The first round of voting for the House of Representatives was held on 15 October 2000. Four days later the elections were declared valid in 97 constituencies and invalid in 13 constituencies, where the elections were to be repeated. In the second round of voting on 29 October 2000 run-off elections in 56 of the 97 constituencies were held and declared valid. The turnout for the first round of voting was officially given as 61.08 per cent. The opposition alleged that the turnout had been artificially inflated by altered voter lists. According to the opposition, the turnout was around 45 per cent. For the 110 seats, 562 candidates stood in the elections and only some 50 were members of the opposition. Political opponents had reportedly been barred by technicalities or spoke about repeated harassment by the authorities. The former Prime Minister, Mikhail Chigir, withdrew his candidacy in the second round of vot-

ing, alleging that the turnout rates in his constituency in the first round had been manipulated.

The ODIHR Technical Assessment Mission stated that the 15 October 2000 parliamentary elections process in Belarus failed to meet international standards for democratic elections. On 18 March 2001, the repeat elections in the 13 constituencies where the turnout in the second round in October 2000 had fallen below the 25 per cent needed, were held. In 11 constituencies, the vote was only successful in a second round of voting on 1 April 2001.

Despite strong popular opposition, on 8 December 1999 President Lukashenko and the Russian President Boris Yeltsin signed a Treaty on the Creation of a Union State. The treaty commits the two countries to become a confederate state and establishes joint governing bodies. On 25 April 2000 the Council of Ministers of the Union of Russia and Belarus, meeting for the first time, discussed the creation of a common currency and the legal basis for further unification. In April 2001 both houses of the National Assembly ratified an agreement to introduce the Russian rouble as the common currency as of 1 January 2005 and a new common currency from 1 January 2008.

HUMAN RIGHTS BACKGROUND

During the period covered by this report, the Government failed to meet its human rights obligations in respect of a number of basic human rights. Excessive restrictions on the freedom of association, expression, the press, and peaceful assembly continued, and conditions in prisons and detention facilities remained poor, amounting in some instances to cruel, degrading or inhuman treatment. There were also allegations of ill-treatment by the police and numerous human rights abuses by members of the security forces. Fair trial standards were repeatedly violated by courts, which frequently allowed evidence that was obtained through ill-treatment or torture. Upon examination of the third periodic report of Belarus in November 2000, the Committee against Torture expressed concern about:

(t)he numerous continuing allegations of torture and other cruel, inhuman and degrading punishment or treatment, committed by officials of the State party or with their acquiescence, particularly affecting political opponents of the Government and peaceful demonstrators, and including disappearances, beatings, and other actions in breach of the Convention. ... The

pattern of failure of officials to conduct prompt, impartial and full investigations into the many allegations of torture reported to the authorities, as well as failure to prosecute alleged perpetrators, in nonconformity with articles 12 and 13 of the Convention.

The opposition suffered harassment in response to lawful opposition activities. On 25 March 2000, some 20,000 people protested peacefully in an unauthorised demonstration in Minsk. Several hundred people were arrested and detained for several hours, among them journalists and activists from the Belarusian Popular Front, the main opposition movement. Police officers reportedly used unlawful force for the arrest. One year later, on the same date, demonstrators protested again, calling for fair and free presidential elections in 2001. At least ten activists were arrested. Several detainees and eye-witnesses alleged excessive use of force by the police and the ill-treatment of the detainees. Most of the detainees were charged with organising or participating in an unsanctioned demonstration and were either fined or imprisoned for 10 - 15 days.

There has been no clarification as to the disappearance of the former Interior Minister Yuri Zakharenko, the Deputy Speaker of the dissolved Supreme Soviet Viktor Gonchar and his friend Anatoly Krasovsky in 1999, or cameraman Dmitry Zavadsky, disappeared on 7 July 2000. In summer 2001 two former investigators fled Belarus and published a letter alleging that senior state officials had organised a "death squad" that had killed several of the "disappeared". (For details, see the cases of Dmitry Petrushkevich and Oleg Sluchek.)

On 17 March 2000 Andrei Klimov, former member of the dissolved parliament and political opponent of President Lukashenko, was sentenced to six years' imprisonment at a hard labour colony with confiscation of property by a court in Minsk. He had been arrested in 1998 and charged with embezzlement. It was widely believed that his arrest was spurred by the work he had done as the chairman of a committee that investigated violations of the Constitution by the President. Mikhail Chigir, former Prime Minister and now an opposition member, was detained on 30 March 1999 on charges of embezzlement, allegedly for politically motivated reasons. On 19 May 2000 he was convicted by the Minsk City Court of abuse of power and sentenced to three years in prison. Two years of the sentence were suspended. On appeal, the Supreme Court revoked the sentence and sent the case back to the prosecutor for further investigation, thereby avoiding having to acquit him.

HUMAN RIGHTS DEFENDERS

Human rights defenders have suffered harassment and intimidation by the authorities, including arbitrary detention, imprisonment for short terms and ill-treatment. Several human right defenders who denounced disappearances are the victims of this campaign by the authorities. There have been a number of raids of offices of human rights defenders by the police or suspicious burglaries. Another form of harassment that human rights organisations face is more bureaucratic. Many defenders have been refused the official registration necessary to function lawfully, and have received official warnings, for frivolous reasons, which may result in closure of their offices. The prominent human rights organisation Spring-96, for example, received an official warning from the Ministry of Justice on 18 August 2000 because the letterhead used on its office paper violated official regulations. Reportedly, the typeface used was the wrong size and inverted commas had been omitted. The Centre for Human Rights reportedly received an official warning in August 2000 for using an organisational symbol different to that which they had used at the time of registration.

ARBITRARY ARREST AND PRE-TRIAL DETENTION

According to the Criminal Procedure Code, the police may detain a person for 24 hours without a warrant. Within that period, the Prosecutor is notified and should decide within 48 hours on the legality of the detention. A suspect can be held for 10 days without being formally charged. Pre-trial detention can last up to 18 months and the prosecutor, not the judge, has the authority to decide on the continuation of detention, in violation of Article 9 (3) of the International Covenant on Civil and Political Rights, to which Belarus is a state party.

INTERNATIONAL HUMAN RIGHTS MECHANISMS

MISSION OF THE UN SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS

The UN Special Rapporteur on the Independence of Judges and Lawyers, Param Cumaraswamy, visited Belarus from 12 to 17 June 2000. In his report, he comments:

The Special Rapporteur acknowledges that Belarus is a country in transition and suffers heavily from economic deprivation and

the after-effects of the Chernobyl accident. However, the pervasive manner in which executive power has been accumulated and concentrated in the President has turned the system of government from parliamentary democracy to one of authoritarian rule. As a result, the administration of justice, together with all its institutions, namely, the judiciary, the prosecutorial service and the legal profession, are undermined and not perceived as separate and independent. The rule of law is therefore thwarted. ...

Executive control over the judiciary and the manner in which repressive actions are taken against independent judges appear to have produced a sense of indifference among many judges regarding the importance of judicial independence in the system. Many appeared to be content with the flawed appointment, promotional and disciplinary procedures and service conditions. These procedures violate international and regional minimum standards for an independent judiciary.

INTERNATIONAL OBLIGATIONS

Belarus has ratified the six main United Nations human rights treaties and has acceded to the Optional Protocol to the International Covenant on Civil and Political Rights. These international human rights treaties have supremacy over domestic laws and therefore oblige Belarus to bring its Constitution and all laws into accordance with them. Art. 8 of the Constitution of Belarus stipulates that Belarus recognises the supremacy of the universally acknowledged principles of international law and shall ensure that its laws comply with such principles.

Nevertheless, in his mission report the Special Rapporteur on the Independence of Judges and Lawyers expressed his great concern about the non-compliance of many Belarusian laws with international norms and about the seeming impunity with which these norms are violated.

THE COUNCIL OF EUROPE

In September 1992 the Council of Europe's Parliamentary Assembly had granted a special guest status to Belarus, which allowed a delegation of seven parliamentarians to attend the assembly sessions in recognition of the country's move towards democracy and respect for human rights. Belarus applied

to join the Council of Europe on 12 March 1993. However, due to the increasingly authoritarian rule of President Lukashenko, the Council of Europe's Parliamentary Assembly suspended the observer status of Belarus in January 1997 and furthermore suspended the application procedure for membership of the Council of Europe in December 1998.

In January 2000 the Parliamentary Assembly of the Council of Europe adopted a critical report on the overall human rights situation in Belarus and expressed its concern that Belarus continued to fall seriously short of Council of Europe standards such as pluralist democracy, the rule of law and respect for human rights, and it decided to continue its suspension of the special guest status and the accession procedure.

After the Parliamentary Troika, composed of members of the European Parliament and the Parliamentary Assemblies of the Council of Europe and the Organisation for Security and Cooperation in Europe (OSCE) had visited Belarus in March 2001 it expressed "...its continuing concern about the human rights situation ... and at the lack of progress in investigating the disappearances of political opponents Mr. Zakharenko, Mr. Gonchar and Mr. Krasovsky as well as of the journalist Mr. Zavadsky."

THE JUDICIARY

Chapter 6 of the Constitution of Belarus regulates the court system. Article 109 vests the exercise of the judicial power in the courts and Article 110 stipulates that judges shall be independent and subordinate to law alone and that any interference in the administration of justice is unlawful.

However, in reality, due to excessive executive influence over judges and prosecutors and control of the legal profession, an independent judiciary in Belarus is almost non-existent.

COURT STRUCTURE

The court system consists of the Constitutional Court and two other court systems, one of general application and one dealing with economic questions. The general court system comprises the District Courts, the Regional Courts (the oblast and Minsk city courts), the Supreme Court and the Military Courts. The economic court system comprises the Higher Economic Court and the *oblast* and Minsk City Economic Courts.

During 2000 there were approximately 55 Supreme Court judges, 159 judges in the Regional Courts and the Minsk City Court, 678 regular and 185 administrative judges in 154 District Courts. The Higher Economic Court has 20 judges and there are 96 judges at the *oblast* level. According to the dictates of the Constitution the Constitutional Court consists of 12 judges.

JUDGES

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

As a further requirement, potential judges must have at least two years of legal experience or two years of fieldwork and practical study. Supreme Court judges must have at least five years of experience. The judges of the Regional, Minsk City, and Belarusian Military Courts, however, are required to have at least three years of experience.

APPOINTMENT OF JUDGES

The procedures for appointment of judges were changed considerably by the 1996 referendum. The main role in this process, is not any longer played by Parliament, but rather by the President of the Republic of Belarus.

Article 84 (8) and (9) of the 1996 Constitution stipulate that the President appoints the Chairperson of the Constitutional Court and the Chairperson and the other judges of the Supreme and Economic Courts. Such appointments must receive the consent of the Council of the Republic, of which one third is appointed by the President himself. The same Article provides in section 10 that the President shall directly appoint six of the 12 Constitutional Court judges and all the other judges of the Republic of Belarus. The remaining six judges of the Constitutional Court are appointed by the Council of the Republic.

The Chairpersons of the Supreme Court and the Higher Economic Court are selected by the (Supreme) Council of the Republic on the submission of the President. The other judges of these courts are chosen by the (Supreme) Council of the Republic. The President appoints the Vice-Chairs of these courts, the Presidents and Vice-Presidents of the District Courts and the oblast Regional Court upon submission by the Minister of Justice and the President of the Supreme Court.

The candidates for all other judges are chosen by the local administration of the Ministry of Justice. They must pass a qualifying examination held by a judges qualification board that consists of representatives of the judiciary and the organs of justice,¹⁶⁰ and must then be recommended for appointment by that board. After the Ministry of Justice approves the recommendation, the final decision is made by the Presidential Administration. Candidates are also subject to clearance by the Security Council of Belarus.

With regard to the appointment of judges the Special Rapporteur stated in his mission report, “(w)hilst appointment by the executive or the legislature is not per se a violation of the independence of the judiciary, the procedure applied must contain appropriate safeguards. During the mission the Special Rapporteur received many allegations that this process lacked transparency and was heavily influenced by political considerations.”

Principle 10 of the UN Basic Principles on the Independence of the Judiciary provides, *inter alia*, that “(a)ny method of judicial selection shall safeguard against judicial appointments for improper motives.” In Belarus, the President retains excessive control over the appointment of judges, a condition which fails to guarantee the independence of the candidates. In particular, the influence the President has over the composition of the Constitutional Court necessarily has an adverse impact on the independence of its members.

SECURITY OF TENURE

Judges are appointed for an initial period of five years. After that period they are evaluated by the Presidential Administration and are either appointed for life or removed. The local administration of the Ministry of Justice continues to be heavily involved in the evaluation.

Article 116 of the Constitution stipulates that the judges of the Constitutional Court are appointed for a term of 11 years and can serve until they are 70 years old.

According to Article 63 of the Law on the Judicial System and the Status of Judges, judges in all courts may not be removed, and may not be transferred to another position or court without their consent.

Principle 12 of the UN Basic Principles on the Independence of the Judiciary provides that judges shall have guaranteed tenure either until a mandatory retirement age or until the expiry of their term of office. However, the initial period of five years is too short to guarantee an independent judiciary. Judges who fear that they may not be reappointed may be prone to

decide in favour of the institution that will have to evaluate their performance, i.e. the executive.

DISMISSAL OF JUDGES

According to Article 111 of the Constitution, the grounds for the dismissal of judges shall be determined by law. Article 84 (11) gives the President the power to dismiss the Chairperson and judges of the Constitutional, Supreme and Economic Courts in the order determined by law and with notification to the Council of the Republic. Article 72 of the Law on the Judicial System and the Status of Judges provides that a judge may be removed from his position when he has committed a "disgraceful act" or deliberately breached the law in a manner that is incompatible with the status of a judge. The removal decision is made by the organ which elects or appoints the judge.

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

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

DISCIPLINE

Article 73 of the Law on the Judicial System and the Status of Judges provides that the Regulations on Disciplinary Responsibilities of Judges, set out in the Presidential Edict No. 626 of 1997, shall prescribe the grounds and procedures for disciplinary proceedings against judges. Grounds for discipline include, inter alia, breaking the law in the consideration of cases, an occupational misdemeanour, and a failure to observe the work rules.

CONDITION OF SERVICE

The Special Rapporteur reported that the extremely low salary rate is especially a concern for judges at lower levels. According to his report the average level of pay for a judge on the District Court is an estimated

US\$ 30 - 45 per month. Judges on the Constitutional Court were reportedly paid US\$ 150 per month. A judge may be paid a bonus of up to 50 per cent of his or her salary every month. The decision regarding bonuses is made by the head of the Ministry of Justice at the oblast level and by the presidents of the respective courts. For higher courts the decision is made by the Presidential Administration. Judges also depend on the local government or the presidential administration for the provision of adequate housing.

Judges are promoted to higher levels by the President according to Presidential Edict No. 35 of 1997. The relevant qualification board holds exams and gives recommendations for the promotion of judges. The promotion to a higher grade entitles a judge to a salary supplement.

STATE OF THE JUDICIARY

Overall, the poor conditions of service for judges pose a threat to the independence of the judiciary of Belarus. Low salaries always entail the risk of corruption. The dependence of judges on the executive for the provision of a monthly bonus, adequate housing, and promotion furthermore increases the danger of judges to be influenced by the executive. This concern is confirmed by the widely reported practise of so called "telephone justice". It is alleged that the executive or local authorities often dictate the outcome of trials they have an interest in.¹⁶⁶ A further example for the existing interference in the judiciary by the President is his blatant disregard for the decision of the Constitutional Court that the Constitution of Belarus could not be amended by referendum.

LAWYERS

President Lukashenko issued Decree No. 12 regarding the activities of lawyers and notaries on 3 May 1997, thereby amending the rules governing the legal profession significantly. Every lawyer is obliged to become a member the Collegium of Advocates in order to be allowed to exercise the profession. The Collegium of Advocates is a centralised body, whose activities are controlled by the Ministry of Justice. The Ministry of Justice has the power to make the final decision to grant a license. However, a license is only granted for a period of five years, after which the candidates must apply to the Ministry of Justice for its renewal. Lawyers can reportedly be expelled from the Collegium of Advocates after two official warnings for which no objective proof is required. Expelled lawyers are not allowed to practise their profession and face considerable financial hardships. Lawyers are afraid of

loosing their employment after a number of lawyers were expelled from the Collegium of Advocates in recent years. (See cases in former editions of *Attacks on Justice*.)

The Special Rapporteur reports that “(s)everal Advocates whom (he) met during the mission alleged that they had been given warnings by their bar association because they had asserted that their client was not guilty, or had challenged the legality of the court proceedings.”

This system constitutes a blatant disrespect by the Government of the independence of lawyers. Principles 16, 17, 18 and 20 of the UN Basic Principles on the Role of Lawyers, *inter alia*, provide that Governments shall ensure that lawyers are able to perform their professional functions without intimidation, harassment or interference and that they should not be threatened with prosecution or sanctions for any action taken in accordance with their recognised professional duties.

Human rights lawyers also face difficulties in providing legal aid. Article 22 of the Law on Public Associations provides that public associations can only represent and defend the rights and legal interests of their members and not of third parties. This law contravenes the UN Basic Principles on the Role of Lawyers that provides in its principles 2, 3 and 4 that Governments shall ensure efficient procedures and mechanisms for effective and equal access to lawyers and shall furthermore ensure the provision of sufficient funding for legal services to the poor.

Oleg Volchek is a lawyer and the chairperson of Legal Assistance to the Population, a local organisation that offers free legal advice on a wide number of issues to people who do not have the means to afford a lawyer. The organisation has offered legal advice in cases of arrests and ill-treatment by police officers during opposition demonstrations. Mr. Volchek and other human rights lawyers and activists have attempted to register a nationally based organisation that is intended to be named Legal Defence of Citizens. However, the Ministry of Justice refused the necessary registration of the organisation on 2 April 2001 on the grounds that the organisation does not meet the requirements to become a public association. The aims defined in the organisation's statutes to render legal assistance and associated consultations to others in the area of human rights and basic freedoms were contrary to the official definition of the term “legal assistance”. The other reason given was that the organisation's activities would be contrary to Article 22 of the Law on Public Associations, which stipulates that public associations may only represent and defend the legal interests of their members and not of third parties. According to Amnesty International, Oleg Volchek intends to appeal this decision to the Supreme Court.

Another such example is the case of the Mogilov Human Rights Centre, that also provides free legal advice to people whose rights have been violated. The organisation reportedly received a warning from the local justice authorities on 29 September 2000 claiming that it had violated the 1994 Law on Public Association because it had defended the right of people who were not members of the organisation. The Centre was ordered to refrain from representing people who are not members or face punitive measures. The organisation intends to appeal this decision to a higher judicial authority.

THE PROCURATOR'S OFFICE

Section VI. Chapter 7 of the Constitution regulates the office of the Procurator. The Procurator-General is the head of a unified and centralised system of bodies of the Procurator's office and is appointed by the President with the consent of the Council of the Republic. The task of the Procurator-General and of the subordinate public prosecutors is supervision of the implementation of laws, decrees and regulations and supervision of the execution of court verdicts. Furthermore, they carry out preliminary investigation and support state charges in the courts.

There have been numerous allegations concerning the undertaking of, or omission to undertake, prosecutions for apparently political reasons. The case of human rights lawyer Oleg Volchek can serve as one example (see *Human Rights Defenders*). In his mission report the Special Rapporteur expressed concern over "the prosecution of many leading members of the opposition in situations that connote a political motivation. Under Belarusian election law, those convicted of offences, whether of a substantial or a minor nature, are not permitted to run for public office."

CASES

Vera Stremkovskaya [lawyer and President of the Centre for Human Rights in Belarus]: Ms. Stremkovskaya is a leading human rights lawyer in Belarus and was the defence counsel in several high-profile cases. As a consequence of her activities she has been repeatedly threatened with expulsion from the Collegium of Advocates. Since December 1998 three criminal cases have been brought against her, all based upon the grounds of defamation of public officials. (for details see former editions of *Attacks on Justice*). In the most recent case, she had represented her politically unpopular client, Mr. Vasily Staravoitov, and had asked in court on 4 March 1999 about the

location of the 40 bottles of cognac which were confiscated from her client's home as evidence. The prosecutor, Mr. Smolencev, filed criminal charges against her for slander in April 1999, alleging that she implied he had taken the bottles. Although the case was dropped in December 1999, Ms. Stremkovskaya found out that the prosecutor had filed a private law suit against her in March 2000 seeking about \$20,000 in damages. On 20 June 2001 the Moscow regional court in Minsk held that Ms. Stremkovskaya had to pay approximately \$500 to Mr. Smolencev. She filed an appeal against the conviction at Minsk City Court.

In another attempt to discredit Ms. Stremkovskaya, the deputy chairman of the Minsk Collegium of Lawyers, Mr. Gambolevský, and the head of the Pervomaisky district legal consultation bureau, Mr. Kartovitsky, began an investigation of Ms. Stremkovskaya. They demanded information about the cases she was involved in from several courts and interviewed a number of her clients in their offices. As a result, some of her clients have now abandoned her services. They managed to find an order initiating a civil case, which Ms. Stremkovskaya signed before she was paid by the client. Although she explained that the particular case had been ongoing for some time and that the client regularly paid money into the Collegium's account, Mr. Gambolevsky filed a complaint and requested disciplinary action.

Ivan Shpakovsky [lawyer and member of the Centre for Human Rights in Belarus]: Mr. Shpakovsky has allegedly been persecuted as a result of his human rights work. In 1998 an administrative case was started against Mr. Shpakovsky because he was advertising a job vacancy with a poster that could be seen inside his office. The charges were later dropped. On 25 November 1999 he was reprimanded for an unsanctioned absence from work on 11 and 12 October 1999, although he had been on a trip from 11 to 13 October 1999 to attend a criminal case hearing of one of his clients. He was subsequently fined. He complained against his fine on 25 November 1999. He was not able to attend the scheduled court session to review his complaint and therefore asked for a postponement of the session. The appellate commission did not satisfy his request and opened yet another administrative case against him on 10 April 2000, without familiarising him with the grounds. On 11 July 2000 the Mogilev Central District Court expelled Ivan Shpakovsky from the Collegium of Advocates on the grounds of his "systematic" violation of the Law on Advocature and Rules of Law Ethics. The appeal to the Central District Court and subsequently to the Mogilev Oblast Regional Court were not successful. The appeal to the Supreme Court of Belarus is currently pending.

Dmitry Petrushkevich and Oleg Sluchek [two former investigators in the Belarusian Prosecutor General's Office]: Mr. Petrushkevich had been involved in the Zavadsky investigation before being dismissed on 29 May 2001. Mr. Petrushkevich and Mr. Sluchek fled the country because they feared for their lives after two otherwise healthy prosecutors involved in the investigation into the disappearance of Dmitry Zavadsky and a witness in the case died earlier in 2001. The two former investigators accused the Lukashenko regime of forming a death squad to murder its political opponents. They claimed that more than 30 people had been killed, including the missing opposition politicians Viktor Hanchar, Yury Zakharanka and Dmitry Zavadsky. They were granted political asylum in the United States in June 2001.

BRAZIL

The Brazilian judiciary confronted a myriad of difficulties, including failure to function expeditiously, lack of independence and corruption. The overly broad jurisdiction accorded to the military judiciary and the resulting impunity contributes to further human rights violations by police forces. Lawyers defending prisoners faced undue obstacles in carrying out their duties. Debate in Congress concerning judicial reform continued, without achieving substantial progress.

BACKGROUND

The 1988 Federal Constitution establishes Brazil as a federal republic composed of 26 states and a federal district, its capital. Each federated state has its own constitution, the provisions of which must comply with the Federal Constitution. The Constitution provides for the separation of powers. Legislative power is exercised by a bicameral parliament: a 513-seat Chamber of Deputies (*Camera de Deputados*) and an 81-seat Federal Senate (*Senado Federal*). Executive power is vested in the President of the Republic, who is elected through popular vote for a four-year period. The Administration of justice is reserved to a court system.

Fernando Henrique Cardoso presently serves as President with the support of a mixed coalition including his own centre-left Social Democratic Party, PSDB, the Brazilian Social Democratic Party, the Brazilian Democratic Movement and the Liberal Front Party. While the governing coalition holds an overwhelming majority it has been sometimes difficult to gain support for governmental legislative priorities due to weak party loyalty and the continuing corruption scandals that have undermined the stability of the coalition.

In February 2001, widespread disturbances took place within the penal system of the state of Sao Paulo. During the incidents, the worst in Brazilian penal history, prisoners gained control of 29 institutions across the state and took approximately 8,000 hostages, including visiting children. The rebellion claimed the life of 20 inmates, who were reported to have been killed by their fellow inmates and by the police during the disorders.

HUMAN RIGHTS ISSUES

Human rights violations continued on a substantial scale. State Police forces perpetrated numerous extrajudicial killings, tortured and beat suspects while interrogating them, and arbitrarily arrested and detained persons.

During the period under review, the country came under scrutiny by several international human rights mechanisms. In May 2000, the UN High Commissioner for Human Rights Mary Robinson visited Brasilia, Sao Paulo and Rio de Janeiro, and reached a working agreement with the Brazilian Government on technical assistance. In the context of the 2001 World Conference against Racism, Xenophobia and other forms of Intolerance, discussions arose over racial equity in Brazil. Brazilians of African origin were said to be excluded by poverty from many of the opportunities enjoyed by those of European descent. In May 2001, the Committee against Torture analysed the initial report of Brazil submitted after a delay of ten years. The Committee expressed concern over the competence of the police to carry out inquiries after reports of crimes of torture committed by members of police forces, without effective control in practice by the Public Prosecutor's Office. According to the Committee, this contributes to the impunity enjoyed by the perpetrators of these acts. The Committee recommended that the State explicitly prohibit the use as evidence in judicial proceedings of any declaration obtained by means of torture.

Visit of the Special Rapporteur on Torture

In August-September 2000, the UN Special Rapporteur on Torture, Sir Nigel Rodley, carried out an intensive three-week visit to Brazil during which he visited Sao Paulo, Rio de Janeiro, Belo Horizonte, Recife, Belém and Marabá. In his 2001 report to the UN Human Rights Commission, the Special Rapporteur noted widespread public distress over levels of ordinary criminality, which led to demands for a draconian official response, sometimes without legal control. According to the report, torture and other ill-treatment occurred on a widespread and systematic basis throughout country. The Special Rapporteur observed that “[torture] is found at all phases of detention: arrest, preliminary detention, other provisional detention and in penitentiaries and institutions for juvenile offenders. It does not happen to all or everywhere; mainly it happens to poor, black common criminals involved in petty crimes or small-scale drug distribution”. The Special Rapporteur described conditions of detention as “subhuman”. He concluded that “the judicial system as a whole has been blamed for its inefficiency, in particular slowness, lack of independence, corruption and for problems relating to lack

of resources and trained staff as well as the pervasive practice of impunity for the powerful." Brazilian authorities described the report as hard but useful and pledged to give careful consideration to its recommendations. In October 2001, the Government launched a campaign all over the country to prevent torture and to provide hot-lines to report cases of torture.

Impunity

The judiciary, which typically refuses to give credence to allegations of torture by criminal defendants, shares responsibility for the lasting exercise of torture in Brazil. Unreserved approval by courts of official denials of torture and their rejection of well-founded claims of physical abuse by detainees encourage further violations. For example, the Santa Catarina State Supreme Court stated that "the allegation of torture, when not accompanied by other evidence and coming from a prisoner, considered highly dangerous and who has escaped from penitentiary, does not merit credibility". The Rio de Janeiro State Supreme Court and the highest court in Brazil, the Federal Supreme Court, (*Supremo Tribunal Federal*), have also supported this path of jurisprudence.¹⁸⁸

Brazil's official report to the Committee against Torture recognises that "many of these crimes remain unpunished, as a result of a strong feeling of *esprit de corps* among the police forces and reluctance to investigate and punish officials involved with the practice of torture" and it added that "within the period of time when data was gathered for this report - from April 1997 to November 1998 - there was no indication of the existence of sentences based on the Law of Torture". This statement would confirm concerns that the impunity enjoyed by torturers is, to say the least, almost total.

On 29 June 2001, Colonel Ubiratan Guimaraes, who led the 1992 military assault on the Sao Paulo Carandiru prison, which resulted in the death of 111 inmates, was convicted of co-authorship of simple homicide of 102 detainees, and five counts of attempted homicide. Colonel Guimaraes, who was sentenced to 632 years in prison, has not been imprisoned pending an appeal against his conviction.

Although human rights defenders function without formal legal limitation, there have been several cases of intimidation against them, including ill-founded law suits, harassment, threats, and also murder attempts. Those defenders operating in rural zones were particularly vulnerable to attacks from gunmen employed by landowners, sometimes with the consent of police officers.

THE JUDICIARY

During the period under review, Parliament continued its consideration of significant amendment propositions involving the media, the Association of Judges and the Lawyers Bar Association and approved a new Civil Code and reform of the Labour Court System.

Structure

Federal Constitution (Article 92 FC) provides that the bodies of the judicial power are the Federal Supreme Court (*Supremo Tribunal Federal*), the High Court of Justice (*Superior Tribunal de Justiça*), the Federal Regional Courts (*tribunais regionais federais*), and the federal one-judge courts (*juizes Federais*). Judicial power is also vested in tribunals and courts specialising in labour, electoral and military matters, although they hold an autonomous structure. Finally, the tribunals and one-judge courts of the various states and the Federal District (*tribunais e juizes dos estados e do distrito federal e territórios*) also form part of the national judiciary.

The highest court is the 11-seat Federal Supreme Court, which has jurisdiction over the entire territory. It is competent to review federal laws as to constitutionality; to try the President, ministers and Members of Parliament for common crimes; to consider *habeas corpus* petitions against the President and Parliament, to try judges of Superior Courts for common criminal offences and misconduct (*crime de responsabilidade*) and to settle conflicts of jurisdiction between Superior Tribunals and other courts (Article 102 FC).

The High Court of Justice is composed of a minimum of 33 justices (Article 104 FC). It has powers to try state governors for common crimes, to try Chief Justices of the state Superior Courts, judges of the Federal Regional Courts and specialised tribunals for labour and electoral issues for common crimes and misconduct and to deal with *habeas corpus* petitions against Cabinet ministers (Article 105 FC). It also serves as a court of appeal for decisions taken by lower level courts.

The Federal Regional Courts are composed of at least seven judges each and are competent to try federal judges, including those specialised in labour and military matters, working within their jurisdiction, for common crimes and misconduct (Article 106 FC). Decisions taken by federal judges may be appealed before these Regional Courts.

The country is divided into judicial districts (*seção judiciária*), which correspond to each of the states and the federal district.

Labour Courts

The Constitution establishes separate and specialised branches of the judiciary for labour, electoral and military matters. Constitutional amendment 24-99 reformed the court system on labour matters, which had been the subject of pronounced criticism. The new system is composed of the High Labour Court, the Regional Labour Courts and one-judge labour courts (Article 111 FC). The amendment eliminated the Boards of Conciliation and Judgement and passed its powers to the newly created one-judge labour courts (*juizes de trabalho* - Articles 112, 116, 117 FC).

The institution of "temporary judges" - those representing employers and employees - was eliminated from the composition of the High Labour Court and the Regional Labour Courts (Articles 111, 115 FC) and the aforementioned first instance courts. The High Labour Court is now composed only of 17 justices (Article 111). The reform was welcome in Brazil, as the separate system for labour courts and the institution of the "temporary judges" had been the target of particular criticism (see *Attacks on Justice 2000*).

Military Police Courts

There are two police forces in Brazil: the civil police, which has investigation powers, and the military police, which carries out regular police functions such as public security and crime prevention. The military police is not a division of the military. Rather, it is a division of the police, established by a 1977 amendment during the military dictatorship and maintained by the 1988 Constitution, with special jurisdiction over acts of the military police. Article 125 of the Constitution grants the military court's jurisdiction over military police for military crimes as defined in law. Article 19 of the 1969 Military Criminal Code defines peace time military crimes as the those "...committed by military personnel who even if not on duty, use military weaponry or any other warlike material to carry out illegal acts". In 1996, Law 9.299/96 reformed the Military Criminal Code and granted the civilian judiciary the power to judge only cases of voluntary crimes against life, but left intact the rest of the jurisdiction of the military justice system with regard to the military police. The initial police inquiry continues to rest with the military investigator, as does the classification as to whether a crime is intentional homicide or manslaughter. Furthermore, the crimes of bodily harm, torture, kidnapping, manslaughter, when committed by military police officers, continue to fall within the exclusive jurisdiction of military courts.

A further cause of concern with regard to the military courts is that they are composed of active military personnel. At the Federal Level, the military judiciary is composed of a military court of first instance, and high Tribunal Military. The first is constituted by a hearing judge and four active military officers who make up the Council of Justice. The 15-seat High Military Tribunal, consists of 11 active military officers of the different branches of the armed forces and four civilian judges. The President of the Republic appoints the whole tribunal.

At the state level, states of the federation have the power to establish High Military Tribunals if it is considered necessary. In practice, many states have created these courts, which typically suffer the same deficiencies as their counterpart at the Federal level.

Military Police Courts are widely considered to contribute to impunity, as punishment is very light and few officers have been convicted. The Special Rapporteur on Torture observed that “[p]rosecutions in military courts reportedly take many years as the military justice system is said to be overburdened and inefficient”. In its 2000 annual report, the Inter-American Commission of Human Rights recommended “that Brazil take measures to abolish the military justice system over criminal offences committed by police against civilians”

Office of the Public Prosecutor's Investigation powers

The Public Prosecutor's Office has the duty to oversee prosecutions of all defendants. The Federal Constitution (Article 129) provides that the Public Prosecutor is exclusively responsible for undertaking public criminal action; assuring effective respect by the Government branches and by services of public relevance for the rights ensured under the Constitution; exercising external control over police activities; and requesting investigation procedures and the institution of police investigations and indicating the legal grounds of its procedural acts.

This provision has been interpreted as meaning that the Public Prosecutor's Office has the power to proceed with independent criminal investigations even in cases where no police inquiry has been opened or where a police inquiry is still pending or has been filed, and that it may indict law enforcement officials involved in criminal activities. A police inquiry is therefore not obligatory in a case in which a prosecutor possesses a sufficient measure of prima facie evidence (*Indicio*). The Office may gather such evidence through means other than a police inquiry, such as through a civil or administrative inquiry.

According to prosecutors interviewed by the Special Rapporteur on Torture, this interpretation is the subject of one of the most severe present institutional struggles, as the police firmly dispute this approach. The draft law recently put before Congress, which would grant public prosecutors greater power over police inquiries, has become a new flash point in this clash. According to the President of the Federal Court of Appeal, politicians lobbied by the police were attempting to undermine the power of the Office of the Public Prosecutor to supervise police behaviour.

ADMINISTRATION

The Federal Union is empowered to organise and maintain the judiciary, the Ministry of Justice and the Public Defender's Office of the Federal District and the territories (Article 21 FC). For their part, the federated states have the authority to organise their justice systems, provided that they respect the principles set forth in the Federal Constitution (Article 125 FC). The scope of the courts and of the state judges is set forth in the states' constitutions, and the law on judicial organisation shall be the initiative of the court of justice (Article 125).

The Federal Constitution provides for the organisational and administrative independence of the courts, including the power of the courts to determine the operations of their organs, as well as their financial autonomy, including the ability to draw up their own budgets (Article 99).

Appointment and Security of Tenure

The justices of the Supreme Court and the High Court of Justice, are appointed by the President of the Republic after their nomination has been approved by the Federal Senate (Articles 101, sole paragraph and article 104, sole paragraph. FC). The members of the Federal Regional Courts are appointed by the President from a list presented by each Regional Court itself, whereas the members of the High Court on Labour are appointed by the President of the Republic with the Federal Senate's consent from a list presented by the court itself (Article 111 FC). One fifth of the members of the Federal Regional Courts must be lawyers and prosecutors coming from outside the judiciary. This appointment procedure gives substantial power to the President of the Republic and has been highlighted as prone to facilitate unjustified political influence, particularly concerning the Supreme Court.

Judges enjoy life tenure (Article 95 FC). This security of tenure is granted

to first level judges only after serving a two-year term in office. Judges cannot be removed except in the public interest and following the procedures and requisites established by the Constitution and the law.

Discipline and Causes for Dismissal

The absence of discipline and internal control, concurrent with slowness and a deficient legislative framework, has been elaborated as one of the primary problems of the Brazilian judiciary. The disciplinary and sanctioning procedures instituted to deal with judges and prosecutors accused of misconduct while in discharge of their functions, or for ordinary crimes, are lax and inadequate. The law gives higher tribunals the power to exercise disciplinary control over members of lower tribunals, with the exception of the Federal Supreme Court whose justices are subject to impeachment proceedings before the Federal Senate.

The Constitution grants to the Federal Senate the power to impeach the Chief Justice of the Supreme Court, the Attorney General and the Defender General for misconduct perpetrated whilst carrying out their functions (Article 52(II)). Two-third of Congress may decide on the dismissal of these officers and their ineligibility for any other public position for an eight-year period in cases in which a judicial officer may be sanctioned by a body outside the judiciary itself.

All other judges are liable to discipline and control by the immediately higher judicial body. For instance, the Supreme Court tries and sanctions its own members, other than the Chief Justice, those of the High Court of Justice, and specialised High Courts for labour and electoral matters (Article 102(I) paragraphs b and c FC). The High Court of Justice, consequently, tries and sanctions members of all Federal Regional Tribunals (Article 104(I) paragraph a), and the Regional Tribunals carries out the same function over all other federal judges working in their jurisdiction (Article 108(I) paragraph a FC). The states' judiciaries follow the same internal discipline and control. In actuality, however, this control scheme only functions to some extent for first level judges who are tried and sanctioned by the disciplinary division of the higher tribunal. The regime does not work efficiently in cases involving judges of higher tribunals, due to lack of legal provisions on the matter.

The Federal Constitution (Article 93X)) provides that in respect of all disciplinary measures, the reasons for the decision must be stated and be adopted by a majority of members of the respective tribunal.

The most important reason for the failure of the disciplinary control of the judiciary is the proclivity of judges to shelter one another. In addition, the definition of misconduct is vague, giving grounds for substantial legal uncertainty. Law 1079, which defines misconduct (*crime de responsabilidade*) of the justices of the Supreme Court, fails to make explicit the actions that may constitute misconduct with regard to judges at lower levels (High Court, Federal Regional Tribunals, etc.). Law 1079, enacted in 1950 and prior to the 1988 Constitution, has not been amended to remedy this deficiency. However, it has been argued that the definition of misconduct provided by the rules of the tribunals and in a law applicable to all public officials may be applied to overcome the deficiency of Law 1079. In 1999, a report by a Senate Committee of Inquiry underlined the problem of effectively holding accountable all members of the judiciary (see *Attacks on Justice 2000*).

JUDICIAL REFORM

During the period under review, debate within Congress directed toward adoption of important proposals to reform the judiciary continued. However, the discussion has not advanced substantially. Besides the approval of a new Civil Code, which is widely considered to be a positive development, approval of most of the legislative initiatives regarding the judiciary remains pending. These bills contain constitutional amendments and the enactment of new laws that are necessary to overcome the corruption, impunity and lack of timeliness that affect the proper administration of justice in the country. The following are some of the most significant and controversial topics of the ongoing reform of the judiciary (see also *Attacks on Justice 2000*):

- Disciplinary control of judges for misconduct, and the body in charge of discipline in the judiciary. As mentioned above, the 1950 Law defining misconduct for judges of the Supreme Court does not contain an equivalent provision concerning the rest of the judiciary. A draft bill to reform the law with regard to the misconduct of judges at all levels has been before Congress. A National Council of the Judiciary composed mostly of representatives of the judiciary, the Public Prosecutor's office, and the Bar Association was approved on the first reading in the Chamber of Deputies as the most appropriate body to carry out disciplinary proceedings and to apply sanctions.
- Measures to expedite judicial proceedings and penalise unjustified delays. One proposal to overcome this problem is the incorporation of the legal principle of binding opinion (*súmula vinculante*), roughly corresponding to the "binding precedent" basis of Anglo-Saxon legal systems, directed

toward guaranteeing uniformity of jurisprudence and restricting the recurrent appeals to the Supreme Court of cases similar to others for which there is extant jurisprudence. However, the suggested bill would force judges to comply with the patterns instituted by the Supreme Court and would only allow review by the highest court in all cases where no precedent exists. It would give more power to the Supreme Court, whose all members are elected by the President, and therefore, could widen the executive's influence on the judiciary. The AMB proposed instead a formula that would impede the recourse to a higher tribunal if the lower judge had decided to follow the established precedent and would allow it when the judge decides differently. It would not oblige the judge to follow the criteria set up by the highest tribunal.

- The reform of criminal investigation procedures, and principally the duties of judges and prosecutors in the investigation stage. Brazilian law does not clearly limit the role of prosecutors and police during the preliminary investigation stage. The Public Security Secretary of the state of Sao Paulo presented a proposal for constitutional reform allowing the elimination of the preliminary police investigation to parliament, whereby the police investigation would be replaced by an investigation conducted by the prosecutor and controlled by an investigating judge. The Government has backed the proposal, but it has faced strong opposition from the police. The proposal for an amendment to the Constitution, which would eliminate police investigation as an institution, purports also to eliminate the division between the civil and military police in the states and replace them by a single state police. The unified structure of the new state police would arguably lead to the unification of the jurisdiction to which its members are subject for the commission of common crimes.
- The federalisation of certain human rights violations. Certain human rights crimes, now under state jurisdiction, would be brought under the federal remit. However the criteria used to federalise certain human rights and the possibly inadequate federal infrastructure to deal with a great number of new cases have been raised as obstacles to effective implementation of this initiative.

OBSTACLES TO LAWYERS

During his visits to police lock-ups, the Special Rapporteur on Torture found that most of the suspects believed that their families had not been notified of their arrest and location and that persons arrested were very infrequently counselled by a lawyer. On the contrary, it was reported that in the

few cases in which a detainee was able to secure a private lawyer, the latter had been prevented from seeing his or her clients until after the conclusion of the preliminary proceeding. Lawyers said that they often saw their clients for the first time at the first court hearing. According to the public defenders met by the Special Rapporteur in Rio de Janeiro, a 1995 decree requires that a letter be sent to the Public Defender's Office communicating any arrest within three or four days from the date of the arrest. According to prosecutors from the *Nucleo Contra Tortura* of the Federal District of Brasilia, 97 per cent of suspects were not assisted by a lawyer during the investigation phase, while the majority are only assisted by law students during the judicial phase. It was also reported that students do not go to the police stations, but usually meet their clients for the first time during the first instruction hearings and are therefore not in a position to present witnesses.

CASES

Darcy Frigo [lawyer]: Mr. Frigo is a lawyer and member of the Pastoral Land Commission (PLC) of Paraná. In February 2000, he received a death threat by telephone. He was warned he would have his legs "broken" if he were to leave his home. This threat was related to a false accusation against Mr. Frigo, that he had broken a policeman's leg during the use of excessive force against a demonstration by landless peasants at Curitiba, Paraná State. Mr. Frigo, who went to the demonstration, had been seriously beaten by the police. In April 2000, he received protection from the Federal Police. The authors of the threats remain unknown.

Valdenia Aparecida Paulino [lawyer]: In June 2000, Ms. Paulino, a human rights lawyer working in Sao Paulo, received death threats related to her representation of the relatives of two persons allegedly killed by police officers. Two military officers were said to have approached a witness in the case and told him to take a message to Ms. Paulino that she should "be careful".

Henri Burin des Roziers [lawyer]: At the beginning of year 2000, Mr. Burin, a lawyer of the Peasant Movement without Land, was included on a list of people "destined for death" which had circulated publicly. At least, five members of PML had been killed recently. The threat to Mr. Burin worsened when he was preparing the file for the trial of a major landowner, who had been sentenced in June for the murder of a trade unionist. Mr. Burin was subject in July 2000 to a vast smear campaign after he had published a file on the practice of torture committed by the civil police in the Police Commissariat of

the South of Pará state. Mr. Burin was prosecuted by the Pará Government for libel. In December 2000 he was tried together with another lawyer, Anulson Rusi, for taking part in a protest demonstration.

Rosa Marga Roth [Ombudsman]: Ms. Roth is a police Ombudsman in Belém, Pará state. In November 1997, members of the Civil Police of Belém, Pará state, tortured Hildebrando Freitas. Mr. Hildebrando was allegedly taken by ten police officers from his bar after having a dispute with them. Mr. Hildebrando has still not physically recuperated from the torture suffered by him both in the police car and in the police station. The Attorney General's Office has not opened any inquiry into this case. Ms. Roth tried to reopen the investigation and give publicity to the case. Ms. Roth was taken to a court by a police officer, who accused her of crimes, including libel and tampering with a witness. Furthermore, the police chief attempted to instigate her dismissal. The courts have dismissed all charges against Ms. Roth, but at the time *Attacks on Justice* went to press, an appeal before the same court filed by the police officer was still pending. According to Amnesty International, to try to intimidate ombudsmen by starting criminal procedures against them is a regular practice.

Gustavo dos Reis Gazzola, Roberto de Campos Andrade and Thomás Mohuyico Yabiku [Prosecutors]: In February 2001, the three prosecutors brought charges against 26 police officers and prison guards for torturing prisoners at a public prison in Sorocaba, Sao Paulo state. Mr. de Campos Andrade allegedly received an anonymous call on his mobile phone telling him that he would be killed. Mr. dos Reis Gazzola also received a death threat by telephone that he would be killed on his way home from the university at which he teaches. The threats were probably in relation to the prosecutors' role in bringing charges against the prison guards and police officers.

CHAD

Chad has been in a state of near constant internal conflict for the past 30 years. The Government's human rights record remains poor and impunity with respect to serious human rights violations is widespread. President Déby has intervened inappropriately in cases before the judiciary. For the first time in the country's history, a Supreme Court and a Constitutional Council were officially functional.

Chad, which gained its independence from France on 11 August 1960, is a unitary republic. Although General Idriss Déby has ruled Chad since 1990, he was not elected as President until 3 July 1996. General Déby, President of the Patriotic Movement of Salvation (*Movement Patriotique de Salut*, hereinafter MPS) originally came to power after overthrowing the former dictator, Hisssein Habré, who had been president since 1981 and has lived in exile in Senegal since his ouster in 1990.

The 1989 Constitution was suspended in 1990 by the then self-proclaimed President Déby and his transitional regime. In 1993, General Déby lifted the ban on political parties, and a national conference created a transitional parliament under the control of MPS. In 1996, a new democratic Constitution was adopted and approved by popular referendum, providing for an elected President and a Parliament. President's Déby's victory in Chad's first multi-party elections in 1996 was strongly endorsed by France, despite serious allegations of fraud and vote-rigging in the 1996 presidential elections. Similar allegations proceeded parliamentary elections in 1997.

On 27 May 2001, President Déby was re-elected, having received more than 67 per cent of the vote. International observers noted a few "incidents", but did not witness any deliberate intention to commit fraud. Despite the generally positive reports produced by observers, the six opposition candidates alleged that the poll had been marred by massive fraud and called for the result to be annulled. One of the major irregularities reported by the opposition was that opposition party representatives had been expelled from several polling stations. On 28 May 2001, the police detained the six opposition candidates. The six men were released after an hour. Shortly afterwards, an opposition supporter, 22-year old student Brahim Selguet, was killed during clashes with the police in N'Djamena. The six opposition leaders were

again arrested for a brief period on 30 May, purportedly so as to prevent violence from breaking out at the funeral of Selguet.

The new Constitution, adopted on 31 March 1996, provides for a system of separation of powers among the executive, the legislative and the judicial branches of government. Executive power is exercised by the President, elected by popular vote for a five-year term (Article 59). The Government is headed by the Prime Minister, who is nominated by the President and confirmed by the National Assembly. The legislative power is exercised by the Parliament, composed of the National Assembly and the Senate (Article 106). In August 2000, the MPS-dominated National Assembly increased the number of legislators from 125 to 155.

An economically important and environmentally sensitive pipeline project was put on hold following petitions by national and international NGOs to the World Bank. The petitions expressed the need to inform and educate the local population and to address serious human rights concerns.

Armed Conflict

Chad has been in a state of almost constant war since achieving independence. Ethnic and religious differences have led to conflicts marked by external intervention by France and clan rivalries. Government forces have suffered casualties in their fighting against insurgents in the Tibesti region in the Northwest part of the country. The *Mouvement pour la Democratie et la Justice au Tchad* (MDJT), led by Youssouf Tougoumi, a former Minister of Defence and Justice, constitutes the most serious threat to the Government. The Government had begun efforts to negotiate with the group, but by the end of 2000 the fighting had intensified, resulting in heavy casualties on both sides, and the success of negotiations was in doubt.

HUMAN RIGHTS BACKGROUND

Chad is a State-party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention on the Rights of Child, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Chad has also ratified the first Optional Protocol to the International Covenant on Civil and Political Rights.

Chad is also a member of the African Union, (formerly Organisation of African Unity).

The Government's human rights record has always been problematic. However, the situation improved somewhat after the ouster of Hisséin Habré in 1990. According to a 1992 Truth Commission report, there were some 40,000 cases of political murder and systematic torture under the Habré regime. The former dictator was indicted in February 2000 in Senegal, but in July 2000 an appellate court there dismissed the charges on the grounds that Senegal had no jurisdiction over crimes committed in Chad. In February 2001, in Senegal's High Court, the prosecutor argued that charges should be reinstated, and Chadian victims moved to bring cases against Habré's accomplices to court in Chad. In March 2001, Senegal's High Court ruled that Habré could not stand trial in the country and on 7 April 2001, Senegal's President announced that he had asked Habré to leave Senegal. The UN Committee against Torture has called on Senegal to prevent Chad's exiled former president from leaving the country. In parallel proceedings, Habré's victims initiated proceedings in November 2000 against the former dictator in Belgium. On 26 October 2000, 17 Chadian victims filed a complaint against Habré and former high ranking officials of his government in Chad. On 6 April 2001, the Constitutional Council of Chad ruled that Chadian courts had jurisdiction to try this case. On May 2001, proceedings were initiated at the N'Djamena court of first instance.

Upon seizure of power in 1990, President Déby declared that his aim was to "bring neither gold nor silver but freedom and democracy", and he formally ended single party rule. Déby has since officially recognised the right of NGOs to operate; and despite harassment Chadian human rights NGOs carry out activities and publish findings critical of the Government. However, the *Commission Nationale des Droits de l'Homme* (CNDH), established by a national assembly law in 1994, has had to contend with presidential interference and has been weakened after an impressive start.

The right to freedom of expression and political freedom

The Constitution provides for freedom of speech and freedom of the press, but in practice the Government has continued to limit this right in a number of instances. The Government has used retaliatory threats against journalists writing about the insurgency in the Tibesti region, and has imposed restrictions on freedom of assembly. On 17 April 2001, the Government decided to ban political programmes on private radio stations

ahead of the presidential election of 20 May 2001. *Reporters sans Frontières* (RSF) asked the High Council of Communications to revoke the ban decision, which states that “during the entire 2001 presidential election campaign period, any political debate or debate of a political nature is banned on the airwaves of private, associative or community radio stations”. Moreover, Article 35 of the above mentioned decision provides that radio stations “that do not conform to the present decision will be suspended during the entire electoral campaign period.” While newspapers are not affected by the ban, the decision to restrict radio communications is of critical importance in a country with a 90 per cent illiteracy rate. On 8 May 2001, the High Council of Communications decided to suspend the operation of “FM-Liberté”, a radio station s advocating human rights, on the grounds that it continued broadcasting political debates in contravention of the governmental ban.

On 4 December 2000, the N'Djamena's Magistrate Court sentenced Garonde Djarama, a former senior public servant, to a suspended sentence of six months' imprisonment, a fine of 50,000 CFA Francs (USD68, 72 Euros) and a symbolic fine of one CFA Franc in damages and interest. His article in the *N'Djamena Hebdo* criticised the slack reaction of the Chadian Government to the racist attacks against Chad nationals in Libya. The *N'Djamena Hebdo* director, Oulatar Begoto Nicolas was summoned by the police the day following the publication of the article and was interrogated before being released the same evening.

On 1 February 2001, the acting editor of *Le Temps* was sentenced to 1 year imprisonment, was fined and was asked to pay the disproportional amount of five million CFA francs (7622 Euros) for damages.

Racial discrimination

Article 14 provides for equal rights for all citizens, regardless of origin, race, sex, religion, political opinion, or social status. In practice, however, the army and the political life are dominated by members of the small Zaghawa and Bideyat groups from President Déby's northeastern region. This ethnic dominance has served as a major impetus to the rebellion of political groups in the south. These tensions are taking place in a country where there are approximately 200 ethnic groups within a population of about seven million people.

Exercise of democracy

Chad has never experienced a peaceful, and fair transference of political power, and both presidential and legislative elections have been marred by serious irregularities and indications of outright fraud.

The Constitution provides citizens with the right to change their government peacefully, but, in practice, this right remains limited. President Déby declared that presidential elections would take place on 20 May 2001 due to strained resources. Legislative elections, initially scheduled in 2001 are to take place in 2002. The President of the Independent National Electoral Commission (CENI) announced on 17 May 2001 that "everything is ready" for the first round of the presidential elections. However, there were noted logistical problems 36 hours before the elections, and the CENI could not decide whether to use the hand-written lists or the computer generated ones. Opposition parties accused President Déby of vote-rigging and fraud even before the elections took place and all opposition leaders have signed a coalition agreement against the president in the second round. According to reports by international observers, the first round of the electoral process was considered to have been conducted fairly.

The rebellion: child-soldiers and impunity.

The *Mouvement pour la Justice et la Démocratie au Tchad* (MJDT), led by the former defence minister Youssouf Togoimi, has been fighting government forces in Tibesti, a region bordering Libya and Niger, since 1998. Fighting intensified throughout 2000, with both groups suffering heavy casualties. The MJDT has announced that since December 2000 it has killed 423 soldiers, while government troops claimed to have killed 120 rebels. Brutality by soldiers and rebels marked the clashes, and those who committed human rights abuses have generally enjoyed impunity. The Déby Government has denied allegations that it is responsible for killing 13 MJDT prisoners in December 2000.

Minors continue to serve in the army, and it has been reported that teenagers from the Zaghawa tribe have been forced to fight on the Government's side in the Tibesti region. It has also been reported that recruited children were put on the front line in order to detect mines, and that the two generals involved in the children's recruitment did so with impunity. The Government denies that its military has been recruiting young people from Southern Chad. However, there is information that students in the Sarh region are living with the fear of forced enrolment.

THE JUDICIARY

Structure

The 1996 Constitution establishes an independent judiciary (Article 146). Judicial power is exercised by the Supreme Court, the Courts of Appeal, tribunals and the Justices of the Peace.

Interestingly, under a separate section of the Constitution (Titre VIII), a High Court of Justice is established, which has the power to judge the President of the Republic and high ranking government officials in cases of high treason. The High Court, composed of senators, members of the Parliament, the Constitutional Court and the Supreme Court, also has jurisdiction to try gross violations of human rights, as these are included in the definition of high treason, under article 178.

Law N°004/PR/98 of 28 May 1998 reorganised the judiciary. Article 1 of the new law sets out the jurisdictions as consisting of the Supreme Court, the Courts of Appeal, the Criminal Courts, the Courts of First Instance, the Labour Tribunals (*les tribunaux du travail*), the Trade Tribunals (*les tribunaux de commerce*) and the Justices of the Peace (*justices de paix*), which are local courts with jurisdiction over light offences and established where there is no tribunal of first instance.

The Court of Appeal is composed of six chambers (civilian and customary affairs, administrative and auditing, trade, social matters, correctional and simple police affairs, and one accusation chamber).

The Creation of a Supreme Court and a Constitutional Council

For the first time since Chad achieved its independence in 1960, legislation has been adopted to provide for the creation of a Supreme Court and a Constitutional Council, which were officially installed on 28 April 1999. These two high jurisdictions complete the Chadian judicial system.

The Supreme Court is the highest jurisdiction, composed of three chambers with jurisdiction in judicial, administrative and auditing matters (Article 7). It is the only tribunal competent in local election affairs. The Supreme Court is comprised of 16 justices including the President. Article 12 of Law N°006/PR/98 guarantees Supreme Court judges security of tenure. Judges can only be removed in case of retirement or on grounds of conviction for certain crimes.

The Constitutional Council has jurisdiction over constitutional matters, international treaties and agreements. It is also competent to consider matters related to presidential, legislative and senatorial election disputes. Its decisions are binding on all administrative authorities and public powers and there is no possibility of appeal against them. Every citizen can question the unconstitutionality of a law during his trial and before any competent jurisdiction.

On 28 April 1999, President Déby swore in 16 members of the Supreme Court as well as nine members of the Constitutional Court. They fully began operations only in October 2000, due to inadequate funding.

Appointment and Security of Tenure

Judges are nominated by decree of the President of the Republic with the approval of the High Council of the Magistracy (*Conseil Supérieur de la Magistrature*). The President of the Republic, the Minister of Justice and the President of the Supreme Court preside over the High Council of the Magistracy. They can be removed under the same conditions (Article 153). Article 155 states that judges can only be removed under several conditions, as prescribed by law.

The Supreme Court is composed of a President and fifteen *Conseillers*. The President of the Supreme Court is designated from among the highest judges of the judicial order by the President of the Republic, on approval of the National Assembly and the Senate (Article 8). The Presidents of the chambers are designated by decree of the President of the Supreme Court. The *Conseillers* are nominated by the President of the Republic, the National Assembly and the Senate, from among high magistrates and specialists of administrative law and auditing. Article 12 of Law N°006/PR/98 guarantees Supreme Court judges security of tenure. Judges can only be removed in case of retirement or on grounds of conviction for certain crimes.

The Constitutional Council is composed of nine members, among them three judges and six highly qualified jurists, nominated by the President of the Republic, the President of the National Assembly and the President of the Senate to terms of nine years (Article 1 of Organic Law N°019/PR/98, of 20 July 1998).

Administrative Control

The Ministry of Justice exercises overall administrative control over the

activities of the courts and the functioning of the judicial bodies (Article 78 of Law N°004/PR/98). The Presidents of the Courts of Appeal and the Attorney Generals (*Procureurs Généraux*) control their own jurisdictions and send an annual report on the functioning of the judiciary to both the President of the Supreme Court and the Minister of Justice (Article 79). The President of the Supreme Court and the Attorney General send a similar report to the Minister of Justice (Article 80) regarding the state of independence of the judiciary.

Independence of the Judiciary in practice

The Constitution provides for an independent judiciary. However, the judiciary has proved to be ineffective and subject to executive interference. It has been reported that Déby favoured the incarceration of two former administrators for several months during 2000 on the grounds of misappropriation of funds, despite the fact that there was a lack of evidence.

Two Supreme Court justices, Maki Adam and Ruth Romba, were demoted in April by the Chief Justice, and apparently in reaction to a decision that went against the Chief Justice's personal interests.

At the beginning of the year, President Déby dismissed the Minister of Justice due to a torture incident that has generated negative publicity. In September 2000, police and military officials allegedly tortured a detained businesswoman. However, apart from the dismissal of the Minister of Justice, no legal action was taken against the officials involved.

Residents in rural areas often address their cases to traditional tribal courts, and traditional practices and customary law are applied in addition to French-based legal code by judicial institutions.

The salaries of the officials in the judiciary branch are at levels so low as to carry negative implications for the independent functioning of judges.

CASES

Maître Jacqueline Moudeina [lawyer-legal counsel at the *Association Chadienne pour la Promotion et la Défense des Droits de l'Homme* (ATPDH)]: On 11 June 2001, members of the anti-sedition police unit attacked Ms. Moudeina while she was participating with approximately 100 women in a peaceful demonstration outside the French Embassy in N'Djamena. The demonstrators were protesting against French policy in Chad

in relation to the outcome of the May 2001 election, in respect of which vote-rigging was alleged. Ms. Moudeina was wounded by a grenade. She was hospitalised in a private clinic in N'Djamena and subsequently in Paris. It was reported that the police identified Ms. Moudeina within the group of demonstrators and that the grenade was especially directed against her. This attack against Ms. Moudeina was due to her legal activities as lawyer of the Chadian victims in the proceedings against the former president of the country, Hissein Habré. The official in charge of the anti-sedition police unit during the demonstration, Mahamat Wakayé, was a former high-ranking security officer in the Habré regime. At the time of the attack against Ms. Moudeina there was a lawsuit pending against former Habré officials including Mahamat Wakayé. The lawsuit was filed by victims of the Habré regime.

CHILE

The former military ruler, General Augusto Pinochet, returned to the country and faced proceedings before the Chilean judiciary. Although the judiciary took significant steps to advance the Pinochet trial, in July 2001, the Santiago Appeals Court suspended proceedings against the former dictator on health grounds. Politicians opposed to Pinochet's prosecution and the Armed Forces exerted considerable pressure on both the executive and the judiciary. Judges appeared to be willing to open trials for past human rights violations. However, the 1978 amnesty law continued to be a major obstacle to such prosecutions. The criminal law system reform process, which attempts to incorporate aspects of the adversarial model, progressed substantially in several areas.

BACKGROUND

The Chilean Constitution was designed by the former military government and approved by popular referendum in 1980. In 1989, the Constitution was amended slightly after the military dictatorship lost a referendum concerning the question as to whether (ret'd) General Pinochet should continue to be President. Although the Constitution establishes the separation of powers, it also includes provisions to protect the military's interests by granting it excessive powers in the functioning of the democratic institutions. The President, who is elected for a non-renewable six-year term and is head of State and head of the Government, exercises executive power. A bicameral Parliament, composed of the Chamber of Deputies and the Senate, exercises legislative powers. There are 120 deputies and 49 senators elected through periodic direct elections, with the exception of nine designated senators. Four of these designates are former chiefs of military branches and two are former Presidents who are senators-for-life. The Constitution provides for an independent judiciary. The influence of the military in the judiciary has significantly decreased, as continued rotation in the court system has reduced the number of military-period nominees.

In March 1999, the United Nations Human Rights Committee (HRC) expressed concern over certain powers retained by members of the former

military dictatorship. The HRC also noted that the structural constitution of the Senate prevents legal reforms that would enable Chile to comply more adequately with its Covenant obligations. In January 2000, the Inter-American Commission on Human Rights (IACHR) found that the institution of designated senators, who instead of being elected are appointed by the military and other non-representative institutions, was undemocratic and a breach of human rights obligation because it distorted political representation. In October 2000, a Senate Commission approved unanimously a proposal to shorten the presidential period from six to four years and to eliminate the institution of non-elected senators starting in 2006. However, this motion has not become law and remains under consideration by Parliament.

Ricardo Lagos was elected President in January 2000 and took office two months later. As a presidential candidate, Mr. Lagos led the *Concertación para la Democracia*, a centre-left coalition that included his Socialist party. President Lagos has attempted to reach political agreements to end the excessive role the military has played in Chilean institutions, give the President the power to dismiss and promote members of the army, democratise the Parliament, and address the impunity for past human rights violations. However, the *Concertación's* lack of a working majority in Parliament and electoral rules that give excessive representation to the second most popular party or coalition, presently the centre-right coalition Alliance for Chile (*Alianza por Chile*), have made difficult the smooth approval of Presidential initiatives.

HUMAN RIGHTS BACKGROUND

A number of criminal suspects detained by members of the uniformed police (*carabineros*) were reportedly tortured or otherwise ill-treated. In April 2001, Parliament passed a new press law, which effectively extended the protection of freedom of expression. The new law repealed article 6(b) of the State Security Law, which had criminalized “contempt of authority” and provided for prison sentences for those who “insulted” public authorities. Since 1990, more than 30 journalists, politicians and ordinary citizens had been prosecuted under this law. The most recent cases were brought in February 2001. Article 66 of the Statute was also repealed. That provision had been used in 1999 to confiscate the entire stock of the “Black Book of Chilean Justice”, an exposition of judicial corruption in Chile, on the day of its launch (See *Attacks on Justice 2000*). The new law protects journalists from any obligation to reveal their sources, eliminates courts' powers to censor press

coverage of criminal cases, and ends the powers of military tribunals to try journalists for sedition. However, existing legislation still offers ways to ban publications and prosecute critics for defamation. The ordinary criminal code permits prosecution for defamation of the President, legislators, judges and ministers. Other criticised provisions include article 30 of the State Security Law, which allows judges to confiscate publications used to carry out defamation against State authorities. In March 2001, President Lagos pledged to introduce legislation to repeal the contempt of authority provisions of the Chilean Criminal Code.

IMPUNITY

Judges were inclined to investigate and open trials for past human rights violations. Nevertheless, such cases posed substantial legal and institutional obstacles, particularly the amnesty law passed in 1978, covering crimes committed between 1973 and 1978. In 1999, the HRC, in reviewing the periodic report of Chile, reiterated its previous view that amnesty laws are generally incompatible with the duty of the State party to investigate human rights violations. In July 2001, the International Commission of Jurists, together with Amnesty International submitted a report on the incompatibility of the 1978 amnesty law (Law 2191) with international law. The report highlighted the international human rights obligations of Chile; the State's obligation to judge and punish the authors of human rights violations; the incompatibility of the amnesty law for perpetrators of human rights violations; the imperative of the *pacta sunt servanda* principle; and the non-application of the amnesty by domestic tribunals.

Since 1999, Chilean courts have managed to prosecute cases, notwithstanding the 1978 amnesty laws, by applying a jurisprudential rule which established that the "disappeared" should be considered to be victims of abduction because the last known fact about their situation is their illegal capture. According to the Supreme Court, it is necessary to ascertain whether a person is in fact dead and, if so, to establish the time of death. If it were discovered that he or she was still alive at the time of the 1978 amnesty law and was killed shortly thereafter, the perpetrators could not benefit from the amnesty. The cases then remain open until the legal truth is established about the fate of the disappeared. This jurisprudence was complemented by a more recent Supreme Court ruling that full investigation of a crime that is allegedly covered by the amnesty law and the identification of the person responsible for that crime are required before the amnesty law may be applied.

Investigation of the 1982 killing of labour leader Tucapel Jiménez continued. Judge Muñoz led the Appeals Court to order the detention of 12 persons for the crime, including retired army General and former Director of army intelligence, Ramses Arturo Alvarez Scoglia. Judge Muñoz also charged General Hernán Ramírez Hald, suspected to have helped one of the suspects to flee the country. In November 2000, an investigative judge indicted Brigadier-General Hernán Ramírez Hald in the Tucapel Jiménez case. The indictment was the first ever of a General on active duty. Seventeen people have been charged in this case.

In November 2000, an Argentinean court found Chilean intelligence agent Enrique Arancibia Clavel guilty and sentenced him to life in prison for his role in the 1974 car bombings in Buenos Aires, Argentina, which killed former Chilean Army Chief Carlos Prats and his wife. The Argentinean judge requested the extradition of Pinochet and other military officers allegedly involved in Prats' murder. In 2001, The Chilean Supreme Court rejected the extradition petition on technical grounds.

In December 2000, Italy requested the extradition of (ret'd) General Manuel Contreras and another official to serve life prison sentences for the 1975 murder of Chilean political leader Bernardo Leighton, which occurred in Italy. The extradition request was denied on the grounds of insufficient evidence and lack of due process because the two former officers had been tried in Italy in absentia.

THE ROUND TABLE (MESA DE DIÁLOGO)

The *mesa de diálogo* was set up in 1999 to deal with the disappearances during the years of military rule between 1973 and 1990. Although several prominent human rights lawyers took part in the Round Table, the major groups representing the victims of human rights violations refused to participate. The *mesa de diálogo* signed a declaration in June 2000, which recognised the gross human rights violations committed during the dictatorship. The *mesa de diálogo* also accepted the explanation of the armed forces and the uniformed police (*carabineros*) that they did not have information on the disappeared but were committed to cooperate in obtaining such information. The Declaration set a timetable to collect information and asked for legislation to provide a limited measure of anonymity to those who provided information on the whereabouts of the remains of the disappeared. Legislation with this purpose was approved in July 2000.

On 8 January 2001, the armed forces released a report describing the fate of 200 victims, in fulfilment of agreements reached by the *mesa de diálogo*. The report revealed that the armed forces had dumped the bodies of more than 150 prisoners into the ocean, rivers and lakes of Chile. Most of the cases registered in the armed forces' report dated from the first six months of the military dictatorship, before responsibility for repression was given to a centralised apparatus, the secret police known as DINA. Although the report was important because it represented the first time that the Chilean armed forces gave information about their widespread human rights violations, a great deal of information was lacking, especially regarding the fate of hundreds who disappeared after being abducted by the DINA, which ultimately responded to General Pinochet alone.

The armed forces had some interest in establishing the fate of the disappeared in order to stop ongoing prosecutions. Doubts arose concerning the consequences of the army's report on cases of disappearance, with some arguing that information on the victims' deaths means the amnesty law should end ongoing prosecutions. However, the information provided by the military was vague and inadequate to allow for judicial verification. Although approximate identification of the sites where the bodies were dumped was provided, the report did not give details on when the prisoners were disposed of, how the prisoners were killed, or what happened to their bodies after they were murdered. It is clear that only independent confirmation could allow judges to close investigations and to award amnesty when there is no definitive proof of death.

On 16 February 2001, relatives of the victims filed two suits which accused the three commanders in chief of the armed forces and the director of the National Police of having obstructed justice by releasing minimal information concerning the fate of those executed or disappeared during the Pinochet regime. However, these charges were dismissed in March 2001 by the Santiago Criminal Court.

GENERAL AUGUSTO PINOCHET CASE

On 3 March 2000, (ret'd) General Augusto Pinochet Ugarte returned to Chile after the authorities of the United Kingdom ordered his release on medical grounds from house arrest in England (See *Attacks on Justice 2000*). In Chile, complaints before more than sixty tribunals, involving nearly 2,000 individual cases of human rights violations lodged since January 1998, were awaiting General Pinochet. However, in addition to the political challenges that would confront the judiciary in trying General Pinochet, the legal obsta-

cles included the 1978 amnesty law, the parliamentary immunity of the retired General and his alleged illness. By the time of General Pinochet's return, human rights lawyers had filed a legal complaint before the Santiago Appeals Courts to lift Pinochet's parliamentary immunity from prosecution as a lifetime senator. The 1980 Constitution awarded all former Presidents who have completed their terms this non-elected post.

In April 2000, Parliament approved a constitutional reform granting parliamentary immunity to former Presidents who have served a full term and therefore encouraging General Pinochet to resign from the Senate without jeopardising his protection from prosecution. However, General Pinochet failed to resign his Senate position, and his counsel argued before the Santiago Appeal's Court that as the General was too ill to carry out his defence, the proceedings would violate his right to a fair trial. In May 2000, however, the court dismissed petitions to undertake a medical test before deciding on Pinochet's immunity. On 23 May 2000, the Santiago Appeals Court voted thirteen to nine to remove Pinochet's immunity, on the grounds that there were bases for Pinochet to be prosecuted. The Supreme Court confirmed the decision by an even larger majority in August 2000. The Supreme Court ruled that "the true purpose of an immunity proceeding is to decide whether there is probable cause against a congressman charged with a crime", and added that according to the Code of Criminal Procedure, "there is probable cause when evidence is discovered against a congressman charged with a crime". The Supreme Court decision on Pinochet also gave guidelines calling for full investigation of cases of deaths and disappearances that are likely to fall under provisions of the amnesty law or that eventually may be subject of the statute of limitations. The Court reasoned that amnesty should not be applied in the abstract, but instead only to individuals found guilty of a crime. In the same way, the statute of limitations should be applied only after the guilty has been identified and the courts determine that no impending factors, such as subsequent crimes by the accused, are relevant. The investigating judge's request for lifting of immunity related directly to the case known as the "Caravan of Death", an operation carried out one month after the military came to power in 1973, in which 72 people were secretly executed. It was unclear what effect the ruling would have on the approximately seventy other criminal cases pending against General Pinochet.

General Pinochet's loss of immunity produced tensions between the President and the armed forces. President Lagos emphasised that he would respect the court's rulings and that regardless of any political agreement on past human rights violations, justice must continue. However, the courts came under pressure when, under urging from the armed forces, President

Lagos called a meeting of the National Security Council, which is constituted by members of the armed forces, thus sending a clear message to the judiciary that Pinochet's indictment was considered an issue of national security.

On 1 December 2000, the case judge, Juan Guzmán Tapia, indicted Pinochet on charges of kidnapping and asked that he be placed under house arrest pending trial. However, 10 days later, the Santiago Appeals Court dismissed these charges on the grounds that Judge Guzmán Tapia had failed formally to interrogate General Pinochet. Days later, the Supreme Court confirmed the Appeal Court's dismissal of the charges, but ordered Pinochet to undergo questioning regardless of whether medical tests to establish fitness for trial had been undertaken. On 9 January 2001, General Pinochet submitted to medical tests, pursuant to which a team of six experts established unanimously that he suffered from "vascular dementia"(a light to moderate form of dementia, according to one expert) caused by several minor strokes. One independent expert chosen by each side, in an apparently impartial procedure, observed the six experts. After the medical diagnoses it remained for the judge to decide whether Pinochet's condition was grave enough to prevent him from carrying out his defence and understanding the charges against him

On 23 January 2001, General Pinochet was formally questioned at his home for two hours by Judge Guzmán. During the deposition, Pinochet was reported to have denied that he had ordered the "caravan of death" executions and to have suggested that local commanders might have been responsible. Following the deposition, Judge Guzmán renewed Pinochet's house arrest and, on 29 January 2001, reinstated charges against him. Judge Guzmán determined that Pinochet was fit to stand trial and indicted him on 57 charges of murder and 18 of kidnapping. On 28 March 2001, the Court of Appeal in the capital Santiago ruled that the charges should be reduced to those concerning conspiracy to conceal the activities of the military death squad. The Court also approved Pinochet's release from house arrest after the payment of a bail.

On 9 July 2001, the Santiago Appeals Court suspended the proceedings on health grounds. Although the investigating judge had concluded that Pinochet's condition did not rise to the level of madness or dementia required under the law, the Santiago Appeals Court ruled, by two votes to one, that his physical state did meet the requirements based on a different interpretation of the term "dementia". Although opinion on the matter among outside observers was in no way unanimous, many criticised the decision on the basis that trials in Chile are largely written procedures and that Pinochet seemed to

some to be fit enough to understand the charges and adequately instruct his defence team.

On 22 August 2001, the Supreme Court reopened the possibility of a trial of the former dictator. While the contents of the ruling of the Santiago Appeals Court could not be appealed, prosecutors went to the Supreme Court arguing that the decision was illegal on technical grounds. Prosecutors said that the tribunal had based its decision at least in part on a reform of Chile's penal code, which is not yet in effect in Santiago. The Supreme Court voted 5-0 to study the request and did not set a date for the issuing of a final ruling.

Whatever the ultimate outcome, the Pinochet case has helped to establish the principle that certain grave human rights violations are subject to "universal jurisdiction" and that heads of states are not immune from prosecution. Furthermore, Chilean courts overcame the 1978 amnesty law by stating that prosecutions of ongoing disappearance are possible, because the crime continues as long as the fate of the victim is concealed.

JUDICIARY

The Constitution provides for an independent judiciary. The influence of the military in the judiciary has significantly decreased as continued rotation in the court system has reduced the number of military-period nominees. In 2000, the judiciary's budget was US\$ 155,339,806, which constitutes a mere 0.83 per cent of the annual State budget.

STRUCTURE

The judiciary is constituted of an ordinary court system and a specialised court system. Within the ordinary system, the 21-seat Supreme Court has the highest position. There are also 17 Appeals Courts with jurisdiction over the regions, and courts of first instance (*juzgados de letras*), with jurisdiction over a district within a region under the principal jurisdiction of an Appeals Court. The Supreme Court is responsible for general supervision, including discipline and resource management and also plays a key role in the appointment procedure.

The President of the Supreme Court, while delivering the Court's annual report, expressed dismay at the interference and the unjustified criticism the judiciary has faced in respect of a number of its decisions. The President of

the Supreme Court rejected criticism that political pressures have influenced judicial decisions.

In June 2001, following a petition from the Government, the Supreme Court decided to appoint nine criminal judges, who would exclusively carry out 51 investigations on disappearance. Fifty-one first instance judges were also appointed to oversee proceedings on 65 cases of disappearance. The decision was taken on the grounds that a substantial number of cases are being carried out on facts that allegedly constitute human rights violations committed since 1973. The appointment of these judges is directed toward achieving a significant advance in these cases.

A Constitutional Tribunal is empowered to exercise control over organic laws and the laws that interpret a constitutional provision. Due to its restricted powers and because of its composition, the Constitutional Tribunal has maintained a low profile in Chile. The appointment of justices is one of the enclaves of powers retained by members of the former military dictatorship, as three of the six members are appointed by the National Security Council, half the members of which belong to the armed forces. When the Constitutional Tribunal reviewed the new Code of Tribunals it recommended that Parliament re-draft the provisions in order to guarantee certain rights. The Parliament, on the understanding that the statement was a recommendation only, did not change the text of the code and it was ratified by the President. In this case, it was clear that the rulings of the Constitutional Tribunal were ineffective.

APPOINTMENT AND SECURITY OF TENURE

Supreme Court justices are appointed by the President and ratified by at least two thirds of the senate of the Republic from a list of five candidates submitted by the Supreme Court (Article 75). Appeals Courts justices are appointed by the President from three-candidate lists submitted by the Supreme Court. First instance judges are also appointed by the President from a list submitted by the Appeals Court of the corresponding jurisdiction. The law of the Public Prosecutor's Office establishes that the appointment of prosecutors follows the same method of appointment.

The Constitution, under article 77, guarantees security of tenure to judges "during good behaviour", but stipulates lower level judges will exercise their functions during the time established by the law. The Supreme Court may remove judges on grounds of "bad behaviour" upon the request of the President of the Republic, of an interested party or on its own initiative. By

majority vote of its members, the Supreme Court may also transfer a judge to a different position. Furthermore, judges and magistrates are subject to periodic evaluations by the next superior court (Code of Tribunals, Articles 273, 275 and 277). In 2000, the Supreme Court imposed 146 disciplinary measures, including the removal of one justice of the Appeals Court of Santiago. Removals, transfers and other sanctions applied by the Supreme Court were seen by most observers as being in compliance with legal provisions. The new Commission of Ethical Control, created in March 2000 within the Supreme Court, has carried out advisory functions on behalf of the plenary with regard to general policies on addressing irregularities within the judiciary and the investigation of cases.

The wide powers of the Supreme Court with regard to magistrates and judges undermines the latter's independence.

JUDICIAL REFORM

The reform of the criminal law system, which began in the early 1990s, continued during the period under review, with substantial progress reported in different areas. Following the 1997 constitutional reform, which established the Public Prosecutor's Office (*Ministerio Público*), several laws have been evaluated and approved to modernise the Chilean Criminal law system. In 1999, the new Law of the Public Prosecutor's Office was adopted by Parliament (Law 19640). This law created the Office of the Public Prosecutor, which enjoys autonomy and independence. During the period under review, three new laws entered into force. Law 19696 provided for a new Code of Criminal Procedure; Law 19665 reformed the Code of Tribunals; and Law 19718 created the Public Penal Defence.

Most of the administrative and financial efforts of the judiciary have been directed toward implementing this reform throughout the country. The reform is to be implemented over the entirety of the country by the end of 2003. The planned gradual implementation is for the purpose of accounting for any disadvantages of the new system, so that they may be corrected through appropriate legislative measures.

Law 19640 (See *Attacks on Justice 2000*) grants to Public Prosecutors the powers to investigate and formulate criminal charges. Prosecutors have direct control over the investigations and the police forces for this purpose. However, orders to deprive individuals of their constitutional rights, such as arrest warrants, need prior approval by a judge (*Juez de garantías*). The Prosecutor-General, the head of the Public Prosecutor's office, is appointed

by the President of the Republic with the consent of the Senate from a list of five candidates submitted by the Supreme Court, following an open and public contest. The Prosecutor-General, elected in 2000, will serve for a non-renewable ten-year term.

Law 19665, containing a new Code of Criminal Procedure, establishes a criminal procedure based on an adversarial model that is due to be fully implemented by the year 2003. The new code separates the function of investigation, prosecution and judgement by giving these functions to different organs, contrary to the former system under which they were concentrated in the criminal judge. The new organs are the Public Prosecutor's Office, in charge of the investigation and prosecution; Courts of Guarantees responsible for ensuring the fulfilment of the procedural guarantees during the investigation stage; and an Oral Tribunal that will carry out the judgement. The new code grants prosecutors control over the police during the investigation stage, contrary to the former system, in which the police enjoyed free initiative to act. The entry into force of the new system will bring a substantial increase in the number of criminal judges and prosecutors. By September 2001, the Supreme Court started to organize merit-based contests to fill the vacancies. According to the Ministry of Justice, the Public Prosecutor's Office must have 642 specialised prosecutors.

Law 19665 reformed the Code of Tribunals. Its purpose is to tailor the structure of the judiciary to the new Code of Criminal Procedure. The new Code created 151 Courts of Guarantees, with 413 judges; and 43 Oral Tribunals with 396 judges.

Law 19718 created the Public Defender's Office. It will be composed of approximately 417 legal defenders who will provide free legal assistance to those accused who do not have the resources to cover their legal defence in criminal cases. The Public Defence has its own budget, which will be controlled by the President through the Minister of Justice. In April 2000, the head of the Public Defence Office was appointed.

MILITARY JUSTICE

Military courts continued to hold broad jurisdiction over all matters involving military officers. The military courts also have jurisdiction to try civilians for certain kinds of criminal offences. Decisions in the military court system are subject to review by the Supreme Court, but the Supreme Court has seldom overturned a military court decision. Moreover, in respect of

disputes of jurisdiction that have arisen between the military and civilian courts, the Supreme Court has tended to grant jurisdiction to the former. However, as the composition of the Supreme Court no longer reflects an overwhelming military influence, this trend has begun to shift in recent years. (By September 2001, only three of the Supreme Court's members had been appointed by the military.) One example was the transfer of the Albania case from the Military Courts to the civilian judiciary in June 2000. Operation Albania refers to the 1987 killings of 12 members of the Manuel Rodríguez Patriotic Front.

Regarding the military tribunals' jurisdiction, the Committee against Torture recommended in March 1999 that "the law be amended to restrict the jurisdiction of the military courts to trials only of military personnel charged with offences of an exclusively military nature". In 2000, the Human Rights Committee expressed concern at "[the] wide jurisdiction of the military courts to deal with all cases involving prosecution of military personnel and their power to conclude cases that began in the civilian courts." The Committee added that this phenomenon "contributes to the impunity which such personnel (military officers) enjoy against punishments for serious human rights violations". The Committee recommended that the law be amended in order to restrict the jurisdiction of the military courts to trials only of military personnel charged with offences closely related to military matters.

CASES

Julia Urquieta [Lawyer]: Ms. Urquieta is a member of the Committee for the Defence of People's Human Rights (CODEPU). On 30 October 2000, Ms. Urquieta gave a television interview in which she explained on behalf of those she was representing in a case the reason that Mr. Ricardo Claro Valdés was being accused of having supported the repression carried out by the military regime. Following the statement of Ms. Urquieta, legal proceedings were initiated against her at a criminal court in Santiago on 23 May 2001. On 1 June 2001, lawyers and human rights organisations submitted an *amparo* petition aimed at seeking protection for constitutional rights, which was rejected. The case, currently at the Second Chamber of the Supreme Court, is said to lack merit and to have been undertaken against Ms. Urquieta in response to her exercise of legitimate legal activities.

CHINA

INCLUDING TIBET AND THE HONG KONG AND MACAO SPECIAL ADMINISTRATIVE REGIONS

The human rights situation in China continued to deteriorate. Persecution and torture of members of the Falun Gong spiritual movement and members of political dissident groups continued. A major campaign against crime led to a record number of executions and allegations of pressure on judges and lawyers to process large numbers of criminal defendants in a short time. Judges and lawyers continued to be controlled by the Chinese Communist Party. There was still no independent judiciary in Tibet. While the overall human rights situation in Hong Kong and Macao remained satisfactory, some concerns about the independence of the judiciary remained.

The People's Republic of China (PRC) is a unitary state with 22 provinces, five autonomous regions (Guangxi, Inner Mongolia, Mingxia, Tibet, Xinjiang), three directly governed municipalities (Beijing, Shanghai, Tianjin) and two special administrative regions (Hong Kong and Macao).

Under the 1982 Constitution, legislative power is vested in the National People's Congress (NPC), which has around 3000 indirectly elected members. Executive power is exercised by the State Council, which is elected by the NPC. President Jiang Zemin is the head of the state and Zhu Rongji is the Prime Minister.

In practice, effective political control is in the hands of the Chinese Communist Party (CCP). The CCP enjoys unassailable political power and state organs act as instruments implementing the Party's policy.

HUMAN RIGHTS BACKGROUND

China signed the International Covenant on Civil and Political Rights on 5 October 1998, but has yet to ratify it. In February 2001, China ratified the International Covenant on Economic, Social and Cultural Rights. In November 2000, China signed a Memorandum of Understanding with the UN High Commissioner for Human Rights, designed to set up a program of technical cooperation in the field of human rights.

However, while showing a willingness to adhere at a pro forma level to the international human rights regime, the Chinese authorities pursued certain domestic policies resulting in serious human rights violations on a large scale.

The Government's campaign against those it deemed a threat to political stability and public order continued. From 25 October 1999 through July 2000, courts in four cities sentenced ten leaders of the dissident-led China Democracy Party (CDP) to heavy prison terms, primarily on subversion charges. Other activists, such as An Jung, founder of the nongovernmental organisation Corruption Watch, were sentenced to long prison terms on charges of inciting the overthrow of the government.

The Chinese Government also continued its campaign against the Falun Gong spiritual group. Followers of the group faced detention, unfair trials, torture and imprisonment as part of the Government's crack-down on groups considered to be "heretical organisations". Legislation was used abusively to convict alleged leaders of the Falun Gong on politically driven charges and new regulations were introduced to further restrict fundamental freedoms. The clamp-down on "heretical organisations" increasingly encompassed other Qi Gong and religious groups, although in September 2001 there were signs that China might re-establish diplomatic links with the Vatican.

In 2001, Falun Gong sources in China and abroad alleged that violence and torture against Falun Gong practitioners detained all over China is now systematic and officially sanctioned. They described this as a new pattern and claimed that a special government task force was set up in Beijing to lead the campaign against Falun Gong, the "610 office". This office allegedly has issued unwritten instructions allowing police and other officials to go beyond legal constraints in this campaign, discharging them of legal responsibility if a Falun Gong practitioner dies in detention due to beatings.

There were a growing number of reports of deaths in custody of Falun Gong practitioners. By mid-January 2001, at least 201 deaths in custody had been reported since the ban on Falun Gong in July 1999. By September 2001, this number had reportedly more than doubled in just over six months.

In April 2001, the central Chinese authorities issued directives to intensify the "strike hard" campaign against crime, resulting in tens of thousands of arrests and a record number of executions in the following weeks. Within three months, from April until early July 2001, Amnesty International recorded 2,960 death sentences and 1,781 confirmed executions. Under pressure to produce results in the "Strike Hard" campaign, there were reports that lawyers were called on to cooperate with the police and prosecution, and not

to hold up the judicial process. Courts have boasted of their speed and “special procedures” during the campaign.

The practice of torture continued to be widespread. Victims included both political detainees and criminal suspects. Persons detained pending trial were particularly at risk of torture during pretrial detention due to systemic weaknesses in the legal system or lack of implementation of the revised Criminal Procedure Law. In May 2000, the UN Committee Against Torture called upon China to ensure prompt, thorough, effective and impartial investigation of all allegations of torture.

Chinese authorities struggled to gain control of the Internet with its estimated more than 20 million users. New regulations issued in March 2000 forbade China-based websites from reporting news from “independent news organisations” thus limiting them to state-controlled sources. Internet users continued to be arrested and charged with serious offences for spreading information about human rights or other politically sensitive issues.

Political and religious repression was evident in Xinjiang. A major aim of the “Strike Hard” campaign was to “deal a decisive blow to separatist forces, eliminating separatism and illegal religious activities”. At least 24 alleged terrorists, most of them Uighur Muslims, were executed during 2000. At the end of April 2001, 30 Uighurs were sentenced to death in four districts of Xinjiang alone, 16 of whom were reportedly executed immediately. The charges included “separatism” and a range of alleged violent crimes.

On the positive side, there were some signs that the Chinese authorities were attempting to reform the legal system, seeking international expertise to help design new legal structures, train judicial and legal personnel, and help disseminate information on the reforms to the public, the courts, and the police. However, as the following outline shows, much more is needed in the area of judicial reform.

THE CRIMINAL PROCEDURE LAW (CPL)

The 1996 edition of *Attacks on Justice* outlined the major features of the CPL, which was adopted by the NPC on 17 March 1996 and came into force on 1 January 1997. While the amended CPL was praised both inside China and internationally for making certain improvements in the protection of defendants in China's criminal justice system, doubts were raised as to how much impact these reforms have had in practice.

Some sources alleged that the implementation of the CPL has departed substantially from both the letter and the spirit of the law, and that authorities appear unwilling to allow the limited safeguards in the CPL to be implemented in practice. The CPL provisions aimed at safeguarding human rights were said to have been either diverted by interpretative rules, or violated outright without the authors of the violations suffering any consequences. Loopholes and ambiguities in the CPL have been exploited to the full by law implementation authorities, and in certain areas, the amended CPL has actually resulted in greater limitation of key rights.

An official report from the Standing Committee of the National People's Congress recently confirmed many of the problems with the implementation of the CPL. NPC Standing Committee inspection groups, which were sent out to review the implementation of the CPL, revealed serious problems, particularly regarding three main areas of CPL implementation. Firstly, they found various time limits on detention to have been widely ignored. Secondly, they found that torture has reached epidemic proportions, although both the CPL and the Criminal Law prohibit it. Thirdly, they found that lawyers representing defendants or suspects in criminal cases encountered a great deal of difficulty in fulfilling their professional duties.

THE JUDICIARY

STRUCTURE OF THE COURTS

The Chinese court system is composed of four levels: the Supreme People's Court, the Higher People's Court, the Intermediate People's Court and the People's Court. There are special courts for handling military, maritime, and railway transport cases.

The Supreme People's Court is responsible to the NPC, to which it reports on its activities. The three lower levels of courts report to the Standing Committee of the People's Congress of the judicial district concerned.

Neither prosecutors nor judges are required to have law degrees or legal experience, and qualification standards traditionally have been low. Only nine percent of judges had received higher education, and many were not well versed in the law. During 2000, the authorities undertook additional efforts to improve the training and professionalism of judges and lawyers. There is now a unified state legal examination for all professional and judicial personnel. On 30 June, 2001, the NPC Standing Committee passed the revi-

sion of the Law on Judges and the Law on Prosecutors. Aside from heightening the standard for appointing judges and prosecutors, the NPC Standing Committee declared that all future judges and prosecutors would be selected from those who pass the unified state legal examination. Further changes in the law require judicial and prosecutorial appointees to be law school graduates who have practiced law for at least two years, or postgraduates who have practiced law for at least one year. Such measures are important steps toward enhancing the quality of judges and prosecutors and should be welcomed.

After July 2000, in an effort to distance the judges from prosecutors, judges in Beijing shed their military style uniforms in favour of robes or suits.

INDEPENDENCE OF JUDGES

Like other governmental organs of the PRC, the Chinese judiciary is subject to the control of the leadership of the Chinese Communist Party. China's Constitution recognises the independent exercise of the power to adjudicate, and it states that courts "are not subject to interference by administrative organs, public organisations or individuals". However, it must be noted that the CCP is neither an "administrative organ" nor a "public organisation".

Through various channels, the CCP can interfere with and control the judiciary at various stages of litigation. One method of control is through the Central Political-Legal Committee, which was established directly under the CCP Central Committee, together with political-legal committees at lower levels.

The responsibility of these committees includes supervision of judicial personnel, discussion of "important cases", reporting to the Party committee on trends in legal affairs and implementation of Party policy on legal affairs through the judiciary. The judiciary is under the obligation to report on its work to the Political-Legal Committee, such as when opinions are divided on certain matters. This allows the Committee to routinely review the judiciary's work.

It is unclear how the committee system affects the routine work of the judiciary as a whole, since its operations are highly secretive. However, the high frequency of documents issued by the Central Political-Legal Committee suggests that it is deeply involved in judicial affairs.

At the structural level, the court system itself has implications for the impartiality of the judiciary. The Organic Law of the People's Courts

provides that an adjudication committee should be established within every people's court. The mandate of the adjudication committee includes discussion of major or difficult cases. However, the law fails to specify the procedure by which a case is subjected to discussion as well as what kinds of cases should be decided by the adjudication committee. Local people's courts have substantially expanded the mandate of the adjudication committees. Thus, in practice, due to the ambiguity of the rules, virtually all cases may be subject to a discussion, and therefore to a decision by the adjudication committee, seriously impairing the independence of individual judges.

Another structural element of the judiciary is the case review system. Despite the fact that the CPL stipulates that individual judges should try cases independently, it is common practice that individual judges report cases to senior judges and the president of the court before a verdict is reached. This case review system has dominated judicial practice within every court. It has recently been reported that the chief justice of the Supreme People's Court called for the use of this practice to be limited (but not abolished).

APPOINTMENT AND DISMISSAL OF JUDGES

The appointment of judges is under the control of the Party committee. Similar to other "cadres", all judges and prosecutors are nominated by the local Party committee under the guidance of the Party's Political-Legal Committees. The local People's Congresses merely confirm the nomination. This process can result in local politicians exerting undue influence over the judges they appoint.

Judges and prosecutors can leave their posts in "fault" or "no-fault" situations. The Judges Law provides a list of prohibited acts that would trigger removal of judges from their positions in a "fault" situation. Some loosely-defined acts, such as spreading words damaging to the reputation of the country, participating in illegal organisations as well as demonstrating against the country, are among the most serious. There is also a catch-all clause embracing all other acts deemed to violate laws or discipline. Again, there is neither a clear definition of what behaviour should be considered under this clause nor an identifiable practice for determining such acts. In a "no-fault" situation, a judge may be removed if he or she is assigned a job outside the court. In addition, a judge may also be dismissed if he or she is found to be unqualified. Yet there is no transparent process or standard for determining judicial competence.

OTHER DEVELOPMENTS

Corruption and inefficiency in the judicial system are endemic. The Government continued a self-proclaimed “unprecedented internal shake-up” of the judiciary, designed to combat corruption and improve efficiency, which began in 1998. In February 2000, the Supreme People's Court issued new regulations tightening conflict of interest guidelines for judges. Judges who violate prohibitions against accepting money or other gifts from litigants or who privately meet with litigants may be liable for malpractice under the new regulations.

The courts have recently initiated some reforms, aimed at quieting the popular outcry against judicial corruption. One notable reform involves “holding judges accountable for wrongfully decided cases”, whereby an individual judge may bear personal responsibility for judgments that he issues in a trial. In many jurisdictions, reversal of judgments or orders for retrial by appellate courts are considered “wrongfully decided cases” of the judge who issued the first decision. The penalties for “wrongfully decided cases” include warning, demotion, monetary punishment, or even dismissal. This reform has serious implications for the ability of individual judges to carry out their duties independently.

LAWYERS

According to the Lawyers Law, which was promulgated in 1996, the Ministry of Justice has significant control over lawyers, law firms and bar associations. However, lawyers are now allowed to organise private law firms that are self-regulating and do not have their personnel or budgets determined directly by the State.

The CPL allows lawyers to provide legal counsel to suspects being detained or questioned. After cases are transferred to the Prosecutors office, defendants have the right to seek the assistance of a lawyer to handle their defence. While they are preparing their defence, lawyers can collect evidence and check, take note of or duplicate the evidence collected by prosecutors. Lawyers have the right to meet with their clients and maintain communication with the defendant.

However, these rights are not respected in practice. Defense lawyers have faced serious obstacles in bringing these rights to life, because of both their inability to exercise the rights given to them under the CPL and because of loopholes in the law itself. For example, officials continue to deny requests

for lawyer-client meetings. Even when approved, meetings are often limited in frequency and duration, or subjected to conditions that severely compromise meaningful consultation. Lawyers are commonly held responsible for security during meetings with clients and further told what they can and cannot discuss. Attorney-client confidentiality is generally disregarded as meetings are often monitored, recorded or held in public rooms.

Lawyers continue to experience difficulties in preparing a proper defense. In addition to limited access to detained clients, defense lawyers are restricted in their ability to review evidence collected by the prosecution, have insufficient power to collect their own evidence, and are unable to cross-examine witnesses who have provided testimony but who fail to appear in court. Mounting official hostility towards lawyers has also greatly increased the risk of representing criminal defendants. Lawyers who undertake such work are often harassed and intimidated, and sometimes detained or even convicted of crimes, merely for actively defending the interests of their clients. This is particularly so in politically sensitive cases. Lawyers have consequently been reluctant to work in criminal defense, which has led to a disturbing decline in the number of criminal cases where defendants are represented by counsel.

Lawyers are now working under the shadow of Article 306 of the Criminal Law, by which a defense lawyer may be accused and convicted of the crime of inducing or helping a witness to change testimonies. Under this article, any changes of testimony after a lawyer's involvement would incriminate that lawyer at official will, in particular the will of the prosecutor. It has been reported that dozens of lawyers were detained, charged and even convicted according to this article. Lawyers associations at all levels have protested this legal provision, but so far have failed to attract sufficient official attention.

TIBET AUTONOMOUS REGION

The Tibetan Autonomous Region and other Tibetan autonomous areas have been given nominal autonomy, with most local powers being subject to central approval. The actual extent to which Tibetans control their own affairs is even more circumscribed, however, due to the centralised dominance of the Communist Party and the exclusion of Tibetans from meaningful participation in regional and local administration. The reality for Tibetans is that there is neither democracy nor an independent judiciary, nor any rule of law in Tibet.

The Chinese Government strictly controls access to and information about Tibet. Thus, it is difficult to determine accurately the scope of human rights abuses. However, there appeared to be a total disregard of basic civil and political freedom. The Chinese authorities continued to commit numerous serious human rights abuses in Tibet, including instances of torture, arbitrary arrest, detention without public trial, and lengthy detention of Tibetan nationalists for peacefully expressing their political or religious views.

Repression of religious activities in Tibet intensified during 2000. It is believed that hundreds of Buddhist monks and nuns remained in prison at the end of the year. Few escaped torture and ill-treatment, particularly during the early stages of custody.

In August 2001, the UN Committee on the Elimination of Racial Discrimination said that it "remained concerned with regard to the ...freedom of religion for people belonging to national minorities (in China), particularly in Xinjiang and Tibet." It also cited "continuous reports of discrimination with regard to the right to education in minority regions, with particular emphasis on Tibet."

Legal safeguards for ethnic Tibetans detained or imprisoned are the same in principle as those in the rest of China. However, many Tibetans, particularly political detainees, are deprived of even elementary safeguards of due process. Tibetan judges must report to the Communist dominated "Adjudication Committees" or the "Politics and Law Committees", which then advise on what they consider to be an appropriate ruling. Any judge who reverses the decisions of the Committees is subject to serious repercussions.

A majority of judges are ethnic Tibetans, but most have little or no legal training. Authorities are working to address this problem through increased legal education opportunities. Judges are appointed and may be removed without cause by the People's Congress or one of its standing committees.

THE HONG KONG SPECIAL ADMINISTRATIVE REGION

Hong Kong reverted from British to Chinese sovereignty on 1 July 1997. In the Joint Declaration between the British and the Chinese Governments on the question of Hong Kong, it was stipulated that the existing social and economic system and the present lifestyle of Hong Kong be left unaffected for a period of 50 years.

The format chosen for implementing this "one country, two systems" principle was the Special Administrative Region (SAR) under direct authority of the Central People's Government of the PRC. The status of the Hong Kong SAR was established in Article 31 of the 1982 Constitution of the PRC. The Basic Law, approved in 1990 by the PRC's National People's Congress, provides for fundamental rights and serves as a "mini-constitution" for the Hong Kong SAR.

Under the Basic Law, Hong Kong is allowed to have its own legislature and judiciary. A Chief Executive, selected by a 400-person selection committee that was chosen by a China-appointed preparatory committee, wields executive power.

The legislature (known as the Legislative Council) is composed of directly and indirectly elected members. On 10 September 2000, the second Legislative Council was elected, for a 4-year term. Twenty-four seats were elected on a geographic basis through universal suffrage, 30 seats through functional (occupational) constituencies, and 6 seats through indirect election. Human rights groups and democracy advocates complained of a democratic deficit in the election procedures, but no parties boycotted the elections. Pro-democracy candidates won 17 of the 24 seats elected on a geographic basis and 22 seats overall.

The power of the legislature is curtailed substantially by voting procedures that require separate majorities among both geographically and functionally elected legislators for bills introduced by individual legislators and by Basic Law prohibitions against the legislature's initiating legislation affecting public expenditures, political structure, or government operations. In addition, the Basic Law stipulates that legislators are only allowed to initiate legislation affecting government policy with the prior approval of the Chief Executive.

HUMAN RIGHTS BACKGROUND

The International Covenant on Civil and Political Rights was ratified by the United Kingdom in 1976 and extended to Hong Kong with several reservations. When the PRC resumed sovereignty over Hong Kong in 1997, the change in Hong Kong's legal status had implications for the extension of the ICCPR to the SAR. However, an annex to the Joint Declaration was adopted which stipulates *inter alia* that "the provisions of the ICCPR and the ICESCR as applied to Hong Kong shall remain in force".

Human rights in Hong Kong were generally respected, but there were signs of censorship and threats to judicial independence (see below).

In April 2000, a senior official of the central government's Liaison Office warned Hong Kong journalists against advocating Taiwanese independence, saying they should report only what was in the interests of Beijing. In September 2000, the Chinese Government cautioned Anson Chan, the head of the civil service in Hong Kong, that she and her entire staff must step up their support of the SAR's civil executive.

The *Falun Gong* spiritual movement has not been outlawed in the Hong Kong SAR, where the right to freedom of assembly is protected, despite the ban on the movement in the PRC. However, there has been substantial debate in Hong Kong on whether the SAR should follow the PRC in outlawing the movement with reference to Article 23 of the Basic Law, which deals with perceived threats to national security. The Government also considered but decided against adopting legislation to adopt an "anti-cult law" which would have the consequence of outlawing *Falun Gong*, and the Chief Executive referred to the organisation as an "evil cult". In some cases, international members of Falun Gong have been refused entry to Hong Kong. The issue of Hong Kong's approach to *Falun Gong* is considered by some as a test case of Hong Kong's autonomy.

THE JUDICIARY

By law and tradition, the judiciary has remained independent since the transfer of power to the PRC, underpinned by the Basic Law's provision that Hong Kong's common law tradition be maintained. Articles 19 and 85 of the Basic Law guarantee independent judicial power and freedom from interference, and Article 82 of the Basic Law vests Hong Kong's highest court with the power of final adjudication. However, the Basic Law also stipulates that the Standing Committee on the NPC has the power of final interpretation of the Basic Law.

Structure of the courts

The court system in the Hong Kong SAR consists of the Court of Final Appeal, the Court of Appeal, the Court of First Instance, the District Court, the Magistrates' Court and other tribunals with judicial officers presiding.

The Court of Appeal and Court of Final Appeal exercise appellate jurisdiction only. There is a constitutional limitation on the powers of

interpretation of the Court of Final Appeal under Article 158 of the Basic Law. Under this provision the Standing Committee of the National People's Congress reserves some matters for determination. These relate to the provisions of the Basic Law which concern the relationship between the Central Authorities and the Hong Kong SAR.

Independence of the judiciary

The Government's controversial 1999 request to the Chinese Government to seek a final interpretation of the Basic Law in the so-called "right of abode" cases was discussed in *Attacks on Justice 1999*. The cases arose from Article 24 of the Basic Law, which conferred the status of Hong Kong Permanent Resident on six categories of people. The NPC Standing Committee's interpretation, which effectively overturned a ruling by the Court of Final Appeal, raised questions about the potential future independence and ultimate authority of Hong Kong's judiciary. In a later decision in December 1999, the Court of Final Appeal declared that the Standing Committee's Interpretation was lawful and binding on all Hong Kong courts.

The third round of right of abode cases involved four actions for judicial review. Judgments for three of the cases were given together on 20 July 2001 (the fourth decision had not yet been handed down by September 2001). In the *Chong Fung-Yuen* judgment, the Court of Final Appeal took the view that the Standing Committee has the power to interpret any provision of the Basic Law at any time, and its interpretation binds the Hong Kong courts so that they must give effect to it.

Appointment and dismissal of judges

A Judicial Recommendation Commission advises upon judicial appointment or promotions, conditions of judicial service and any other matters affecting judicial officers. The membership of the Commission consists of the Chief Justice and the Secretary for Justice *ex officio*, and two judges, one barrister, one solicitor and three lay persons by appointment of the Chief Executive. Certain categories of persons, such as members of the legislature and other pensionable officers, are not allowed to be members of the Commission.

Commission members may be nominated by the private bar. However, Commission resolutions may be adopted with two dissenting votes, thereby allowing for appointments in the face of opposition by the Bar. Legal experts have complained that the commission's selection process is opaque. In

November 2000, legislators requested that the process be made transparent. The Government responded that privacy concerns prevented opening the process to the public.

According to Article 90 of the Basic Law, removal and appointment of the judges of the Court of Final Appeal, and of the Chief Judge of the High Court, must be endorsed by the legislature and reported to the Standing Committee of the National People's Congress. Only judges of courts starting from the level of District Court enjoy security of tenure until retirement age (either 60 or 65, depending on date of appointment).

THE MACAO SPECIAL ADMINISTRATIVE REGION

Macao reverted from Portuguese to Chinese administration on 20 December 1999. This followed a "Joint Declaration on the question of Macao" between Portugal and China from 1987, whereby the parties declared Macao to be Chinese territory and provided for China to resume the exercise of sovereignty over it as of 20 December 1999.

Under the terms of the Joint Declaration, China undertook a series of basic policies following the principle of "one country, two systems", similar to the approach taken with regards to the Hong Kong SAR. These undertakings included the establishment in Macao of a Special Administrative Region (Macao SAR) of the PRC, which is under the direct authority of the Chinese Central Government, but which enjoys substantial autonomy, including executive, legislative and "independent judicial power, including that of final adjudication". China also undertook to respect the current legal, social and economic system in Macao, which are to remain in place for 50 years. A Basic Law, passed by the Chinese legislature in 1993, works as a Constitution for the region.

The Government of the Macao SAR is headed by a Chief Executive, chosen by a 300- member Selection Committee, which was chosen by the Preparatory Committee (60 Macao and 40 PRC representatives appointed by the NPC). The Chief Executive will hold office for a renewable five-year term.

The first legislative assembly is composed of 23 members, of which only 8 are directly elected by the people. Eight are elected by interest groups and seven are elected by the Chief Executive. All of them will serve until October 2001 when a new legislative assembly will be elected. The number of legislators will increase in successive terms: the second legislature will be com-

posed of 27 members (of which 10 will be directly elected) and the third of 29 members (12 elected directly).

HUMAN RIGHTS BACKGROUND

The Macao SAR Government generally respects the human rights of its citizens, although there are problems in certain areas. Such problems include the limited ability of citizens to change their government; limits on the legislature's ability to initiate legislation; occasional instances of police abuse; inadequate provision for the disabled; a lack of legal protection for strikes and collective bargaining rights; and trafficking in women.

Rising unemployment undermined high expectations of economic recovery and government reform under the Chinese regime. Unemployed workers staged several large marches, culminating in a violent confrontation on 2 July 2000, when police used tear gas to disperse stone-throwing demonstrators and arrested several alleged organisers.

THE JUDICIARY

Structure of the courts

There are four courts in the Macao SAR: the Primary Court (with general jurisdiction in the first instance); the Administrative Court (with jurisdiction of first instance in administrative disputes); the Court of Second Instance; and the Court of Final Appeal.

Independence of the judiciary

Since the handover in December 1999, the organisation of the courts has been governed by the provisions of the Basic Law. Article 83 establishes that the courts of the Macao SAR are independent and have power of final adjudication over all cases in the Macao SAR. The courts also may rule on matters that are "the responsibility of the Central People's Government or concern the relationship between the central authorities and the SAR". However, before making their final (i.e. not subject to appeal) judgment, the court must seek an interpretation of the relevant provisions from the Standing Committee of the Chinese National People's Congress. When the Standing Committee makes an interpretation of the provisions concerned, the courts, in applying those provisions "shall follow the interpretation of the Standing Committee".

The Standing Committee of the NPC must consult its Committee for the Basic Law of the SAR before giving an interpretation of the law. This Committee is composed of 10 members, 5 from the SAR and 5 from the mainland.

Appointment and dismissal of judges

According to Article 87 of the Basic Law, the Chief Executive appoints judges at all levels, acting on the recommendation of an "independent commission" (which he appoints), composed of local judges, lawyers and "eminent persons". The Basic Law stipulates that judges must be chosen on the basis of their professional qualifications.

Judges may be removed only for criminal acts or an inability to discharge their functions. Judges can only be removed by the Chief Executive acting on the recommendation of a tribunal appointed by the President of the Court of Final Appeal and composed of not less than three local judges. In the case of the justices of the Court of Final Appeal, their removal may only be decided by the Chief Executive following a recommendation of a review committee composed of members of the legislature.

Other developments

The need to translate laws and judgments from Portuguese and a severe shortage of local bilingual lawyers and magistrates may hamper development of the legal system (of the 100 lawyers in private practice, approximately 5 can read and write Chinese). However, the authorities have instituted a rigorous postgraduate training program for magistrates, who received legal training outside the SAR.

COLOMBIA

At least 64 judges, lawyers and prosecutors were victims of attacks between February 2000 and November 2001. Intimidation against other judicial officers and witnesses contributed to the widespread impunity enjoyed by a wide variety of criminal offenders. The criminal justice system failed to address adequately such endemic problems as corruption, armed opposition and paramilitary activities, organised crime, drug-trafficking and human rights violations, leading to widespread public distrust of the judiciary. The Constitutional Court overturned much of the Law of Specialised Jurisdiction. Three new codes on criminal justice entered into force. The military judiciary has generally refused to transfer cases of human rights violations involving high-ranking officers to civilian jurisdiction. A new law was approved in congress, which, if implemented, would undermine the independence of the judiciary and the separation of powers. The Constitutional Court ruled that judging a military officer allegedly responsible for humanitarian law and human rights violations within the military judiciary amounted to a grossly illegal proceeding. The armed opposition FARC-EP has continued to prevent the presence of an impartial judiciary in the demilitarised zone and has carried out grossly unfair trials.

BACKGROUND

Colombia is a democratic and pluralist republic. The 1991 Constitution provides for a unitary State and the separation of powers. The hierarchy of sources of law in the civil tradition, on which Colombian legal system is based, is a Constitution, legislation and regulations. The President, who is head of the Government and chief of state, exercises executive power. The President is elected by direct and universal suffrage for a four-year period and is barred for life from re-election. A bicameral Congress exercises legislative power. The 102-seat Senate is elected for a renewable four-year term. One hundred of the senators are elected from nation-wide lists and two from special national indigenous lists. The number of seats of the Chamber of Representatives changes according to the variation of the

country's population. Its current 163 members are elected from regional lists for a renewable four-year term. The 32 departments (*departamentos*) and the Capital District hold at least two seats, and the rest are distributed according to population. The exercise of judicial power is reserved to an independent court system, as provided by the Constitution. However, subornation and intimidation by the various actors in the armed conflict and a highly active organised crime network impede its proper functioning.

President Andrés Pastrana, elected in 1998, continued to face political difficulties resulting from the minority status held by his Conservative Party in Congress. Political support for several initiatives has been obtained from some political forces, including permanent or occasional dissidents of the major opposition party. However, in June 2001 a constitutional amendment to strengthen the political parties and reform the electoral system was rejected by Congress. The opposition Liberal Party enjoys majority status in both legislative chambers. Candidates have started their campaigns for the 2002 national elections. The future of the peace process and the difficult economic situation, said to be the worst in 70 years, appeared to be the major issues for the coming presidential elections.

The internal conflict and peace negotiations

Paramilitary organisations, which collectively call themselves the United Self-Defence Groups of Colombia (*Autodefensas Unidas de Colombia-AUC*), have expanded rapidly. They maintain a presence in 40 per cent of the country and have some 8,000 members, representing an 81 per cent increase over the last two years.

The Revolutionary Armed Forces of Colombia-People's Army (*Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo-FARC-EP*), established in 1964, Colombia's largest rebel group (approximately 16,000 members) continued to operate throughout most of the country. The peace process between the Government and the FARC-EP, which started in January 1999, continued in the demilitarised zone (*zona de despeje*). The army withdrew from the mentioned zone following the agreement between the FARC-EP and the Government to facilitate an area for the carrying out of the negotiations. The demilitarised zone, which comprises five municipalities and a population of 90,000, is regularly prolonged by the Government by decree (by December 2001, the Government has prolonged the demilitarised zone nine times). In the most visible result of the peace talks, in June 2001, a Government-FARC-EP exchange of 73 ailing prisoners took place. Days later, the FARC-EP unilaterally freed 274 prisoners. Many of these prisoners

had been held for more than one year. However, at least 41 soldiers remain in the FARC-EP's power. The peace process has continued without substantial progress. During the period under review, the process was suspended and resumed several times, but no significant breakthrough emerged. Public support for the peace process has decreased due to its shortcomings. A cease-fire has not been agreed, negotiations have not advanced, and FARC-EP's actions have worsened. It has been difficult for President Pastrana to continue the peace process and prolong the withdrawal of the military from the *zona de despeje*. Even the IACHR, while supporting the peace process, expressed its disappointment at the slowness of the already three-year old peace negotiations.

The National Liberation Army, (*Ejército de Liberación Nacional-ELN*), an insurgent group formed in 1965, continued to operate mostly in mountainous areas of North, Northeast, and Southwest Colombia. Peace talks with the Government and the ELN developed under uncertainty, but, by the end of 2001, positive signs emerged. The Government and the ELN had agreed on a reduced and internationally verified version of the FARC-EP's demilitarised zone (*zona de encuentro*) to facilitate the dialogue. This "encounter zone" was to be established in northeastern Colombia. However, violence erupted once the plans to establish the zone became public. The area fell under the control of paramilitary forces and thousands of civilians protested, fearing abuses by guerrillas and paramilitary reprisals. The Government described the protesters as being sponsored by paramilitary groups. On 9 March 2001, the ELN suspended dialogue and on 7 August 2001, President Pastrana decided to suspend talks. The ELN responded by escalating its military actions. However, peace-talks resumed on 12 December 2001, following a meeting in La Havana, Cuba. The Parties agreed on a six-month timetable for the negotiation with thematic forums to take place outside Colombia. On 17 December 2001, the ELN announced a Christmas cease-fire in order to gain trust for the resumed peace process.

Plan Colombia

The Government adopted a controversial programme known as Plan Colombia. The official objective of this initiative is the fulfilment of a number of the State's obligations. The Government maintains that seven and a half billion US dollars is needed for the implementation of Plan Colombia. Four billion US dollars would come from Colombia, with the remaining sum to be delivered by the international community. In January 2000, then-President Clinton of the United States, addressed the American Congress and expressed

his support for the Plan. In July 2000, the United States Congress approved Public Law 106-246, which included US\$ 1.3 billion in aid. Although this legislation includes resources for programmes on human rights, administration of justice, and alternative economic development, the bulk of the aid (approximately 70 per cent) has been earmarked for the Colombian army. The dismal human rights record of the Colombian military forced the American Congress to add specific human rights conditions to the aid package (Section 3201). In August 2000, the Clinton administration acknowledged that Colombia could not fulfil six of the seven human rights requirements included in Public Law 106-246 for the delivery of the military component of the aid and therefore decided to waive the human rights conditions (Section 4) on the grounds of "the United States' interests of national security". The United States maintained that it was necessary to preserve the counter-drug efforts in Colombia, which is the producer, processor and exporter of 90 per cent of the cocaine entering the United States. In January 2001, the United States Government said that it would not issue a new certification or waiver necessary for the release of the aid, in order to by-pass the law and continue the funding without the restraints imposed by the human rights conditions. Plan Colombia has become a matter of concern both in Colombia and abroad. The decision by the United States to waive the human rights requirements has sent the troubling message to the Colombian armed forces that human rights might be side-stepped in order to pursue a problematic war on drugs. Plan Colombia also includes aerial fumigation of illegal crops, the environmental and social effects of which may be grave. Plan Colombia's military component began to be implemented in 2001 and President Bush has expressed his support for Plan Colombia and promised efforts to continue funding it.

HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW ISSUES

During the period under review, representatives from several human rights mechanisms visited Colombia. In December 2001, the Inter-American Commission of Human Rights undertook an *in loco* visit to Colombia. On 13 December, the IACHR made public its preliminary observations on the human rights situation in the country. The IACHR considered it necessary to take into account the dynamics of the armed conflict, the generalised violence and the sometimes weak, or non-existent, presence of the State in certain

areas of the country. The IACHR also noted that the situation had become more complicated due to the links between the armed factions and drug trafficking. In October 2001, the Special Representative of the Secretary General on Human Rights Defenders, Hina Jilani, undertook a fact-finding mission to Colombia at the invitation of the Government. On 1 November 2001, the UN Special Rapporteur on Violence against Women, Radhika Coomaraswamy, arrived in Colombia to carry out a one-week mission in the country.

An understaffed judiciary is required to deal with human rights violations and other criminal offences carried out by all armed actors involved in the Colombian conflict and heavily organised crime. In Colombia, some 26,000 homicides are committed every year. Although the violence related to politics is the most visible, it represents only 15 per cent of the killings in the country. Eighty-five per cent of the homicides result from many types of common crimes, including domestic violence, drug-trafficking and armed robbery. However, the violence produced by the civil conflict has also worsened. One of the most serious consequences of the conflict is the forced displacement of large numbers of Colombians. According to the CODHES (Advisory Office for Human Rights and Displacement), more than 300,000 people were displaced in 2000.

The Armed Forces and links with paramilitary organisations

The Colombian Armed Forces have continued to violate international humanitarian law and international human rights law, although direct participation of agents of the State in such violations has decreased significantly during recent years. The UNOHCHR in Colombia has received several complaints of forced disappearance, alleging direct involvement by the armed forces. Ethnic minorities suffered arbitrary detentions, killings, and disproportional use of force by members of the military. The army has generally failed to provide protection for civilians before widely expected paramilitary massacres took place.

The 2000 report of the UNOHCHR on the Human Rights Situation in Colombia included accounts of several actions directly attributed to paramilitary organisations, in the chapter dedicated to State responsibility. The theoretical justification for this approach was that "human rights violations committed by paramilitary groups entail State responsibility in a number of ways. First as regards the setting in which such violations take place, the State bears some general responsibility for the existence, development and expansion of the paramilitary phenomenon. Second, there are situations in which official support, acquiescence or connivance have been contributory

factors in such violations. Acts perpetrated by paramilitary groups and facilitated by inaction on the part of the authorities must also be regarded as human rights violations. The Colombian State has positive obligations to protect human rights and prevent their violation". In December 2001, the IACHR, expressed its concern over co-operation between the paramilitary and State-agents, as indicated by prima facie evidence collected by the Commission. Although the Government does not accept these findings, allegations of such military-paramilitary ties continued to be reported. In February 2000 and September 2001, Human Rights Watch (HRW) publicised well-documented reports on the links between the Colombian army and paramilitary organisations (*The Ties that Bind: Colombia and Military-Paramilitary links*, and *The Sixth Division*). Together with evidence previously collected, human rights NGOs concluded that half of Colombia's eighteen brigade-level army units (excluding military schools) remained tied to paramilitary organisations. Most of the reports on paramilitary-Army collaboration allege sharing of intelligence information, transfer of prisoners, provision of ammunition, and joint patrols and military operations. Colombia's military high command has failed to take the necessary steps to cut these links.

Armed groups

The paramilitary groups have committed widespread and systematic atrocities during the period covered by this report. Contrary to their alleged purpose of combating guerrilla forces, paramilitary groups have continued to target civilians. According to the United Self-Defence Groups of Colombia (AUC), the rural civilian population constitutes potential collaborators or passive supporters of guerrillas. Paramilitary groups have committed most of the human rights and humanitarian law violations by carrying out massacres, torture, destruction of buildings and causing forced displacement of the population. In January 2001, paramilitary activities increased. Throughout eleven departments, 26 massacres were carried out, resulting in the death of 170 people. In April 2001, paramilitary members killed approximately 40 peasants living in several villages, located in El Naya (Valle del Cauca). The killings caused the forced displacement of hundreds of inhabitants. This massacre was widely predicted by locals, NGOs and the Inter-American Commission on Human Rights (IACHR). Finally, on 17 August 2001, twelve persons were killed in Yolombó (Antioquia) in another massacre carried out by paramilitary organisations. In October 2001, the paramilitary intensified its military actions by killing more than 140 people in 10 days. The AUC also carried out social cleansing and systematically persecuted

human rights defenders, judiciary officials, trade unionists, religious ministers, university professors and students. In December 2001, the IACHR expressed its serious concern regarding paramilitary violence and the social support it was attracting.

The FARC-EP has systematically disrespected international humanitarian law. During the period covered by this report, the FARC-EP was held responsible for killing and abducting civilians, hostage taking, the use of child soldiers, grossly unfair trials, massive forced displacement of civilians, cruel and inhuman treatment, the use of prohibited weapons, and attacks on medical workers and facilities. In December 2001, the IACHR noted that much of the violence against civilians is attributable to the FARC-EP and the ELN. The ELN's approximately 4000 members have violated international humanitarian law standards by taking civilians as hostages for ransom or for political reasons, destroying the energy infrastructure by inflicting major damage on pipelines and the electric distribution network; threatening groups supporting humanitarian accords for protecting civilians (including children's organisations), using landmines, and blocking the transit on vital roads to convert travellers into human shields.

Impunity

In December 2001, the IACHR expressed its concern over the failure to bring to justice the perpetrators of many acts of violence against civilians and crimes against humanity and expressed its surprise over the freedom with which confessed perpetrators of crimes against humanity travelled throughout the territory and even gave interviews.

During the period under review, little progress was made to put an end to the impunity enjoyed by members of the security forces and the paramilitary groups. Although in October 2000 and March 2001 the Government discharged active duty military officers linked to human rights violations and support for paramilitary groups, no criminal investigation was started and such information was not passed to the Attorney General's Office (*Fiscalía General de la Nación*). At the same time army officers accused of serious abuses have remained in the army. Furthermore, military tribunals continued to maintain jurisdiction over key cases involving military officials accused of human rights violations, in contravention of a 1997 Constitutional Court decision (*see below*).

Human rights defenders continued to face threats throughout the period under review. At least 28 attacks have been reported during the period under

review and seventeen human rights defenders were killed and another four disappeared. The situation was particularly difficult in the city of Barrancabermeja (Santander). In June 2001, Kimy Perinea Domico, leader of the Embera-Katios ethnic group, was disappeared in the department of Córdoba, allegedly by paramilitary organisations. Days later, Alirio Domico and Alberto Sabugara, leaders of the same community, were killed in Quibdó (Chocó) reportedly by paramilitary groups. Responses of the different actors in the Colombian conflict to the well-documented HRW reports illustrate the manner in which they have approached criticism from human rights NGOs. Following respective HRW reports on FARC-EP's abuses and military-paramilitary links, the rebel group accused the international NGO of supporting "Yankee interests", and the Chief Commander of the Army said that HRW was being sponsored by drug traffickers.

JUDICIARY

The primary legal sources of the Colombian judiciary are contained in the Constitution (Title VIII), the General law of Administration of Justice Law 270 1996 (*Ley Estatutaria de la Administración de Justicia*) and the Law of Specialised Justice (Law 504 1999). During the last decade, the Colombian judiciary has undergone several legal and Constitutional reforms. However, the Colombian criminal law system has not dealt adequately with serious contemporary challenges, such as, drug-trafficking, armed opposition, paramilitary groups, organised crime and human rights violations. The enormous judicial workload is a further cause of impunity in the country. On 17 October 2001, the President of the Criminal Chamber of the Supreme Court said that the judicial system in Colombia is "highly expensive and non-efficient". He also pointed out that the judiciary faces high levels of internal corruption as well as severe backlogs. One consequence of the general distrust towards the Colombian judiciary is that the State has been increasingly losing jurisdiction over disputes with international companies that sign contracts with State offices. There has been a proliferation of arbitration clauses designed to keep Colombian courts from maintaining jurisdiction in disputes with transnational corporations. During the period covered by this report, there were several cases in which the State was ordered by international arbitration tribunals to pay sums in the millions, although there were serious allegations of corrupt manoeuvres in such contracts.

Structure

The judicial branch of power in Colombia is composed of the organs that belong to the country's jurisdictions, the Office of the Attorney General and the Superior Council of the Judiciary. During the period under review, clashes within the High Courts of the judiciary continued because the Constitution does not clearly establish a hierarchy among them. The Constitutional Court's decisions in key human rights issues were among the subjects of discussion.

The ordinary jurisdiction is composed of the Supreme Court of Justice, the District Tribunals and lower courts specializing in several areas. The Supreme Court heads the ordinary jurisdiction and is constituted by 23 justices elected by the Supreme Court itself for a non-renewable eight-year period. They are elected from a list of at list six candidates per vacancy sent by the administrative chamber of the Supreme Council of the Judiciary. The Supreme Court may function both as a plenary and in chambers. The Law of the Administration of Justice (*Ley Estatutaria de la Administración de Justicia*) provides for four chambers besides the plenary, namely, Governmental, Labour, Civil and Agrarian, and Criminal. As a plenary, the Supreme Court decides on jurisdictional disputes that do not belong to any of its chambers. The Chambers of the Supreme Court exercise the judicial review of the decisions of lower courts related to their jurisdictions.

The organs of the jurisdiction on administrative disputes (*jurisdicción de lo contencioso administrativo*) are the Council of State, the Administrative Tribunals and the lower courts. The Council of State heads this jurisdiction and is composed of 27 justices. The Council elects the justices for a non-renewable eight-year period from lists of at least six candidates for any vacancy presented by the administrative chamber of the Superior Council of the Judiciary. The Council exercises its functions through three chambers, namely, the Plenary, the Chamber on Administrative Disputes, and the Chamber for Consultation and Civil Service. The Council of State exercises the ultimate jurisdiction over disputes on administrative matters and petitions of unconstitutionality of regulations issued by the national Government that are not within the Constitutional Court's jurisdiction. The Council of State is also the supreme advisory body to the Government in administrative matters.

Constitutional jurisdiction is exercised by the Constitutional Court as well as by any judge that decides on petitions seeking protection of constitutional rights. The Constitutional Court is composed of nine justices elected by the Senate for a non-renewable eight-year period. The justices are elected from lists of three candidates per vacancy that are presented, three each by the

President, the Supreme Court, and the Council of State. The Constitutional Court guards the Constitution by ruling on petitions of unconstitutionality of laws presented by any citizen, verifying the compliance of international treaties with the Constitution, and deciding on the constitutionality of decrees issued by the Government in cases of state of emergency. Decisions of the Constitutional Court have *erga omnes* effect in their resolution, but the substantive aspect of the sentence is considered to be only an auxiliary criterion for the interpretation of the law. In 2000, the Court took controversial decisions on economic issues, which led to accusations from the Government against the Court that it had become a “legislative body”. The Government also considered economic matters not to be part of the Court's field of expertise. In September 2001, the Government accused the Constitutional Court of causing judicial instability. In 2001, eight new justices became members of the Constitutional Court.

The Constitution establishes that the justices of all high courts enjoy security of tenure while observing good conduct, satisfactory work and while they are below the age of retirement.

SPECIALISED COURTS

In July 1999, the heavily criticised system of regional courts or “faceless judges” was replaced by a new system of specialised courts (See *Attacks on Justice 2000*). Although the new law (Law 504 of 1999) presented a few positive changes from the old system, it still fell short of compliance with international human rights standards. This jurisdiction deals with serious criminal offences related to terrorism, drug-trafficking, paramilitary activities and kidnapping. The system is composed of 38 specialised one-judge tribunals.

The Constitutional Court analysed the compliance of the specialised jurisdiction with the Constitution and the General Law of Administration of Justice (C392/2000). In April 2000, the Constitutional Court declared constitutional the law on specialised courts. However, a number of elements of the law were invalidated. The Court held that defendants had the right to know the identity of their accusers and that such provisions that allowed for prosecutors and witnesses to remain anonymous in certain dangerous situations did not comply with the Constitution. The Court also ruled that persons detained for any of the crimes designated in the law could be confined to their homes instead of kept in detention and could request special permission to go to work, as would be the case under ordinary jurisdiction. The Court ruled that prosecutors and specialised jurisdiction judges could not transfer cases to other judicial officers if they believed their personal security to be in danger.

Prosecutors would be allowed to carry out investigations for 12 months instead of six months, as is provided for ordinary criminal cases.

The reversal of the regime of specialised justice requires urgent reform of the programme for the protection of witnesses, prosecutors and lawyers. However, the Government in this regard has thus far adopted no effective measure.

ADMINISTRATION

In 2000, US\$ 347,631,979 were assigned to the judiciary. This sum represented 4,62 per cent of the State's budget. In mid-1999, the Superior Council of the Judiciary reported that the civilian judiciary was experiencing a backlog of approximately 3,069,000 cases, including 604,000 criminal cases, and that there were approximately 338,000 outstanding arrest warrants. In November 2001, the high courts met in order to seek a solution to this problem. According to the Supreme Council of the Judiciary, every year a judge should decide 3000 cases, but, currently, judges are only able to adjudicate some 600 cases.

The Superior Council of the Judiciary

The Superior Council of the Judiciary (*Consejo Superior de la Judicatura*) exercises the administration of the judicial branch, including disciplinary control. The Superior Council of the Judiciary is divided in two units, the administrative chamber and the jurisdictional chamber.

The Administrative Chamber is composed of six justices, elected for a non-renewable eight-year period. One is elected by the Constitutional Court, two by the Supreme Court, and three by the Council of State. This chamber regulates the judicial career, draws up lists of candidates for the designation of justices (except the military justice), designates the budget of the judicial branch of power to be submitted to the Government and approved by the Congress, and sets up the division of the territory for judicial purposes (districts, circuits and municipalities). It also has the power to create, eliminate, merge and transfer positions in the administration of justice, as long as the exercise of this faculty does not exceed the year's budget.

According to article 156 of the Law of the Judiciary, the judicial career is based on the professional performance of the judicial officers, their efficiency, the guarantee of equal opportunities for all citizens with the necessary qualifications, and consideration of merit as the main ground for entering,

remaining and being promoted within the judiciary. However, the Superior Council of the Judiciary has failed to establish a coherent judicial career system and therefore many of the judicial officers do not enjoy security of tenure. The Council frequently has been accused of being subject to political influence.

The Jurisdictional Chamber is composed of seven justices elected for a non-renewable eight-year period by the Congress from lists of three candidates presented by the President per each vacancy. It examines the conduct of the members of the judiciary and lawyers and rules on disputes between the different jurisdictions, including those between the ordinary and the military jurisdictions (see below). The Superior Council of the Judiciary sanctioned 6,438 lawyers for irregular conduct between March 1992 and February 2001. There were 232 reprimands, 21 rehabilitation orders for good behaviour, 419 exclusions from professional exercise, 3,073 suspensions, and 2,714 cases of censorship (*Censura*). These disciplinary measures are based on Decree 196 of 1971, and were imposed for reasons such as, retention of money from clients, failure to carry out professional duties properly, abandonment of cases, disproportionate fees to clients, threats against authorities, and defamation. There also exist Sectional Councils of the Judiciary, the number and location of which is established by the Administrative Chamber of the Supreme Council of the Judiciary. They are divided into administrative and jurisdictional chambers. The corresponding chamber at the Superior Council of the Judiciary elects the members of each chamber of the Sectional Councils of the Judiciary

Ombudsman's Office

More than half of the defendants in court proceedings in Colombia depend upon the services of public defenders. At the moment the Ombudsman's Office (*La Defensoría Pública*) employs approximately 1,000 public defenders in charge of criminal processes, covering 85 per cent of the municipalities. There are no objective, transparent criteria for the hiring of personnel. On a positive note, provisions allowing non-graduate law students to carry out legal defence services for defendants without resources were abolished.

ATTORNEY GENERAL'S OFFICE

The Attorney General's Office (*Fiscalía General de la Nación*) was created under the 1991 Constitution and is still in the process of transition from a

purely civil law system to a mixed regime that includes elements of an adversarial structure. The Attorney General's Office has the duty to exercise penal action. The Office investigates crimes and prosecutes those presumed responsible before courts and tribunals, except for crimes committed by members of the armed forces on active duty and related to the exercise of such duty. In order to fulfil these obligations, the Attorney General's Office 1) ensures the attendance of the accused in court; 2) decides whether an indictment should be passed to a judge; 3) directs and coordinates the judicial police; and 4) provides for the protection of victims, witnesses and other parties to the process. The Office of the Attorney General operates throughout the country and has the duty to respect procedural guarantees and fundamental rights of the accused. The Office of the Attorney General has administrative and economic autonomy.

The Attorney General is elected by the Supreme Court for a non-renewable four-year term, not to coincide with that of the President, from a list of three candidates presented by the President. The Attorney General has the power to administrate the Office according to the general principles established by law by providing the number of personnel in each department and establishing the requirements and functions for every position. A new Attorney General was elected and took office in July 2001

There are no career appointments for members of the Attorney General's Office. The new Attorney General, has dismissed several prosecutors. Prosecutors in Colombia, lacking security of tenure, find it difficult to maintain independence from their superiors. The consequence is that once there is a new administration in the Office of the Attorney General, dismissals and arbitrary appointments are inevitable. On 17 October 2001, the Council of State asked the Attorney General's Office to take the measures necessary to ensure that its 20,000 officers enter a career system which provides stability to them, and to finance the career system with its own funds.

Agents of the Office of the Attorney General have continued to abuse systematically their preventive detention powers, thereby violating the right of an accused to be presumed innocent. Prosecutors typically operate under the assumption that a suspect is a criminal during the investigation, and often unjustifiably order preventive detention or delay taking decisions regarding *habeas corpus* petitions. Finally, The programme of protection for judicial officers, victims, witnesses and other parties to criminal proceedings has been inadequate and lacking in necessary resources. Dozens of prosecutors have been forced to flee the country, abandon their cases, or quit their posts, allegedly due to threats from paramilitary organisations and State officers. On

12 July 2001, evidence about the possible infiltration of paramilitary organisations in the programme forced the retirement of seven officers, including its director.

National Human Rights Unit

In 1995, the Attorney General created a special National Human Rights Unit (*Unidad Nacional de Derechos Humanos*) to investigate human rights abuses. The Unit has carried out its work despite continuous threats and intimidation. In 2000, the Unit investigated over 918 cases of human rights and international humanitarian law violations in which 1,379 individuals were under investigation. The number includes 286 members of the military and police, 573 members of the paramilitary forces, 353 members of the rebel forces, and 187 civilians, including drug-traffickers. Although significant progress was made in these cases, most of the arrest warrants were not executed. While 507 paramilitary members were in jail, their leaders remained unaccountable.

Although the Human Rights Unit is only competent to handle cases of human rights violations, many cases that the Unit has in fact been investigating are not related to this primary objective. This situation causes excessive workloads for the Unit, which affects its efficiency when dealing with the cases for which it was created. The military has not demonstrated any willingness to cooperate with the Unit nor with other civilian judicial officers. Instead, military officers sometimes prevent civilian investigators from gaining access to information on cases involving military personnel. It has been reported that police or military officers often protect paramilitary members by informing them in advance about the plans of the Attorney General's Office to carry out arrests in areas with paramilitary presence. Prosecutors have thus been obliged not to inform the army about its plans on several occasions. However, in order to capture members of armed groups, it is clear that such dangerous operations need the participation of the National Police or the army, as prosecutors and the Technical Judicial Police (CTI) are not allowed to carry heavy arms.

In April 2001, agents of the technical Investigation Body (*Cuerpo Técnico de Investigación-CTI*), a body responsible to the Attorney General's Office, undertook searches throughout Montería (Córdoba)- a region under heavy paramilitary presence. The search concluded with the arrest of four persons allegedly involved in financing paramilitary organisations. The investigation was reportedly based on the uncovering of 200 cassettes containing conversations between known paramilitary leaders and some landowners from the

region. The operation was carried out with a Colombian Special Army Unit brought from the capital.

The Office of the Attorney General has created eleven new satellite units of the Human Rights Unit, four of which began to function in December 2000. However, in September 2000, the Attorney General described as “dramatic” and “paralysing” the budgets cuts implemented by President Pastrana for the Unit.

The new Attorney General and the General (Ret.) del Río Case.

A new Attorney General was elected and took office on July 31, 2001. Although the Supreme Court eventually elected one of the candidates from the Presidential list, it expressed concern that none of the candidates was an expert in criminal law and that the criteria for the President's selection had not been objective. Shortly after assuming office, Luis Camilo Osorio Isaza, a long-term ally of President Pastrana, changed the course of several high-profile corruption cases involving persons close to the President. Attorney General Osorio Isaza also dismissed prosecutors in charge of key corruption cases. This course of action has raised serious concerns over the politicisation of the Office. The Internal Affairs Office has been uneasy over the changes imposed by newcomer prosecutors in several cases.

Among the most controversial cases was that involving General (ret) Rito Alejo del Río. In April 1999, The Human Rights Unit opened an investigation for the crimes of “Conspiracy to commit crimes” (*concierto para delinquir*) and “formation of armed illegal groups” against General del Río. The charges are related to General del Río's alleged involvement in the creation of paramilitary groups during his work as Commandant of the XVII Army's brigade in Urabá (Antioquia) between 1995 and 1997. On 23 July 2001, General del Río was detained following a warrant of arrest ordered by the prosecutor in charge of the case to interrogate him. After the interrogation, the prosecutors found merits to put General Del Río in preventive detention. Following the arrest, the Minister of Defence, Mr. Gustavo Bell Lemus, described as exaggerated and unnecessary the operation to capture the retired General. The acting Attorney General responded that it was regrettable that high-ranking State officials were challenging judicial decisions and thereby jeopardising the autonomy of the Attorney General's Office and the separation of powers. On 29 July 2001, General del Río, denied all charges against him and levelled accusations that the Colombian judiciary had been infiltrated by supporters of the FARC-EP and the Colombian Communist party.

On 31 July 2001, Attorney General Isaza took office. On 1 August 2001, he publicly expressed his disagreement over the preventive detention imposed on General del Río and said that such a decision should have been made with his consultation. On 2 August 2001, the Attorney General reiterated his disagreement with the concerned decision to the Sub-Attorney General and the Co-ordinator of the Human Rights Unit. Both officers responded that each prosecutor is autonomous in his decisions and rejected the idea that prosecutors should consult their decisions with their superiors. The Attorney General asked the Co-ordinator of the Human Rights Unit to resign. The Sub-Attorney General also quit, although he was already scheduled to leave some weeks later. Article 12 of the Criminal Procedural Code establishes that “judicial officers are independent and autonomous. No administrative or judicial superior may insinuate, request or advise judicial officers in order to impose decisions or the criteria to adopt in his/her rulings“. Article 249 of the Constitution includes the Attorney General's Office within the judicial branch. Therefore, the actions of the Attorney General were illegal and unconstitutional and a clear attack against the independence of the concerned prosecutor. The Inter-American Commission expressed its concern over this situation on 9 August 2001 and ordered the Government to take precautionary measures to guarantee the protection of eight members of the Attorney General's Office.

Some days later, General del Río was released after filing a *habeas corpus* petition submitted to another judge. The petition was based on questions of jurisdiction, as the defence stated that the Attorney General himself should have instructed the case because it was an act related to official service (Article 235 of the Constitution). However, the Constitutional Court had already ruled that acts such as those allegedly committed by General del Río should not be considered as related to military functions. Furthermore, a *habeas corpus* petition is not the appropriate means by which to challenge the jurisdiction of a judge or prosecutor. The judge that ruled in favour of the *habeas corpus* petition was accused of exceeding his powers (*prevaricato*). General del Río continued to be under investigation, and currently his case is being investigated by the Attorney General himself. Concluding her visit to Colombia, the UN Special Representative of the Secretary-General on Human Rights Defenders, said that she had “serious doubts about the very important role that should be played by the Attorney General. It is possible that this will be diminished”. She announced to reporters: “I am frankly worried about the ability of the human rights Unit in the Attorney General's Office to continue investigations of human rights violations with the independence of the previous administration.” On 8 September 2001, the main witness in the case was murdered.

MILITARY JUSTICE

The inappropriate use of military justice is a principal cause of impunity in Colombia with regard to members of the military. The primacy of the principle of military hierarchy and the dependency of the military justice render this system incompatible with international standards regarding impartiality and independence of the judiciary.

The military judiciary is part of the Ministry of Defence and therefore belongs to the executive branch. The Armed Forces commander is also the president of the military judiciary. In July 2000, a new Military Penal Code entered into force (See *Attacks on Justice 2000*). Some positive aspects of the military justice are that unit commanders may not judge their subordinates, the military judicial corps is independent, and service members are protected legally if they refuse to obey illegal orders to commit human rights abuses. Article 234 provides that the Supreme Court, not the Superior Military Tribunal, has first instance jurisdiction in cases involving criminal acts by generals, admirals, major generals, vice-admirals, brigadier generals and other high ranking military officers. Only cases that had been in trial phase before August 1999 continue under the old military penal code. The same article states that the Supreme Court is the court of second instance review of rulings by the Superior Military Tribunal. The system is composed of magistrates of the Military Court of Appeals, lower military court judges, investigating judges, prosecutors and judge advocates at the General Inspector, Division and Brigade levels. Military Prosecutors report to the Directorate of the Military Penal Justice System and not to unit commanders, as in the former system.

In the new penal military code, only torture, genocide and forced disappearance have been explicitly excluded from military jurisdiction. This article conflicts to some extent with the 1997 Constitutional Court ruling that only those cases involving allegations of crimes against humanity and cases of unusual gravity should come under the jurisdiction of civilian courts. The decision excluded those crimes mentioned by the new military Penal Code, as well as other serious human rights violations, such as extrajudicial killings and collaboration with paramilitary organisations. Furthermore, the new military penal code defines crimes related to military service as those "deriving from exercising military or police function proper to them". This definition omits the expression "deriving closely and directly from..." as expressed in the Constitutional Court's judgement. The Constitutional Court also ruled that in borderline cases, the decision should favour civilian courts, because military justice is an exception to the general rule.

The difference in wordings is important because most of crimes allegedly committed by members of the military are not included in the military penal code, including extrajudicial execution, rape and the aiding and abetting of atrocities carried out by paramilitary organisations. Furthermore, the Superior Council of the Judiciary, which is responsible for the resolution of jurisdictional disputes, has used a broad definition of acts of service, thus allowing members of the armed forces to be judged in military courts. The Council has assigned most of the cases involving high-ranking military officers to military courts and has not considered itself bound by the Constitutional Court's decision (C.358/97).

The Colombian Government has continued to contravene decision C-358-97 by allowing military courts to judge cases of gross human rights violations. In August 2000, President Pastrana signed Directive 01 in order to fulfil one of the human rights conditions that the United States had established for reception of military aid under Plan Colombia. The condition asked the Government to issue a directive based on the Constitutional Court's decision. However, Directive 01 was not based on the Court's decision, but on the new military Penal Code, which only excludes genocide, torture and forced disappearance.

Military officers claim that military courts carry out serious investigation and sanction violators of human rights and "fundamental rights". The expression "fundamental rights", has been used by Colombian armed forces incorrectly to classify military infractions, such as slapping a subordinate, as human rights violations. The effect is an artificial increase in the numbers of human rights violations reportedly prosecuted and punished. Many cases the military claimed to have been transferred to civilian jurisdiction do not concern human rights violations, but rather drug-trafficking and theft. Finally, since 1997, military courts have not transferred a single case involving an officer with the rank of colonel or higher from a military tribunal to a civilian court.

The Uscátegui Case

In February 2001, General Jaime Uscátegui was sentenced to 40 months in prison by a military court. General Uscátegui was found guilty of failing to prevent paramilitary organisations from massacring dozens of civilians in Mapiripán (Meta) in July 1997. Also sentenced to 40 months in prison was Lt. Colonel Hernán Orozco. The case marked the first time Colombian courts convicted a General for allowing paramilitary groups to kill civilians. However, General Uscátegui's sentence was light and the trial inappropriately

was carried out by military tribunals. Considering that Colonel Orozco had testified against General Uscátegui and presented evidence that he had warned the General about the coming massacre, the sentence against him was perceived as a message to the rest of the military that accusations against superiors were not welcome.

On 14 November 2001, the Constitutional Court ruled that General Uscátegui should have been judged under civil jurisdiction, not by the military judiciary. The ruling reiterated arguments expressed in a prior ruling of the Court (C.358/97) that human rights and international humanitarian law violations could not be considered as acts of duty. According to the Court, the fact that the case was judged within the military judiciary amounted to a *via de hecho* (a grossly illegal proceeding), so the decision could be overturned. The Court gave a 10-day term to the Supreme Council of the judiciary to decide whether the Supreme Court or the Attorney General's Office had jurisdiction over the case.

LAW OF SECURITY AND NATIONAL DEFENCE

In August 2001, President Pastrana signed the "Law of Security and National Defence" (Law 684 of 2001), commonly known as "The Law of War". The members of the Chamber of Representatives that sponsored the bill argued that it was not a "law of war", but a permanent statute for the organisation of the State's agencies in charge of national defence. The sponsors also contended that the bill was respectful of international human and humanitarian law obligations and the Constitution. On 3 May 2001, The International Commission of Jurists (ICJ), Human Rights Watch (HRW), Amnesty International (AI), the Colombian Commission of Jurists (CCJ) and various other Colombian human rights NGOs sent a letter to the sponsors of the bill urging its rejection because it did not comply with human rights standards. On 10 May, the CCJ reiterated its concerns in an address to the Congress. However, in June 2001, Congress approved the bill with some positive but insufficient amendments. In September 2001, the ICJ, HRW and AI submitted an *amicus curiae* (friend of the court) to the Constitutional Court on the incompatibility of Law 684 of 2001 with international human rights obligations of Colombia as well with the Constitution. In December 2001, the IACHR expressed concern over the provisions of Law 848 in relation to Colombia's obligation under the Inter-American Convention on Human Rights. The IACHR said that if implemented, the law would undermine the independence of the judiciary and the division of powers and would sanction the primacy of the military over the civilian power.

The Law is based on the concept of “national power”, defined as the capacity of the State to take all the necessary steps to respond to situations that endanger the exercise of freedom and liberties, and to maintain the independence, integrity, autonomy and national sovereignty. The definition adds that this power should be exercised in conjunction with articles 2 and 95 of the Constitution. The reference to article 95 of the Constitution, which enumerates the duties of citizens, is incompatible with the notion that such functions as defence of sovereignty, integrity and autonomy must be exclusively State responsibilities, devoid of participation of private actors. Private actors have the constitutional duty to act in conformity with principles of social solidarity and to respect and support democratic authorities, but this constitutional provision (art.95) does not imply that private actors could respond to situations that compromise the mentioned threats at any time and place. This is exclusively a State function. The new notion of “national power” confuses the responsibilities of the State and those of private actors, and could lead to the legitimisation of paramilitary organisations, which might argue for the necessity to respond to threats against national sovereignty or their fundamental rights. The Law also establishes *de facto* states of emergency by allowing the President to declare such state in several regions (*teatros de operaciones*) without the judicial and political control proper to a democratic State. The *teatros de operaciones* provide for subordination of civilian authorities to army officers once the President has declared it necessary.

Another concern is that the Law of Security and National Defence gives judicial police powers to the Armed Forces (art 59). The bill establishes that in cases in which the prosecutors cannot permanently accompany the armed forces in their operations because of “well-founded reasons” (*motivos fundados*), the Attorney General must grant transitory precise judicial police powers to members of the armed forces. The article is unconstitutional and disrespectful of international standards and may be used by the armed forces as a means to veto the presence of the Attorney General's Office during military operations. The article imposes the obligation on the Attorney General Office's to permanently accompany the army in its operations, which threatens the independence of the office. Furthermore, due to economic constraints, this permanent accompaniment is impossible. These “transitory” judicial police functions of the army could, in reality, become permanent.

The Law makes it difficult to conduct disciplinary investigations against members of armed forces accused of abuses, by limiting the action of the Office of Internal Affairs Delegate for Human Rights (*Procuraduría Delegada para Derechos Humanos*). Article 60 establishes that only the Office of the Internal Affairs Delegate for the Armed Forces (*Procuraduría*

Delegada para las Fuerzas armadas) is allowed to carry out disciplinary investigations against Military officers for “acts related to service”. This notion has been interpreted very broadly in Colombia, and the same may happen in the disciplinary control system. The law establishes that the term to collect evidence in disciplinary investigations against military officers is two months. The new term establishes an unjustified difference vis-à-vis the ordinary six-month term. Under the above legislation, the Armed Forces are not required to physically place any person captured in flagrancy immediately at the disposition of a judicial authority, but to “communicate” to such authority the fact of the capture. Finally, transitory article 1 orders the President to issue a general strategy to fight terrorism within the two months proceeding the entry into force of the law.

In December 2001, the Government submitted to Congress “the Counter-terrorist statute”. This statute enhances the army's powers to arrest persons without judicial order for a 36-hour term. However, the bill would not oblige the army to physically place the concerned individual before a judge, but only to “communicate” the arrest to the judge. The bill would also impose as compulsory the preventive detention of presumed terrorists. Finally, the bill would allow judges and prosecutors to limit and abolish visits and written correspondence of detained terrorism suspects; limit, control and verify communications between the suspect and his lawyer; and, if necessary, exclude the defence counsel from the investigation. In the latter case, the Ombudsman Office would provide another lawyer to carry out the defence.

NEW PENAL AND CRIMINAL PROCEDURE CODES

On 24 July 2001, two new legal reforms entered into force (See *Attacks on Justice 2000*). The new Penal Code (Law 599/2000) includes such new crimes as genocide, forced displacement, child pornography, irregular adoptions, sexual tourism, forced military support and forced disappearance. Article 56 provides that those who committed a crime “under deep circumstances of marginalization, ignorance or extreme poverty” will not serve more than half of the maximal punishment.

The new Criminal Procedure Code (Law 589/2000) includes some changes designed to expedite trials and to bring preventive detention measures into compliance with international standards on presumption of innocence. The Code introduces preparatory hearings (*audiencias preparatorias*) to allow judges to rule on oral petitions of the parties. Under the previous system, petitions to ask for new evidence or make a petition for bail, were

processed in writing and took from six to eight months to be decided. The new Code provides that these petitions will be processed orally and that judges have 30 working days to rule. Another positive aspect is the limitation on the application of the preventive detention measures. Under the previous system, prosecutors could subvert the presumption of innocence by preventively detaining those allegedly involved in a wide number of crimes. The new code establishes that preventive detention must only be applied in order to ensure the attendance of the defendant at the judicial hearings or when the community is endangered. Preventive detention is applicable in respect of serious crimes, such as homicides, genocide, rape and kidnapping.

The new Criminal Procedure Code also provides that general preventive measures must only be used when there are two sources of evidence, not only one, as prescribed in the former system. Judges will exercise greater judicial control over the prosecutors' rulings by deciding on petitions filed by the defendants. Finally, the new Code allows judges to change the type of criminal offence for which the defendant is being prosecuted at the judgement stage, without having to annul the whole process. The entry into force of these new codes produced the greatest judicial workload in years in Colombia. The reduction of penalties and the procedural benefits the new laws have led many defendants to ask for parole, bail or preclusion of criminal judicial proceedings against them.

VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW STANDARDS ON TRIALS BY THE FARC-EP AND THE SITUATION OF THE JUDICIARY IN THE DEMILITARISED ZONE

The demilitarised zone, which comprises five municipalities and a population of 90,000, has come under the FARC-EP's *de facto* control. Mechanisms of control were not agreed and the population was not consulted. The Attorney General's Office is unable to operate in the demilitarised zone, as its staff was forced to leave the zone following orders and threats from the FARC-EP. To date, no independent judiciary has been allowed in the zone and only the office of the Ombudsman has been able to receive complaints of FARC-EP's abuses in the zone. However, this office has neither the legal power nor resources to intervene.

In July 2001, members of the FARC-EP attacked a UN car in order to kidnap a former governor riding in it. The FARC-EP had accused the former governor of Meta of having links with paramilitary groups and announced

that they were going to carry out a revolutionary trial against him. UN Secretary-General, Kofi Anan declared that FARC-EP's actions were jeopardising the UN's presence in the country.

FARC-EP has continued to violate international humanitarian law standards (Art 6 Protocol II to Four Geneva Conventions) regarding the carrying out of fair and impartial trials for prisoners. The FARC-EP announced trials, including some carrying a potential death sentence, that grossly violate international guarantees. The FARC-EP usually does not inform those accused of the charges against them or the procedures that it intends to carry out, and the right to defence is commonly violated. The accused is presumed guilty and may not even be allowed to attend the trial. Furthermore, these "trials" do not accept legal remedies. By contrast, sentences of the FARC-EP involving its own personnel accused of serious violations may be extremely light. Only in a few cases, following international pressure, has the FARC-EP publicly announced that it would sanction perpetrators. On 5 March 1999, FARC-EP members killed three American indigenous activists. The trial carried out by the insurgents found two FARC-EP members guilty of the killings and sentenced them to dig and clear 55 yards of land.

CASES

During the period covered by this report (February 2000 - October 2001), at least 50 judges, lawyers and prosecutors were victims of attacks or harassment as a consequence of discharging their professional functions. The State is legally responsible both for the attacks carried out directly by Colombian Armed Forces and for those committed by paramilitary organisations, because official support, acquiescence or connivance have been contributory factors in such violations. Moreover, violations perpetrated by paramilitary groups and condoned by inaction on the part of the authorities must also be regarded as human rights violations.

During the past two and half years, 12 courts and 62 judicial officers had to be transferred due to threats by the guerrillas and paramilitary organisations. On 10 May 2001, the Ombudsman urged the Government to prevent the forced displacement of prosecutors and judges as a consequence of threats by armed groups. On 18 September 2001, the presidents of the high courts asked the President to take urgent measures to protect judicial officers. They said that the threats against the members of the judiciary were "affecting the unity of the State". The CTI, Body of Technical Investigation, (*Cuerpo Técnico de Investigación CTI*) is a State institution that depends on the

Attorney General's Office and carries out judicial police functions. In 2000, at least 17 members of the CTI suffered attacks as a result of their judicial activities, including a car bomb that exploded next to the CTT's offices in Medellín (Antioquia) on 19 February 2000.

A table of individual cases appears on the following pages.

Name	Position	Date of Attack	Place of attack	Kind of Attack	Alleged Responsible
Jesus Leyva Cortez	Prosecutor	1-Feb-00	Balboa (Cauca)	Killed	unknown
Carlos González Quintero	Lawyer and ex-Prosecutor	24-Feb-00	Aguachica (Cesar)	Disappeared	unknown
Argenis de la Fuente	Specialized judge	8-Mar-00	Cali (Valle)	Death threats	FARC-EP
Bayardo León Sossa	Ombudsman	9-Mar-00	Dabeiba (Antioquia)	Murder Attempt	Paramilitary
Jorge Eliecer Matías	Specialized judge	12-Mar-00	Ibagué (Tolima)	Death threats	unknown
Nancy Escalante	Judge	12-Mar-00	Buga (Valle)	Death threats	Paramilitary
Ranulfo Guerrero	Judge	12-Mar-00	Buga (Valle)	Death threats	Paramilitary
Juan Tello	Judge	12-Mar-00	Buga (Valle)	Death threats	Paramilitary
Hernando Duarte	Judge	23-Mar-00	Barranquilla (Atlántico)	Death threats	unknown
Eduardo Cerra	Judge	23-Mar-00	Barranquilla (Atlántico)	Death threats	unknown
Margarita Pulgarín T.	Prosecutor	3-Apr-00	Medellín (Antioquia)	Killed	unknown
Jorge Vidal Diaz	Lawyer	10-Apr-00	Ciénaga de Oro (Cordoba)	Killed	unknown
Harold Zapata	Procurator	12-Apr-00	Buenaventura (Valle)	Death threats	unknown
María Rondón Rodríguez	Prosecutor	11-May-00	San Martín (Meta)	Killed	FARC-EP
Hugo Carbono	Specialized judge	14-Jun-00	Santafé de Bogotá	Death threats	Paramilitary
Alvaro Vargas	Lawyer	5-Jul-00	Cali (Valle)	Killed	unknown
Carlos Julio Pinzón Aragón	Lawyer	1-Jul-00	Barranquilla (Atlántico)	Killed	unknown
José Hernández Córdoba	Lawyer	21-Jul-00	Barrancabermeja (Santander)	Killed	Paramilitary
Nestor Garza Cárdenas	Ombudsman	23-Jul-00	Lourdes (Norte de Santander)	Kidnapped	EPL
Yamil Hurtado Castaño	Ombudsman	24-Jul-00	Nariño (Antioquia)	Killed	FARC-EP
Balbina Villamizar	Ombudsman	25-Jul-00	Chitagá (Norte de Santander)	Death threats	Paramilitary
Wilson Arias Rojas	Ombudsman	26-Jul-00	Cali (Valle)	Surveillance	Colombian Army

Name	Position	Date of Attack	Place of attack	Kind of Attack	Alleged Responsible
Gustavo Gallón Giraldo	Lawyer	4-Aug-00	Santafé de Bogotá	Defamation	Colombian Army
Rafael Navarro Carrasco	Ombudsman	7-Aug-00	San Calixto (N. de Santander)	Death threats	Paramilitary
Alejandro Vélez Jaramillo	Judge	30-Aug-00	Argelia (Antioquia)	Killed	FARC-EP
Victor Silva	Ombudsman	15-Sep-00	Jagua de Ibirico (Cesar)	Disappeared	unknown
Carlos Ramírez Ramírez	Judge	21-Sep-00	San Rafael (Antioquia)	Death threats	unknown
Alicia Romero Escobar	Lawyer	20-Oct-00	Soledad (Atlántico)	Illegal detention	National Police
Miltón Rodríguez	Prosecutor	4-Nov-00	Frontino (Antioquia)	Kidnapped	FARC-EP
Dora Elena Muñoz Pérez	Judge	27-Nov-00	Yolombó (Antioquia)	Kidnapped	ELN
Jorge Betancur Echeverri	Prosecutor	27-Nov-00	Yolombó (Antioquia)	Kidnapped	ELN
Fernando Cruz Peña	Lawyer	13-Dec-00	Cali (Valle)	Disappeared	National Police
Carlos Henao Cadavid	Prosecutor	2-Jan-01	San Carlos (Antioquia)	Death threats	FARC-EP
Joaquin Cubides López	Lawyer	3-Jan-01	Rionegro (Antioquia)	Killed	unknown
Gustavo Santafé A.	Prosecutor	4-Jan-01	Barranquilla (Atlántico)	Murder Attempt	unknown
Oscar Rodas Villegas	Lawyer	24-Jan-01	Medellín (Antioquia)	Death threats	Paramilitary
Evelio Hoyos Zapata	Judge and President of National Judges's labour Union	24-Feb-01	Medellín (Antioquia)	Disappeared	unknown
Carlos Efraín Guerra	Judge	5-Mar-01	Leiva (Nariño)	Death threats	FARC-EP
Edgar Robles Chamorro	Judge	5-Mar-01	Leiva (Nariño)	Death threats	FARC-EP
Jesus Betancourth	Judge	5-Mar-01	Leiva (Nariño)	Death threats	FARC-EP
Fernando Arias Tabora	Lawyer and dean of a law faculty	5-Mar-01	Chinchina (Caldas)	Tortured and Killed	National Police
Edgardo de Santís	Lawyer	9-Mar-01	Montería (Córdoba)	Death threats	unknown

Name	Position	Date of Attack	Place of attack	Kind of Attack	Alleged Responsible
Lesther González Romero	Judge	2-Apr-01	Santafé de Bogotá	Death threats	unknown
Rodrigo Valencia Restrepo	Judge	15-Apr-01	Frontino (Antioquia)	Kidnapping	FARC-EP
Luis Saldarriaga	Lawyer	23-Apr-01	Betulia (Antioquia)	Kidnapping	Paramilitary
Misael Palma Jiménez	Lawyer	24-Apr-01	Palmira (Valle)	Disappeared	unknown
Eduardo Camacho Rojas	Judge	25-Apr-01	San Gil (Santander)	Death threats	unknown
Zenaida Suárez	Prosecutor	7-May-01	El Carmén (Norte de Santander)	Kidnapping	ELN
Adalgisa Lopera	Judge	21-May-01	Medellín (Antioquia)	Death threats	unknown
Carlos Beltrán Herrera	Lawyer	22-May-01	Florencia (Cauquetá)	Murder Attempt	unknown
Armando Vizcaino Terreros	Controllor	31-May-01	Santafé de Bogotá	Killed	unknown
Alma Rosa Jaramillo L.	Lawyer	29-Jun-01	Rural area in Bolívar	Killed	Paramilitary
María Silva Ríos	Prosecutor	28-Jul-01	Cúcuta (Norte de Santander)	Killed	Paramilitary
Alirio Uribe Muñoz	Lawyer	15-Jul-01	Medellín (Antioquia)	Death threats	Paramilitary
Luis Guillermo Pérez Casas	Lawyer	15-Jul-01	Medellín (Antioquia)	Death threats	unknown
Maret Cecilia García	Lawyer	15-Jul-01	Medellín (Antioquia)	Death threats	unknown
Virgilio Hernández	Prosecutor	8-Aug-01	Santafé de Bogotá	Dismissed	Attorney General's O.
Pedro Díaz Romeo	Prosecutor	8-Aug-01	Santafé de Bogotá	Dismissed	Attorney General's O.
Diana Yolima Niño	Prosecutor	8-Aug-01	Santafé de Bogotá	Dismissed	Attorney General's O.
Yolanda Paternina	Prosecutor	29-Aug-01	Chengue (Sucre)	Killed	unknown
Edgar Fernando Rondón	Lawyer	20-Sep-01	Cali (Valle)	Killed	unknown
Ismael Mancera Lozano	Lawyer	3-Oct-01	Sabaneta (Antioquia)	Killed	unknown
Carlos Arturo Pinto	Prosecutor	1-Nov-01	Cúcuta (Norte de Santander)	Killed	unknown
José Fernando Duarte	Prosecutor	29-Nov-01	Santafé de Bogotá	Dismissed	Attorney General's O.
Johny Withman Ibarra	Prosecutor	30-Nov-01	Santafé de Bogotá	Dismissed	Attorney General's O.

CÔTE D'IVOIRE

Côte d'Ivoire has experienced unprecedented social and political unrest during the preceding three years, which has had a devastating effect on its stability. Groups of military personnel have set up a parallel system of justice, arresting suspected offenders, harassing lawyers and judges, and threatening journalists.

Côte d'Ivoire gained independence from France in 1960. President Félix Houphouët-Boigny ruled until his death in 1993. Henri Konan Bédié, of the Democratic Party, was elected President in 1993. During that period the country, although lacking full democratic institutions, became an African model for economic growth and political stability. On 24 September 1999, General Robert Guei took power in a military coup and ousted President Bédié who then went into exile. General Guei promised to respect democratic rule, but subsequently dissolved the National Assembly and the Constitutional Court, suspended the Constitution, and formed a transitional government of military and civilian figures, the National Committee for Public Salvation (CNSP). A Constitutional and Electoral Consultative Commission, composed of major political parties and civil society members, drafted the new Constitution that was approved by a referendum on 23-24 July 2000. The new Constitution was approved by a huge majority and the Supreme Court declared the referendum valid on 28 July 2000.

Laurent Gbagbo of the *Front Populaire Ivoirien* (FPI) won the 22 October 2000 presidential election and General Guei had to relinquish power after two days of mass demonstrations in Abidjan, during which several people were killed. Legislative elections, held on 10 December 2000, were marred by irregularities and very low participation. Protesters clashed with the security forces over the exclusion of Alassane Ouattara's candidacy. His supporters boycotted the election.

The new Ivorian Constitution includes a restrictive presidential eligibility clause providing that presidential candidates must be born of Ivorian parents and may never have benefited from the use of another nationality. The public debate on citizenship focused on the nationality of Alassane Ouattara, leader of the opposition party *Rassemblement des Républicains* (RDR). RDR supporters contended that this constitutional

provision was aimed directly at excluding Ouattara, whose candidacy constitutes the major threat to the Gbagbo government. On 30 November 2000, the Supreme Court's Constitutional Chamber declared Ouattara ineligible to run in the October presidential elections and the December legislative elections on the alleged grounds that the candidate was of Burkina Faso origin. The Supreme Court attracted heavy criticism, as it short-listed only five presidential candidates (all from the Southern part of the country) out of a possible 19 contenders from the various political parties. The party of President Gbagbo, the FPI, became the largest party in the 225-seat national Assembly, but failed to win an absolute majority. The RDR achieved a sweeping victory in the municipal election held in 24-25 March 2001.

The 1960 Constitution embodied the principle of the separation of powers. However, the new Constitution refers to this principle only in the Preamble. According to the 2000 Constitution, the executive power is exclusively vested in the President of the Republic who is both the head of state and head of government. The president is the chief of the army, defines the policy of the country and presides the Council of Ministers. He appoints the Prime Minister, who answers to the President. Under Article 41 of the Constitution, the President, with the advice of the Prime Minister, names other members of the government. The president has the power to dismiss the Prime Minister as well as the members of the government. The President may initiate laws together with the members of the National Assembly. He is responsible for promulgating the laws that are transmitted to him by the President of the National Assembly, within 15 days of their adoption. This period of promulgation is reduced to 5 days in the case of an emergency. Any laws which are not promulgated by the President within the applicable period set out above are decreed by executive order of the Constitutional Council formed by the President of the National Assembly. The President of the Republic may, before the expiration of the above periods, demand that the National Assembly deliberate a second time on any particular Article, and this deliberation can not be refused. The president is elected for a term of five years and may only be re-elected once.

Legislative power is vested in the National Assembly. The members of the National Assembly are directly elected by the public for a period of five years. Under Article 71 of the Constitution, the National Assembly must approve legislation concerning the organisation of courts of law and administrative courts.

HUMAN RIGHTS BACKGROUND

INTERNATIONAL HUMAN RIGHTS MECHANISMS

Côte d'Ivoire has ratified the International Covenant on Civil and Political Rights and its first Optional Protocol, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child. Côte d'Ivoire is also a State Party to the African Union (formerly Organisation of African Unity).

On 1 November 2000, the Special Rapporteur on extrajudicial, summary or arbitrary executions, together with the Special Rapporteur on torture, transmitted an urgent appeal concerning 28 soldiers who had reportedly been arrested following an attack on the private residence of General Guei. The Special Rapporteur on summary executions also sent an appeal concerning the 55 bodies found in Yopugon in October 2000. On 7 November 2000, the Government of Côte d'Ivoire informed the Special Rapporteur that the new government was favourably disposed to the establishment of a commission of inquiry on the appeals received.

The Special Rapporteur on Religious Intolerance, in his report to the 57th session of the UN Commission on Human Rights, expressed concern regarding the religious tone characterizing the clashes between militants of FPI and RDR during the presidential elections of October 2000. Following these confrontations between Muslim Senufos and Dioulas from the North, who supported RDR, and Christians from the South, who supported FPI, several persons died, and mosques and churches were destroyed.

Côte d'Ivoire abolished the death penalty for all crimes on 23 July 2000 when the new Constitution was adopted. Article 2 of the Constitution stipulates that "All penalties resulting in the deprivation of human life are prohibited", and therefore, the courts can no longer hand down death sentences.

Child trafficking is a growing phenomenon in Côte d'Ivoire. Young girls have been transported from rural communities to the cities for domestic work and children have been brought into the country from neighbouring states. The new Constitution gives children special protection under Article 6 and also guarantees the right to seek asylum.

THE SECURITY FORCES AND IMPUNITY ISSUES

Since the December 1999 coup, the country has experienced social tensions that sometimes lead to blatant violations of human rights. Impunity is enjoyed by members of the military who have committed human rights abuses since the coup. The authorities acknowledged at an early stage that violations had taken place, and in May 2000 General Guei asked the population to "forget the abuses" carried out by the military.

According to the Amnesty International report on Côte d'Ivoire published in September 2000, groups of military personnel have established a parallel system of justice marginalizing the legal judicial institutions. Military personnel frequently carry out inquiries and arrest political activists without warrant. The *Mouvement Ivoirien des Droits de l'Homme* (MIDH) contends that this parallel police carries out arbitrary arrests of suspected offenders, who end up in cells in the office handling "intelligence and co-ordination of information" situated in the building housing the presidency. There have also been allegations that the armed forces have summarily executed presumed law-breakers, sometimes in public.

An unofficial gang of soldiers, known as *La Camora*, have allegedly committed a number of extrajudicial killings, sometimes in public. They are also said to have raided Douakro, the hometown of former President Bédié and detained and beaten several journalists from *La Référence* newspaper.

The CNSP set up the *Poste de Commandement de crise* (PC-crise) unit in order to cope with the increasing level of criminal behaviour in the country. The PC-crise, based mainly at the Akouedo military camp, was composed of military personnel whose mandate was to pursue offenders and to hand them over to the police and the justice system. Such policing activities carried out by military personnel without adequate training violates the UN General Assembly resolution on the Code of Conduct for Law Enforcement Officials. In fact, the PC-crise members have reportedly committed numerous extrajudicial killings with complete impunity. Moreover, the soldiers of the PC-crise acted as a special tribunal in numerous cases concerning their friends, relatives or other individuals, to help them resolve personal problems regarding debts, conflicts at work or even marital disputes. Groups of soldiers summoned civilians by force to the Akouedo military camp to try them at the first and last instance, thus acting in disregard of the law and in violation of the right of due process before an independent court. The Ivoirian authorities tried to confine the role of the PC-crise to the pursuit of criminals and the unit was officially suspended in March 2000. However, to date the Government has failed to initiate independent inquiries on extrajudicial killings and

practices of torture. It has therefore not met its obligation to ensure that members of the security forces who have committed human rights abuses be held accountable.

The new Constitution, under Article 132, grants immunity to all CNSP members and all participants in the December 1999 coup for all acts committed in connection with the coup, including criminal activity such as looting, robbery, car-jacking and intimidation. At the beginning of 2000, the Guei government granted amnesty for all offences committed during the September-October 1999 political demonstrations. This amnesty covered all RDR leaders who had been convicted under the previous regime's anti-vandalism law. During the 57th session of the United Nations Commission on Human Rights, the Ivorian Minister of Justice announced the firm decision of his government to combat impunity and to conform to all recommendations made by the UN Special Rapporteurs.

In April 2001, several human rights NGOs welcomed the indictment of six gendarmes for murder and assassination in connection with the Yopugon mass grave inquiry at the Abobo barracks. The hearing began in July 2001 in Abidjan. The mass grave with 57 bullet-riddled bodies was discovered on 27 October 2000, in the midst of an uprising following the presidential elections.

Approximately 150 individuals with the help of the Belgian NGO *Prévention Genocide*, filed a suit for crimes against humanity against President Gbagbo, General Guei, Emile Boga Doudou, the Ivorian Interior Minister and Moïse Lida Kouassi, the Defence Minister. Under the 16-6-1993/36 Belgian law (amended in 1999), the country's courts can judge foreign leaders for war crimes committed anywhere. The plaintiffs complained in their capacity as "victims or relatives of victims of torture, rape or murder committed by the Ivorian security forces". Among the plaintiffs is one survivor of the massacre in Yopugon, in October 2000. Ivoirians reacted with mass demonstrations outside the Belgian embassy in Abidjan denouncing the Belgian NGO. The protesters grouped under an NGO umbrella named "the Collective for the restoration of the image of Côte d'Ivoire" asked the Belgian Government to refrain from involvement in what they said was an international campaign to destabilise their country.

FREEDOM OF THE PRESS

The new Constitution provides for freedom of expression under Articles 9 and 10, but journalists continue to practice self-censorship. The Guei government used a law enacted in 1991 against a number of journalists. This law

authorises the state to initiate criminal libel prosecutions against persons who are deemed to insult the Government. *Reporters sans frontières* (RSF) has denounced the sentencing of a number of Ivorian journalists to imprisonment for libel. According to RSF, in May 2001, the editor-in-chief and the publisher of *Le Patriote* were sentenced in absentia to three months' imprisonment for an article published in June 2000 implicating the President of the Ivorian Human Rights League in an alleged scandal concerning money transfer to Switzerland. RSF expressed its concern that the sentence was disproportionate to the prejudice caused and that neither the defendants nor their lawyers were invited to appear at the trial. International journalists have also been subject to Government harassment and intimidation throughout 2000.

On 20 March 2001, during the 57th session of the United Nations Commission on Human Rights, the Ivorian Minister of Justice announced that there were currently no journalists in the country's prisons and that the law organising the press no longer allowed for such detentions. He added that a presidential Decree, dated 2 August 2000, provided for an independent Observatory for the freedom of the press (OLPED).

Divisions among political, ethnic and religious factions have deepened over the past few years. In June 2001, the Government established the National Reconciliation Forum inviting all political parties to participate. One third of the population of the country is composed of foreign immigrants, as Côte d'Ivoire has hosted migrant workers mainly from Burkina Faso and Liberia. Clashes between indigenous groups and immigrants from Burkina Faso over land issues in the southwest have led to numerous killings in recent years.

THE JUDICIARY

The new Constitution explicitly provides in Article 101 for the independence of the judiciary. According to Article 104, the President of the Republic is the guarantor of this independence.

THE COURT SYSTEM

The judiciary is composed of a lower courts system (*tribunaux*), the Court of Appeal (*Cour d'Appel*), the Court of Cassation (*Cour de Cassation*), the Conseil d'Etat, and the *Cour des Comptes*. The Ivorian legal system is primarily based on French law and, as such, makes a distinction between administrative courts and civil and criminal courts. The Court of Cassation is the final

instance for civil and criminal cases and reviews questions of law and not questions of fact in appeals from the Court of Appeal. The *Conseil d'Etat* is the highest court of appeal for cases concerning administrative acts. The *Cour des Comptes* controls matters related to the finances of the state.

Under Title IX, the Constitution provides for a High Court of Justice (*Haute Cour de Justice*). The High Court is composed of members of the National Assembly and is headed by the President of the Court of Cassation. The High Court of Justice is the only jurisdiction competent to deal with cases of high treason against the President of the Republic. The High Court, under Article 110 of the Constitution, has jurisdiction over crimes committed by members of the government in the exercise of their functions.

The Constitutional Court, under Articles 88-100 of the Constitution, has jurisdiction over matters arising under the Constitution or involving its interpretation. It is also competent to consider matters related to the presidential and legislative election disputes. The Constitutional Council decides on the eligibility of certain candidates and ratifies the election results. It may question the conformity of international treaties with the Constitution and monitors the referendum process. The Constitutional Court is composed of former presidents of the republic, and of six judges. The President of the Republic nominates the President of the Constitutional Court and three of the judges, and the National Assembly nominates the other three judges. The Court's decisions are binding on all administrative and public authorities and there is no possibility of appeal against them. Under Article 96, every citizen can question the constitutionality of a law during a trial and before any competent jurisdiction. Article 77 stipulates that officially registered human rights organisations can also challenge the constitutionality of legislation regarding fundamental rights before the Court. The rulings of the Constitutional Court are not subject to appeal.

The Constitution, under Article 113, provides also for an Economic and Social Council (*Conseil Economique et Social*) that gives advisory opinions on legislation concerning economic and social issues.

In many rural areas, traditional courts are operative, especially in the handling of minor matters and family law.

COURT ADMINISTRATION

According to Article 60 of the 1960 Constitution (amended in 1998), judges were appointed by the President of the Republic, on proposal of the Minister of Justice and following approval by the Judicial Council (*Conseil*

Supérieur de la Magistrature). The 2000 Constitution, under Article 102, provides that special legislation regulates the composition, organisation and function of the judiciary.

The Judicial Council is established under Article 105 of the Constitution to assist the President of the Republic in the guardianship of the independence of the judiciary. It is composed of the President of the Republic, the President of the Court of Cassation, the President of the *Conseil d'Etat*, the President of the *Cour des Comptes*, the Public prosecutor of the Court of Cassation, six persons from outside the judiciary and three magistrates. The President of the Republic presides over the Judiciary Council when it deals with matters concerning the independence of the judiciary. The President of the Court of Cassation presides over the Judiciary Council when it proposes candidates for the justices of the highest jurisdiction, namely the presidents of the Courts of Appeal and the presidents of the first instance tribunals. The Judicial Council also submits its opinion on the nomination and the promotion of other magistrates and is the disciplinary authority within the judiciary for judges.

Article 103 of the Constitution guarantees security of tenure to judges (*magistrats du siège*). A similar guarantee with regard to prosecutors (*magistrats du parquet*) does not exist.

LAWYERS

Although the practice is prohibited by law, police frequently restrict the access of lawyers to some prisoners, especially in case of political arrests. This practice constitutes a violation of Articles 7 and 8 of the UN Basic Principles on the Role of Lawyers. Article 7 provides that "governments shall 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". Similarly, Article 8 stipulates that "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".

Members of the Bar provide pro bono advice to defendants for limited time periods. In April 2000, the Bar began operating a telephone line for free legal advice from volunteer attorneys. In November 2000, the President of the Bar announced that the Bar would not continue to provide free legal assistance to poor clients if their transportation and lodging expenses were not furnished by the government.

Soldiers of the PC-crise, which serve as special tribunals of first and last instance, (see above), were said to have often engaged in acts of intimidation against lawyers who were trying to assist their clients.

CASES

In January 2000, **Maître François Abondio**, was accompanying his client, a company director summoned to the Akouedo military camp following a workplace dispute. Members of the PC-crise unit insulted and physically abused the client. Maître François Abondio was also struck by the soldiers.

On 10 May 2000, **Maître Thomas N'Dri** was apprehended without warrant in his office by soldiers with no legal authority. The lawyer was taken to the camp, where he was confronted with one of his clients who was demanding money from him. Maître N'Dri immediately notified the President of the Abidjan Bar Association, Maître Luc Adjé, who asked him not to respond to these summons. Since then, Maître N'Dri has not been contacted again by soldiers of the PC-crise.

On 2 May 2000, in a similar case, **Maître Abou Soumahourou** was arrested at his home by soldiers carrying a machine-gun. The lawyer was released some hours later without having been physically ill-treated.

Lawyers have also been harassed as a consequence of defending officials of the government of former President Bédié. On 17 March 2000, six armed individuals entered the office of Maître Dirabou, one of the lawyers of the former Interior Minister, threatening those present in the office, and as the lawyer was not in his office, left, threatening "this is the man who defends thieves" and "we are the Red Brigades and we'll be back". Three days later, the soldiers re-entered the office shouting "we'll break his limbs, and drag him in the street to stop him defending thieves". On this occasion Maître Dirabou was in the office and managed to call the Solicitor General, and several lawyers arrived as a sign of support for Maître Dirabou. The then Public Prosecutor put an end to the harassment of the lawyer by the military.

The President of the Bar and certain magistrates' organisations have brought these cases to the attention of the Minister of Justice and the Head of State. Following the dismantling of the PC-crise units by General Guei in May 2000, cases of illegal dispute resettlement and intimidation of lawyers have been reduced significantly. However, charges have not been brought against soldiers who committed these acts.

JUDGES

It was reported that members of the military have intervened in court cases and attempted to intimidate judges. Military personnel have also intervened directly in labour disputes, arresting and intimidating parties. Ivorian judges engaged in a work stoppage from 20-22 May 2000 in protest against harassment by members of the military.

Aka Allou [Magistrate]: On 3 February 2000, in the town of Toumodi, members of the military fire brigade detained Judge Aka Allou and forced him to release their colleague, Kouanda Ismalia, who had been convicted of breach of trust and was serving his sentence at the time. The Guei government intervened following protests from magistrates' unions. Judge Allou was released and the military fireman was returned to prison.

Olivier Kouadio [Judge]: In May 2000, the judge was verbally harassed and threatened by members of the military after he rendered a decision in a labour dispute with which the military disagreed.

DEMOCRATIC REPUBLIC OF CONGO

The internal armed conflict continued with the involvement of several African countries and numerous domestic groups. The Government, which controls approximately half of the territory, functioned without a Constitution. In this harsh context, the judiciary suffered from a lack of independence, in part due to poor infrastructure and resources. The Court of Military Order, highly influenced by the executive, continued to try civilians, notwithstanding pledges by the President to curtail the practice. Furthermore, this court maintained jurisdiction over matters unrelated to the military. Some rebel groups reportedly used the judicial system to arrest individuals on false charges to extract money and property from these persons. Several reports indicated that higher RCD/Goma authorities punished judges who refused to participate in such plots.

BACKGROUND

The Democratic Republic of Congo (known for part of its history as Zaire) gained independence from Belgium in 1960. On 24 May 1997, Laurent Desiré Kabila proclaimed himself head of state and government, following the overthrow of President Mobutu Sese Seko. The text that functions as a constitution is the Constitutional Act of Transition (*Acte Constitutionnel de Transition-ACT*) adopted in April 1994. A new Constitution has been drafted, but it has yet to be adopted. There is no division of powers. The Constituent and Legislative Assembly, for which the President selects members, only has advisory powers. The judiciary remained under the control of the executive and prone to rampant corruption. On 16 January 2001, President Laurent Desiré Kabila was assassinated in confused circumstances in Kinshasa. His son, Major-General Joseph Kabila, commander of the DRC land forces was sworn in as President. Joseph Kabila said that he would prepare the conditions for free and fair elections at a future date and promised to promote political pluralism and economic liberalisation.

At least nine armed internal, international and internationalised internal conflicts were active, with the participation of at least six national armies and

21 irregular groups. The conflict reached its current levels in 1998, when then-President Kabila tried to expel the Rwandan military forces that had collaborated with him in overthrowing President Mobutu. Congolese Tutsis as well as the Governments of Burundi, Rwanda and Uganda all depended on the Rwandan military presence for protection against armed groups operating in the eastern part of the country.

Although the rationale provided by foreign governments for the presence of their armies in the DRC relates to security concerns, an underlying motive for the participation of belligerents on all sides is exploitation of the vast natural resources in the country. In a report released on 17 April 2001, the UN accused Uganda and Rwanda of systematically looting the DRC and called for trade embargoes to be imposed on the two countries. According to the report, there was a direct link between the level of military activity in the DRC and the level of exploitation of natural resources. Other countries, including Zimbabwe, were said to have similar material interests in the country.

LUSAKA AGREEMENTS.

In July 1999 in Lusaka, Zambia, the DRC, along with Angola, Namibia, Rwanda, Uganda and Zimbabwe, signed a cease-fire agreement to end the war between all belligerents in the DRC. Subsequently, the main opposition armed groups, the MLC and the RCD, also signed the Lusaka Agreement. The agreement provides for the normalisation of the DRC's borders, the control of illicit traffic of arms and the infiltration of armed groups, the holding of an inter-Congolese dialogue and the disarmament of militias and armed groups. It also created a Joint Military Commission (JMC) composed of two representatives of each party and proposed an "appropriate force" to be established and deployed by the United Nations. MONUC, the UN Mission in the DRC, was deployed in November 1999. On 15 June 2001, the UN Security Council unanimously extended the mandate of the MONUC until 15 June 2002. After years of widespread disregard for the cease-fire from all parts of the conflict, since January 2001 the cease-fire along the confrontation line has essentially been respected. On 15 June 2001, the UN Security Council unanimously approved Resolution 1355, which noted with satisfaction the current state of cease-fire, but demanded that Ugandan, Rwandan and other foreign forces take the necessary steps to accelerate their withdrawal, and condemned incursions by armed groups into Rwanda and Burundi.

On 4 May 2001, the DRC government and the three main rebel factions signed a declaration of 14 principles for an Inter-Congolese National

Dialogue. In August 2001, the meeting of the Inter-Congolese dialogue resulted in a Declaration of Commitment in which the parties promised to liberalise political activities, protect human rights and release prisoners of war.

In his October 2001 report to the UN Security Council on MONUC, the UN Secretary-General described the overall situation in the DRC as continuing "to develop in a largely positive direction". MONUC was said to have finished the second phase of its deployment in the country, namely, to monitor the cease-fire and oversee the completion of disengagement of forces and their redeployment to new defensive positions. However, outbreaks of fighting have continued, if not intensified, in the east of the country. The third phase of the Lusaka agreements is the total withdrawal of all foreign forces from the territory of the DRC and the disarmament and demobilisation of the armed groups. In his October 2001 report, the UN Secretary-General asked the Governments to increase efforts to stop the fighting in the eastern part of the country by ceasing any military and logistical support to the armed groups operating in that area. Finally, the UN Secretary-General welcomed the withdrawal of Namibia and many of the Ugandan troops from the DRC. The UN Security Council will decide on the future of phase III after verifying that the parties are committed to continuing the peace process. This move would involve the deployment of UN troops and military observers towards the east of the country. By October 2001, MONUC was composed of approximately 2400 officers, including 1868 troops and 397 military observers.

HUMAN RIGHTS AND HUMANITARIAN LAW ISSUES

According to a US aid agency, the number of lives claimed by the three-year-war is approaching 3 million. The war has destroyed much of the country's infrastructure. There are approximately two million internally displaced persons, half of whom are without assistance. According to the World Health Organisation (WHO) and the United Nations Children's Fund (UNICEF), most of the 50 million people of the DRC live on US\$ 0.20 per day, and lack proper nutrition. The World Food Programme has estimated that 16 million Congolese have a critical need for food.

The most serious violations of human rights in the Government-controlled territories are against public freedoms. According to the UN Secretary-General, the new Government has achieved some progress in establishing human rights laws and standards. Some non-judicial detention centres, which had been infamous for torture and extra-judicial executions, have been closed. President Kabila imposed a moratorium on the execution of death sentences

in March 2001. Furthermore, in May 2001, the African Association for the Defence of Human Rights (ASAHDO), a human rights NGO and ICJ affiliated, was authorised to reopen its Kinshasa office after it had been closed in May 1998. However, human rights abuses continue. Although the Government adopted a new law liberalising political activities, registered political parties have been prevented from operating. Human rights defenders have been detained for speaking out on political matters and police harassment of political opponents is common. There are reports of torture in detention centres. Irregular trials continued. Eighty detainees allegedly involved in the murder of former President Laurent-Desiré Kabila have been denied medical care and regular meals. Regarding breaches of international humanitarian law, the Armed Forces are responsible for the bombing of civilian populations.

In the territory controlled by rebel movements, the human rights situation has remained grim and a climate of terror persists imposed by the rebel forces (RCD-ML, RCD-Bunia and the ML) and the armies of Rwanda, Uganda and, to a lesser extent, Burundi. Unlawful killing of civilians, arbitrary arrests, arbitrary detention, torture and rape were widespread. In the Aru, Ituri Province, 750 civilians were reportedly killed during a six-week period. The motives for the massacres were not clear. Human rights defenders continued to be particularly targeted. RCD soldiers have carried out rape of women and young girls. Forced recruitment of young men continues to be a matter of concern. In the North and South Kivu provinces, the Mayi-Mayi, Interahamwe and other militias supporting the Government have carried out numerous massacres, brutal repression and, according to the UN Secretary-General, have conducted a "reign of terror".

JUDICIARY

The Constitutional Act of Transition of the Mobutu Regime and Laurent Kabila's Decree Law Number three provide for an independent judiciary. In practice, however, the executive branch manipulates the judiciary. The Government has failed to provide the legal framework to ensure the independence of the judiciary. The DRC is still awaiting a judicial reform for this purpose, which should have been approved by 1997.

The President enjoys the power to dismiss and replace judges, magistrates and officials of the Public Prosecutor's Office, following a petition of the Supreme Council of the Judiciary. However, the Council is not functioning, and the ruling political party effectively exercises its powers. The executive branch in fact carries out the administration of justice.

Many obstacles have hindered judicial independence, including absence of economic autonomy of the judicial bodies, the proclivity of executive and legislative authorities to exert pressure on the judiciary, and the prevailing corruption of judges and magistrates. Corruption was facilitated by very low salaries or, in certain cases, complete lack of a salary.

Structure

The civilian judiciary is composed of lower courts, appellate courts, the Supreme Court and the Court of State Security. There are also military tribunals that exercise jurisdiction over civilians. Parallel to the official legal apparatus, an informal judicial power has formed. Security services, the militias, the local leaders and warlords, the rebels and other factions exercise such informal judicial power. The civilian judiciary is largely dysfunctional. Its functions have been usurped by military courts, which try almost all cases

The Civil and Criminal Codes are based on Belgian and customary law. The law provides for the right to expeditious public trial, the presumption of innocence, and legal counsel at all stages of proceedings. However, the Government continues to disrespect these rights in practice. Court-appointed counsel at state expense in capital cases, and when requested by courts, is provided by the law. However, the Government only provides counsel at its discretion.

In 1998, the Laurent Kabila Government dismissed 315 magistrates on the grounds of the deterioration of the justice system (see *Attacks on Justice 1998*).

Resources

The judiciary in the DRC suffers from desperate financial conditions. Judges are paid poorly and only on an intermittent basis. There are substantial shortages of personnel, supplies, and infrastructure. Financial autonomy of judicial institutions is not provided and pervasive corruption continues to affect the judiciary. These grave circumstances affect the other judicial officers, including court clerks.

The Court of Military Order

In 1997, the Court of Military Order (*Cour d'Ordre Militaire*) was created by decree (Decree-Law N° 019). Although the Court of Military Order was established to ensure discipline within the army, its ill-defined jurisdiction

has encouraged abusive trials of civilians for crimes such as armed robbery, mismanagement of public funds, or any activity perceived to be a threat to state security. Furthermore, the Court of Military Order has diminished the authority of the civilian judiciary and usurped its jurisdiction, by trying all variety of cases, including those that clearly would fall under the jurisdiction of regular tribunals.

Military tribunals also convict and order the execution of military persons charged with armed robbery, murder, inciting mutiny, espionage, and looting while in a state of mutiny (Although as mentioned above, President Kabila imposed a moratorium on the execution of death sentences). Persons convicted by military tribunals have previously been executed publicly in ceremonies held in stadiums and presided over by senior government officials, such as provincial governors.

Defendants do not have right to appeal to a higher court or access to defence counsel. This court systematically violates the rules of procedure, on the pretext that the DRC is still in a state of war, and that consequently, the existing legal procedures cannot be respected. The Executive branch exercises great influence over the Court of Military Order, as a result of which many members of the opposition have been tried and sentenced to prison.

Death sentences resulting from summary military trials became increasingly frequent during 2000. In November 2000, the Court of Military Order sentenced to death a former presidential security advisor and eight of his subordinates, a sentence that was executed before the moratorium was implemented. During the 2000 visit of the UN High Commissioner for Human Rights to the DRC, then-President Kabila (Sr.) promised that the military no longer would try civilian cases. However, this pledge was not honoured either by him or his successor.

Rebel-controlled areas

In the territories occupied by the various rebel factions, particularly the RCD/Goma, the system of justice remained essentially non-functional. Judges seldom were paid their salaries. There were credible reports of judges accepting bribes in return for favourable decisions. RCD/Goma officials and others with influence reportedly used the judicial system to arrest individuals on false charges so as to extract money and property from these detainees. Credible sources claim that higher RCD/Goma authorities reprimanded judges who refused to participate in such schemes. There were also documented cases of indiscriminate military justice by which individuals suspected of treason were executed without a trial.

Officially, the RCD/Goma established measures to investigate and punish rebel soldiers guilty of committing atrocities against civilian populations. However, the initiative remained largely ignored and ineffective and there were no reports that the RCD/Goma had tried, convicted, or punished any of its troops for committing atrocities.

The rebel movement RCD established a *Conseil de Guerre Opérationnelle* to judge soldiers accused of robbery or insubordination. It is comparable to the Court of Military Order but has double jurisdiction. According to lawyers in Bukavu, hearings are private. However, soldiers are arrested and prosecuted only for common crimes or for military faults, and not for humanitarian law violations.

CASES

Maître Richard Bondo and Maître Jean Marie N'Kwebe [lawyers]: Mr. Bondo and Mr. N'Kwebe are President and Vice-President of the Congolese NGO *Avocats sans Frontières* (ASF). On 8 March 2001, the National Council of the Bar Association struck the two lawyers from its rolls. Many Congolese NGOs claimed the disbarment illegal and unlawful and formed a coalition to denounce the Bar's decision (Nr.9/CNO/RSO/21). The NGOs contended that the decision was motivated by an inconsequential conflict between certain lawyers and their clients and that the blackmailing threats of powerful clients resulted to the disbarment of the two lawyers.

Maître N'Sii Luanda [lawyer]: Mr. Luanda is President of the Committee of Observers for Human Rights CODHO. On 5 June 2001, he was arrested and ten days later was transferred to the penitentiary centre CPRK where he was held incommunicado. He was accused of having contacts with person posing a threat to state security. Maître N'Sii was freed on 7 September 2001.

Kayembe Kasuku [lawyer]: The lawyer was allegedly arrested by the National Information Agency (ANR) and taken to prison, where he was stripped, tortured and beaten to the point that he lost consciousness. He was released and had to spend several days in intensive care in Kinshasa.

Balanda Mikuin Leliel [former President of the Supreme Court]: Mr. Balanda Mikuin Leliel is a professor at the University of Kinshasa. On 5 January 2001, he was arrested by ANR for having been in contact with MONUC. He was released on 19 January 2000.

EAST TIMOR

Since coming under the administration of the United Nations following twenty-four years of Indonesian rule, East Timor has made modest but significant strides towards achieving a functioning and independent judiciary. The new judicial system however remained fragile and in need of a substantial infusion of resources, both human and material.

On 5 May 1999, the Foreign Ministers of Indonesia and Portugal signed an agreement according to which a poll would be held in East Timor so that the population of the former Portuguese colony could choose between an Indonesian autonomy package and independence. The Security Council, by resolution 1246, established the United Nations Assessment Mission in East Timor (UNAMET) on 11 June 1999 to carry out the consultation. The 5 May agreement provided that UNAMET was to oversee a transition period after the vote pending the implementation of the decision reached by the people of East Timor.

On 30 August 1999, 98.6 per cent of the 435,000 registered voters participated in the ballot. The overwhelming majority of the voters, some 78.5 per cent, chose independence, as opposed to 21.5 per cent endorsing autonomy within Indonesia. In the weeks leading up to the vote, hundreds of persons were killed and injured and thousands driven from their homes by militia attacks. The Indonesian military (TNI) received wide condemnation for cooperating with or failing to stop the militia. After the poll, violence erupted again, personnel of the UNAMET were evacuated and its compound was burned by the militia. Many East Timorese were killed or fled the region, including priests and nuns who tried to protect the refugees.

A delegation of the UN Security Council visited Indonesia on 7 September 1999, and two days later Indonesian President Habibie gave his approval for a multinational peacekeeping force, which arrived in Dili on 20 September 1999. The International Force East Timor (INTERFET) was headed by Peter Cosgrove of Australia. The mandate of INTERFET was to restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks, and to assist humanitarian assistance operations. Fierce attacks on journalists, UN workers and local people by the militia followed.

The MPR voted in October 1999 in favour of revocation of the 1978 decree that had provided for the annexation of East Timor to Indonesia. On 25 October 1999, the UN Security Council adopted resolution 1272, which established the UN Transitional Administration in East Timor (UNTAET). UNTAET was established as an integrated, multidimensional peacekeeping operation, fully responsible for the administration of East Timor during its transition to independence. UNTAET's mandate is to provide security and maintain law and order throughout the territory of East Timor; to establish an effective administration; to assist in the development of civil and social services; to ensure the coordination and delivery of humanitarian, rehabilitation and development assistance; to support capacity-building for self-government; and to assist in the establishment of conditions for sustainable development. UN Under-Secretary-General for Humanitarian Affairs, Sergio Viera de Mello, was appointed as transitional administrator in charge of rebuilding the infrastructure of East Timor.

INTERFET was replaced with a UN force of military personnel and police to support the establishment of UNTAET. The handover of command of military operations from INTERFET to UNTAET was completed on 28 February 2000.

The 13-member National Consultative Council (NCC) was established to make policy recommendations to the UNTAET. The NCC included seven members of the National Council of Timorese Resistance (CNRT), a Catholic priest, UN officials and a former pro-Indonesia leader of the East Timorese People's Front. On 12 July 2000 the NCC announced the composition of a new provisional government for East Timor. Four posts within the cabinet were held by East Timorese and four by UNTAET.

José Xanana Gusmao, the president of the CNRT, was elected president of a new UN-appointed 36-member legislature, the East Timorese National Council (ETNC). When Mr. Gusmao resigned from this post on 28 March 2001, he was replaced by East Timor's Foreign Minister José Ramos Horta on 31 March 2001. On 9 April 2001, the ETNC elected Manuel Carrascaló as its new president. On 31 January 2001 the UN Security Council adopted resolution 1338, which extended the mandate of UNTAET until 31 January 2002.

On 30 August 2001, the second anniversary of the referendum on independence, the election of a constituent assembly that will write the country's new constitution took place. Ninety-three per cent of the electorate turned out for the poll. Fretilin (Revolutionary Front for an independent East Timor), the party that spearheaded East Timor's 24-year armed resistance against

Indonesia won 57.3 per cent of the vote and thereby won 55 seats in the 88-seat body. The second largest party was the Democratic Party with 8.7 per cent for seven seats. International observers commended the success of the elections after thousands of people had voted peacefully.

On 20 September 2001 a new cabinet (Council of Ministers) was sworn in. The Council of Ministers is composed of 10 ministers, three secretaries of state and seven vice ministers. It consists of nine representatives from Fretilin, two members of the Democratic Party, and nine independents and experts not affiliated with any party. Mari Alkatiri, the leader of Fretilin, was nominated as chief minister. He will head the transitional government, which remains under the ultimate authority of the UN, pending the assumption of full independence, expected for mid-2002.

HUMAN RIGHTS BACKGROUND

On 31 January 2001, two reports on the violent outbreaks that followed the 1999 referendum on independence were published. The Indonesian Commission to Investigate Human Rights Violations in East Timor (KPP-HAM) concluded in its report that the Indonesian military and civilian authorities, including the police, had cooperated with pro-Indonesian militias to create an atmosphere supportive of crimes against humanity, including mass murder, mass deportation, kidnapping, rape and destruction of property. The report listed the names of 33 suspects for further investigations and possible criminal trial. Among these 33 persons were the then-Governor of East Timor, militia leaders, and six Indonesian army generals.

The International Commission of Inquiry, mandated by the resolution adopted at the special session of the UN Commission on Human Rights in September 1999, delivered its report to the UN General Assembly on 31 January 2000. The report also concluded that "ultimately the Indonesian army was responsible for the intimidation, terror, killings and other acts of violence experienced by the people of East Timor before and after the popular consultation. Further, the evidence collected to date indicates that particular individuals were directly involved in violations of human rights." The report called for the establishment of an international tribunal to prosecute those responsible for the abuses.

During the period of transition new human rights problems emerged. East Timor's lack of resources, facilities, and trained police and judicial personnel led to activities by vigilante groups. Many of those allegedly linked to militia

groups or to the Indonesian army faced mob violence. Refugees returning to East Timor and members of minorities, such as Muslims or ethnic Chinese, were reportedly at particular risk of harassment.

JUDICIARY

UNTAET exercises all legislative and executive authority in East Timor, including the administration of justice. A goal of UNTAET is to “establish a functional system of administration of justice which is fair, effective, independent and impartial, securing the rule of law and providing equal access to justice for people throughout East Timor”.

One of the first efforts of UNTAET has been to establish the Judicial Department. The Judicial Department is composed of five divisions: courts, prosecution, public defenders, administration and logistics, and prison service. The administration is responsible for the budget and organisation of the whole department. At the time of writing the Judicial Department employed approximately 90 international and 2000 East Timorese staff.

STRUCTURE

East Timor's judiciary is a modified version of the Indonesian system (See Chapter on Indonesia). The decision to retain elements of such a structure was taken because those East Timorese with legal backgrounds had all trained under the Indonesian system.

The judiciary of East Timor consists of four District Courts that function as courts of first instance, one Court of Appeal, the office of the Public Prosecutor and the office of the Public Defenders. The four District Courts are situated in Dili, Baucau, Suai and Oecussi and are presided over by 25 East Timorese judges. The Court of Appeal in Dili is composed of two international judges and one East Timorese judge. At the time of writing there were approximately 45 East Timorese administrative staff assigned to support the judiciary. There are two separate offices for the Public Prosecution. One office is for serious crimes, with seven Public Prosecutors, legal advisers, case managers and investigators, all of whom are international staff. The other office of the Public Prosecution is for ordinary crimes and has 13 East Timorese Prosecutors and local staff. There are also 12 East Timorese Public Defenders, who work with four international lawyers.

APPLICABLE LAW

The applicable law in East Timor consists of UNTAET regulations and directives, applicable treaties and recognised principles and norms of international law. Another source of law is that applied in East Timor prior to 25 October 1999, i.e. Indonesian law, in as far it is in conformity with international standards and until replaced by UNTAET regulations or subsequent legislation.

SPECIAL PANEL FOR SERIOUS CRIMES

A special crimes unit was established to exercise jurisdiction over the offences of genocide, war crimes, crimes against humanity, murder, sexual offences and torture committed between 1 January 1999 and 25 October 1999. The Special Panel for Serious Crimes was established within the Dili District Court as a section of the domestic tribunal. The Special Panel is composed of two international judges and one East Timorese judge.

The Special Panel identified ten incidents of major human rights violations which it prioritised for investigation. In addition, it is pursuing individual cases of murder and other offences of already detained suspects. During its first seven months, 26 indictments were submitted to the Special Panel for Serious Crimes. The first indictment was submitted to the Court on 15 November 2000. The Special Panel held 60 preliminary hearings in 21 cases (beginning on 10 January 2001), 23 trial hearings with 9 judgements, and 39 hearings to rule on 34 pre-trial detentions. The first judgement on an individual case was delivered on 25 January 2001. The first indictment for crimes against humanity was filed on 11 December 2000 and the trial began in July 2001.

The Special Panel faces problems similar to that of East Timor's judiciary as a whole. Many factors contribute to the slow progress. The lack of resources is considerable. The Special Panel is in dire need of staff, including interpreters, investigators and prosecutors. The existing staff is partly young and inexperienced. Basic equipment is lacking, including vehicles for transportation, tape recorders, audio equipment, laptop computers, printers, photocopiers and mobile and satellite phones. In order to cope with the enormity of the task UNTAET intends to establish a second panel. However, the realisation of this plan depends on the provision of funds from international sources.

DIFFICULTIES CONFRONTING THE JUDICIARY OF EAST TIMOR

The new judicial system of East Timor remains fragile. It is in need of a substantial infusion of resources. The four District Courts were not all fully operational at the time of this writing. Although the salaries of the judicial officials are high by local standards, they still barely cover the cost of living in East Timor. Low salaries create the risk of corruption. The scarce resources also result in lack of adequate accommodation, a shortage of vehicles for transportation and a lack of basic facilities for the courts. Until summer 2001 all public defenders had to share a single office, which gave them little or no space for private consultations with their clients. As the judges, prosecutors and public defenders were drawn from a small group of law graduates and experienced legal professionals, they are mainly very young and inexperienced and lacking of necessary support and training.

The shortcomings of the criminal justice system have adversely affected the rights of suspects to a fair trial. Some detainees do not have access to legal counsel for weeks or, sometimes, even months. In some cases, detainees have been held beyond the expiry of their detention orders. Due to the slow progress of the courts, the right to trial without undue delay is threatened.

A number of judicial officials have reportedly been subjected to threats and intimidation and have expressed concern about their personal security. On 30 April 2001, a group of youths threatened to kidnap the President of Baucau District Court, an investigating judge and a prosecutor if a suspect was not released. On 8 May 2001 a group of 12 men armed with knives and machetes reportedly shouted threats outside Dili District Court.

All of these shortcomings demonstrate that although the East Timorese judiciary has made progress towards establishing a fair and independent judiciary, it is still in need of the support of the international community with regard to resources, both material and human. When UNTAET's mandate comes to an end, the continued presence and cooperation of the UN to assist the East Timorese Government will therefore be necessary.

EGYPT

Human rights defenders, including some lawyers, have encountered harassment and persecution for carrying out their professional activities. Egypt has continued to maintain an elaborate system of special courts, which undermines the jurisdiction of regular courts. Despite the decision of the Court of Cassation to lift the Government sequestration of the Lawyers Syndicate, and several Administrative Court rulings supporting the Syndicate's right to hold elections in its offices, the group has been prevented from holding its general assembly. A substantial number of human rights violations were committed with impunity in the country.

The Constitution proclaims Egypt as a socialist democratic state in which Islam is the official religion, Arabic the official language and *Shari'a* the principal source of legislation. The executive power in the Arab Republic of Egypt is vested in the President of the Republic in conjunction with the cabinet, which the President appoints and may dismiss at his direction. President Hosni Mubarak, who has been serving as Egypt's President since October 1981, was re-elected for a fourth six-year term in a national referendum in September 1999.

Legislative power is vested in a bicameral parliament, which is composed of the Peoples' Assembly (*Majlis al-Sha'b*), elected for a five-year term and the Advisory Council (*Majlis al-Shura*), which is partly elected and partly nominated by the President. The latest election, held between October 18 and November 15, 2000, confirmed the predominant role of the ruling National Democratic Party (NDP) and its dominance of the political landscape. The NDP won 172 seats, independent candidates won 225 and opposition parties won 17 seats. However, many of the independents elected were former members of the NDP who rejoined the party after being elected, leaving the People's Assembly balance at 338 NDP members. Although the judicial supervision of the election made the process fairer and more transparent than that of past parliamentary elections, there were significant shortcomings. Thousands of supporters of the opposition were arrested in the months before the elections, most of them members of the banned Muslim Brotherhood organisation.

HUMAN RIGHTS BACKGROUND

Serious human rights violations continued to be committed with impunity in Egypt. Abuses included arbitrary detention, trial of civilians before exceptional courts, serious limitations on freedom of expression and association, torture and ill-treatment of detainees. Prison conditions amounted to cruel, inhuman or degrading treatment. Human rights defenders continued to face harassment and persecution for carrying out their professional activities.

The Islamic movement backed by the religious establishment, *al-Azhar*, used the judicial system to incite public opinion against writers and journalists who express views that they consider deviant from *Shari'a* and Islam. They continued to pressure the Government to censor literary works and other forms of expression that they deem to constitute blasphemy. The Islamic Research Council of al-Azhar University issued a statement on May 17, 2000 denouncing the novel "A Banquet for Seaweed", by Syrian author Haidar Haidar, for allegedly insulting religious values. The novel, which was first published in Lebanon 1983, was reprinted by the Ministry of Culture as part of a series on Arabic literature. The Islamist al-Sha'b newspaper (of the pro-Islamist Social Party) denounced the novel as blasphemous for ridiculing Islam, and initiated a campaign against the book and against the Minister of Culture for allowing it to be reprinted. After wide-spread demonstrations by al-Azhar University students, the Minister of Culture relented and agreed to recall the book.

STATE OF EMERGENCY

Since 1967, Egypt has been ruled predominantly under a state of emergency imposed initially in response to the Arab-Israeli war launched that year. In May 1980, following the implementation of the Camp David Agreement between Israel and Egypt, the state of emergency was lifted. However, it was re-imposed on October 6, 1981, following the assassination of President al-Sadat. Since that date it has been renewed regularly. In May 2000, the state of emergency was extended for another three-year period.

The state of emergency imposes serious restrictions on the exercise of many basic rights and continues to have far-reaching implications on the overall human rights situation in Egypt. The Emergency Law grants the President a wide range of powers, including censorship, confiscation and closing of newspapers on the grounds of public safety and national security.

In addition, the Emergency Law empowers the executive to order the prolonged detention without charge or trial of anyone suspected of being a threat to national security and public order. The continuation of the state of emergency has led to the violation of some basic provisions of the ICCPR, to which Egypt is a party, including prohibition of arbitrary detention under article 9 and the right to fair trial under article 14. Legislation has been used to place impermissible restrictions on other rights, including the right of freedom of thought under article 18, freedom of expression under article 19 and freedom of association under article 22.

In addition to the emergency law, several laws restrictive of civil liberties continue to apply. These include:

- **The Anti-terror Law:** This law was adopted in response to an upsurge in political violence in the early 1990s. However, the law not only targets the activities of armed groups, but also criminalizes non-violent political opposition activities. This law has been used as a basis for the trials of more than a hundred alleged Muslims Brotherhood members before military courts in 1995, 1996 and 1999-2000.
- **The Press Law:** Law No. 95 of 1996 includes stiff penalties for journalists with regard to a variety of offences, including mandatory prison sentences for defamation, insult and false information. According to article 185, insulting a public official in relation to the conduct of the official's duties or service may be punished with a maximum of one year's imprisonment. Article 303 stipulates imprisonment of up to two years for defaming a public official, and article 307 provides that the punishment should be doubled in cases where insult or defamation has been produced as printed materials.
- **Law on Associations:** On June 1999, Law No. 153 of 1999 on Civil Associations and Institutions was adopted by the Egyptian parliament to replace Law No. 32 of 1962. Law 153 met with strong local and international criticism for imposing severe restrictions on civil society institutions, including *inter alia*, requirements to receive prior government approval for board elections, affiliation with foreign organisations and funding, prohibition of practising political or trade-union activity outside of the exclusive framework of certain political parties and trade unions, or engaging in activities that threaten national unity or violate public order or morality. In May 2000, the UN Committee on Economic, Social and Cultural Rights called for the amendment or repeal of the Law No. 153, in order to bring Egypt into conformity with its international obligations. The Committee expressed concern that the law "gives the Government

control over the rights of NGOs to manage their own activities, including seeking external funding”.

In June 2000, the Egyptian Constitutional Court declared Law No. 153 to be unconstitutional. The Court did not examine the substance of the law, but rather found that the law should have been presented to the *Maglis al-Shura*, the Egyptian Upper House. The Court further commented that disputes between NGOs and the authorities should be referred to administrative courts rather than criminal courts of first instance. The Egyptian authorities announced that while Law No. 153 of 1999 is suspended, its predecessor Law No. 32 of 1964 applies. Law No. 32 of 1964 had in many respects imposed even more restrictive conditions on the operation of NGOs. Once the NGO is registered under Law 32, the Ministry of Social Affairs has direct control over a wide range of the NGO's activities, including *inter alia*, government and policy matters.

The activities of some NGOs in Egypt have been criminalized through Military Decree No. 4 of 1992, which prescribes a minimum of seven years imprisonment for receiving funding without permission from the authorities.

TORTURE

Despite the existence of constitutional and legal safeguards, torture and ill-treatment of detainees by police, security personnel and prison guards remains widespread. Torture is used to extract information, coerce the victims to end their antigovernment activities and deter other from similar activities. In January 2000, the Egyptian Organisation for Human Rights (EOHR) released a report in which it documented 13 cases of torture that occurred in police stations during the latter half of 1999, two of which ended in death. While the Government has investigated some torture complaints in criminal cases and punished some offending officers, the punishments are typically lax considering the seriousness of the offences.

In a recently published report, the Egyptian NGO Human Rights Centre for the Assistance of Prisoners (HRCAP) analysed 1,124 law suits concerning compensation for torture between 1981 and 1999. The report stated that the perpetrators of torture often go without punishment, as existing provisions in both the Penal Code and the Code of Criminal Procedure render it difficult to bring them to justice. However, the State has disbursed a sum of 4,766,550 Egyptian Pounds from the public treasury in compensation payments.

HUMAN RIGHTS DEFENDERS

The Government approved the holding of the Second International Conference of the Human Rights Movement in the Arab World, which took place in Cairo from 13 -16 October 2000 under the title "Human Rights, Education and Dissemination: A 21st Century Agenda". However, during the period between February 2000 and August 2001 a number of restrictions were imposed on human rights work in Egypt.

On May 21, 2001, the Supreme State Security Court in Cairo sentenced Saad Eddin Ibrahim, a prominent human rights defender, to seven years' imprisonment. Twenty-seven other defendants standing trial were also convicted and received sentences ranging from a one-year suspended prison sentence to five years' imprisonment. Dr. Ibrahim was convicted on the basis of three charges: receiving funding without authorisation (Military Decree No. 4 of 1992), dissemination of false information abroad harmful to Egypt's interests (article 80 (d) (1) of the Penal Code) and appropriating money by fraudulent means. Dr. Ibrahim was the director of the Ibn Khaldun Centre for Development Studies and lecturer at the American University of Cairo. The Ibn Khaldun Centre, established in 1988, is engaged in activities to promote democracy and human rights activities, which have included publications and public events on the situation of minorities in the Middle East and monitoring parliamentary elections.

Several international human rights NGOs have expressed concerns that the charges against Saad Eddin Ibrahim and his co-defendants were politically motivated and constituted a violation of the defendants' right to the peaceful expression of their opinion. The trial was also said to have fallen short of international standards of fair trial, including the right for a full review before a higher tribunal. In a joint statement, the UN Special Representative on Human Rights Defenders and the UN Special Rapporteur on the Independence of Judges and Lawyers remarked: "We believe that the conviction of these members of civil society for their human rights activities will have a chilling effect on the activities of other human rights defenders in Egypt".

THE JUDICIARY

The judicial system in Egypt comprises both ordinary court and exceptional court systems. However, the elaborate exceptional court system continues to undermine the jurisdiction of ordinary courts, particularly in sensitive cases.

THE ORDINARY COURT SYSTEM

The ordinary court system is composed of civil and criminal courts, the State Council, which is a separate administrative court structure, and a constitutional court. The civil court system is composed of a Court of Causation, Courts of Appeal and Magistrate Courts.

The Magistrate Courts have general jurisdiction over small claims and minor offences. In civil cases, they are composed of one judge, while in criminal cases they may be composed of either one judge or three judges, depending on the seriousness of the possible penalty. There are seven Courts of Appeal in Egypt that are composed of three judges. Each is divided into civil and commercial chambers. The Court of Cassation, which sits in Cairo, accepts petitions on judgements rendered by the Courts of Appeal only on two grounds: mistakes of law and violations of due process.

There is also an elaborate system of administrative courts composed of primary level, appeal and State Council. The State Council is an independent judicial body that comprises 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.

THE SUPREME CONSTITUTIONAL COURT

The Supreme Constitutional Court is an independent judicial body, entrusted with the task of examining the constitutionality of laws as well as the interpretation of legislative texts. The Court consists of seven judges who are appointed by the President of the Republic following consultation with the High Council of Judicial Authorities, including the President of the Court, who is third in line for presidency of the Republic after the President and the Speaker of the Peoples' Assembly. Individuals have no legal standing before the Court.

Despite restrictions on the Court, the jurisprudence it develops has far-reaching implications on the question of constitutionality of laws. A series of rulings of the Supreme Constitutional Court has revealed that many existing laws seriously violate the human rights and civil liberty guarantees that are enshrined in the provisions of the Constitution. The Court has ruled that 53 of the Constitution's 211 articles, i.e. some 25 percent, have been contravened by various laws.

SELECTION, PROMOTION AND TRANSFER OF JUDGES

The Constitution guarantees the independence of the judiciary, with article 165 providing that "the Judiciary Authority shall be independent". Moreover, article 166 proclaims that judges shall be independent, subject to no authority other than the law, and that no authority may intervene in judiciary cases or in the affairs of justice. Judges serving in the regular court system are appointed by the President upon recommendation of the Higher Judicial Council. This Council is headed by the President of the Court of Cassation and is composed of senior judges and the Attorney-General.

Judges are appointed for life and may not be dismissed without serious cause. However, in practice the executive authority enjoys considerable influence over the judiciary, in so far as the appointments of judges are a presidential prerogative. Judges are considered functionaries of the Ministry of Justice, which administers and finances the court system. This scheme places the judiciary under the control of the executive, since it makes the executive the *de facto* head of the judiciary, thereby undermining the independence of the judiciary as well as the principle of separation of powers.

SPECIAL COURTS

An elaborate exceptional court system exists parallel to the ordinary court system. This exceptional system may be traced back to 1980 and operates under the framework of a state of emergency and a series of emergency laws. The exceptional court system comprises several types of special courts, which were described in detail in the previous editions of *Attacks on Justice (1996-1999)*. These special courts include State Security Courts, which are composed of the Emergency Security Courts and the Permanent State Security Courts, and Military Courts.

EMERGENCY STATE SECURITY COURTS

The Emergency State Security Courts were established under the Emergency Law. They have jurisdiction to consider not only cases that arise under the Emergency Law, but also cases punishable under the ordinary Penal Code if they are transferred to them by the President of the Republic or his representatives. Emergency Courts are formed by judges appointed by a presidential decree upon the recommendation of the Minister of Justice. The Emergency Law empowers the President of the Republic to appoint military officers to these courts. Judgements passed by them are not subject to appeal or review by any other judicial body. However, the President of the

Republic has the power to alter or annul any decision passed by the Emergency Courts.

PERMANENT STATE SECURITY COURTS

The legal basis for establishing Permanent State Security Courts is found in article 171 of the Constitution, which provides that "the law shall regulate the organisation of State Security Courts and shall prescribe their competence". Law No. 105 of 1980 confers State Security jurisdiction over 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. Law 105 provides for Magistrate State Security Courts, which are composed of a single judge and Supreme State Security Courts, which are normally composed of three judges. The law permits the President of the Republic to appoint military officers to the latter court. Persons convicted in a Supreme State Security Court do not have the right to a full review before a higher tribunal. Verdicts issued by the Magistrate State Security Courts may be appealed before a special chamber within the Court of Appeal and then can be reviewed by the Court of Cassation. Article 8 of Law No. 105 provides that verdicts issued by the Supreme State Security Courts are final and may not be appealed except through cassation or re-consideration, which are decided on by the Court of Cassation. The grounds of appeal in both cases are limited and must be based on points of law, not on the facts of the case. This clearly violates article 14 (5) of the International Covenant of Civil and Political Rights (ICCPR), to which Egypt is a party, which provides: "everyone convicted of a crime shall have the right to this conviction and sentence being reviewed by a higher tribunal according to the law".

MILITARY COURTS

The Military Courts are part of the military hierarchy. According to article 6 (2) of Law No. 25 of 1966 on the Military Judiciary, the President of the Republic, during a state of emergency, has the right to refer to the military courts any crime which is punishable under the Penal Code or under any other law. The jurisdiction of Military Courts to try civilians has further been endorsed by the Supreme Constitutional Court which ruled that the President may invoke the Emergency Law to refer any crime to a military court.

Military Courts do not ensure civilian defendants due process before an independent tribunal. While military judges are lawyers, they are also

military officers appointed by the Minister of Defence and subject to military discipline. There is no appellate process for verdicts issued by Military Courts. Instead, verdicts are subject to a review by other military judges and confirmation by the President of the Republic.

LAWYERS

The independence of the legal profession in Egypt, as well as other professional syndicates, has been undermined by the adoption of Law 100 of 1993. This Law provides for very strict conditions for validating the election processes of professional syndicates. It requires that a 50 per cent quorum of registered members must cast their votes in order for the election of the governing board to be valid. Failing a quorum, a second election must be held in which at least 30 per cent of the membership votes for the board. If such a quorum is unattainable, the judiciary may appoint a caretaker board until new elections can be set. In addition, Law 100 requires professional syndicates to refrain from activities that do not constitute part of their original activities. This provision has been seen as part of an effort by the Egyptian authorities to severely restrict the right to freedom of association for professional syndicates and to prevent Islamists from capturing or retaining the leadership of professional syndicates.

The Lawyers Syndicate underwent a crisis with the Government that ended up in its dismantlement (see *Attacks on Justice 1998*). A nation-wide election for the Lawyers Syndicate, which had been scheduled for 1 July, 2000, was postponed by the Government on the grounds that syndicate offices were inadequate to allow voting by all the members. The elections were allegedly postponed to prevent victories by Islamists, as had occurred in the previous elections.

Despite a decision by the Court of Cassation to lift the Government's sequestration of the Lawyers Syndicate and to allow elections, and despite several Administrative Court rulings supporting the Syndicate's right to hold elections in its offices, no such elections had taken place by the time of the compilation of the present report.

CASES

Yehya Ibrahim [lawyer]: On 3 January 2001, Mr. Yehya Ibrahim was

attacked and detained by a police officer after an argument with the Chief Prosecutor in the prosecution office in El-Bagour, Monofeya. A number of other lawyers who were present at the time organised an assembly, but were dispersed by police, reportedly with excessive force, resulting in the injury of one lawyer, **Magdy Shaltout [lawyer]**, who was taken to hospital.

Fiji

Until the 19 May 2000 uprising, the country was governed by a democratically elected government and the judiciary was independent. Following the uprising, on 29 May 2000 the Fiji military attempted to abolish the 1997 Constitution and began ruling by decree and through a hand-picked "interim civilian government". Fiji judges were involved in drafting military decrees immediately after the military take-over, including a decree to fundamentally alter Fiji's judicial structure. The Court of Appeal in its landmark decision on 1 March 2001 ruled that the 1997 Constitution guaranteeing equality between ethnic Fijians and Fijians of Indian descent was still in force and that the pre-coup government should be re-called.

Fiji chiefs ceded sovereignty over these South Pacific Islands to Queen Victoria in 1874 to end territorial conquests among rival kingdoms. In 1879, the British administration began bringing Indian labourers to work on the sugar plantations. At independence in 1970, the indigenous Fijian and Indo-Fijian populations were roughly equal in population. Following 17 years of rule by the indigenous Fijian Alliance Party, the 1987 elections brought the first Indo-Fijian-led government to power. Tensions increased between the indigenous Fijians, largely heading the government and the military sector, and the Indo-Fijians, who were perceived to be dominating the economic, educational and health sectors. Backed by hard-line indigenous Fijians alarmed at the emerging political influence of the economically successful Indo-Fijians, Lieutenant Colonel Sitiveni Rabuka staged the first military coup in the Pacific area in May 1987. Rabuka declared Fiji a republic and withdrew the country from the Commonwealth. In September 1987, he mounted a second coup and repealed the Constitution. In 1990, Rabuka imposed a constitution which created a legislature composed entirely of separate indigenous Fijian and Indo-Fijian electoral constituencies, and required the Prime Minister to be an indigenous Fijian. Moreover, the Constitution guaranteed indigenous Fijians a perpetual parliamentary majority by reserving them 37 of the 70 seats in the House of Representatives.

In July 1997, the parliament unanimously passed a constitutional amendment ending the guaranteed indigenous Fijians parliamentary majority and

permitting an Indo-Fijian Prime Minister. On 19 May 1999, the first elections under the new constitution resulted in Mahendra Chaudry, a Fijian of Indian descent, becoming Prime Minister.

On 19 May 2000, the first anniversary of the election of Chaudry as Fiji's first non-indigenous Prime Minister, armed indigenous Fijian supremacists led by businessman George Speight took the Prime Minister and the entire cabinet hostage. Following the coup, unrest took hold in many parts of the country, and hundreds of Indo-Fijian families suffered ethnically motivated attacks from coup supporters. Ten days later, the army intervened and President Ratu Mara was ousted in a non-violent coup to allow the declaration of Martial law. Military Commander Frank Bainimarama appointed himself Head of State, attempted to abrogate the 1997 Constitution and began to rule by decree. On 4 July 2000, governmental power was transferred by the military to an interim administration after negotiations with the indigenous Fijian Great Council of Chiefs (a traditional indigenous council).

Under the Muanikau Accord (13 July 2000), the last group of hostages including Prime Minister Chaudry was released after 56 days in captivity. The Muanikau Accord provided for amnesty for Speight and his group, and the commitment to redraft the Constitution in favour of the indigenous population, in return for releasing the hostages. Despite the immunity provision, Speight and advisors were arrested and charged with treason on 26 July 2000, as certain provisions of the Accord had not been fulfilled.

A Constitutional Review Commission (CRC) was also established to begin the process of redrafting the Constitution, based on the "paramouncy" of indigenous Fijians. However, the CRC suspended its work in December 2000 due to a November High Court ruling that the CRC had no legal standing, as the 1997 Constitution still remained in force. The interim administration appealed the order and requested a stay. The Court of Appeal denied the request, heard the appeal, and ruled on 1 March 2001 that the 1997 Constitution was still in force and that the pre-Speight coup parliament had to be recalled.

Following this decision of the Court of Appeal, the House of Representatives was dissolved by President Iloilo on 14 March 2001. On 15 March 2001, Laisenia Qarase, the Prime Minister of the Interim Civilian Government resigned and the new President, under Section 109 of the 1997 Constitution, dismissed Chaudry and re-appointed Qarase as the caretaker Prime Minister in order to open the way for new elections.

On May 2001, the first anniversary of the May 2000 coup, the caretaker Prime Minister Qarase stated that he would like to find "a compromise

between democracy and traditional village government” and that “only indigenous Fijians should be prime minister at this stage of Fiji’s history”.

Elections took place between 27 August and 1 September 2001. The interim government permitted foreign observers from the United Nations Commonwealth Secretariat and the European Union to monitor the national elections. Qarase’s Fijian People’s Party (SDL) won 31 of 71 parliamentary seats, while Chaudhry’s Labour Party won 27 seats. The Conservative Alliance, which counts jailed coup plotter George Speight as a parliamentary member, gained six seats. On 10 September 2001, President Iloilo swore in Qarase as the new Prime Minister. He is required to achieve a coalition deal with the other parties, as the SDL failed to secure an outright majority. Under Article 99, para.5 of the 1997 Fijian Constitution, the Prime Minister, in establishing the cabinet, was obliged to invite the participation of the main opposition party gathering more than ten per cent of the votes, whose members are also entitled to ministerial posts. Qarase invited Chaudhry to join the new government, but at the same time appealed to the Indian-Fijian leader not to accept any posts, asserting that a mixed government would not be “workable”. Chaudhry firmly declared his decision to join the Government rather than lead the Opposition. However, Qarase disregarded the requirement of the Constitution that he offer a proportional number of seats in his cabinet to the Labour Party. Chaudhry is expected to file a petition to the High Court over the cabinet exclusion, alleging it is illegal.

Fiji’s suspension from the Commonwealth remains in force and the return of Fiji to the Commonwealth will depend on compliance with the outcome of the elections.

BACKGROUND

TYPE AND STRUCTURE OF GOVERNMENT

The 1997 Constitution provides for the separation of powers (Chapter 6, 7 and 9). Legislative power is vested in the bicameral parliament consisting of an elected House of Representatives (Vale) and a nominated Senate (Seniti). The 1997 amendment giving equal rights for the first time to indigenous Fijians and Indian Fijians - though discriminatory provisions remain - created a 71-seat Parliament House with 25 seats open to all races, 23 for indigenous Fijians, 19 for Indo-Fijians, three for “general electors” (mainly ethnic Chinese, those of European descent and other Pacific

islanders) and one for Rotuma island. The amendments also required the largest party in Parliament to invite parties whose membership in the House of Representatives comprises at least 10 per cent of the total membership to be represented in cabinet in proportion to their total numbers in the House, thus creating a multi-racial government where political parties are race-based. The Senate under the 1997 Constitution is reduced from 34 to 32 members, of whom 14 are appointed by the President on the advice of the Great Council of Chiefs, nine are appointed by the President on the advice of the Opposition, and one is appointed by the President on the advice of the Council of Rotuma. According to Section 47 of the 1997 Constitution, all Bills originate in the House of Representatives and are then sent to the Senate. The Senate's legislative powers are equal to those of the House of Representatives except that it can not introduce or amend bills that authorise expenditure for the ordinary annual services of the government or that impose taxation.

The executive authority, under Section 85, is vested in the President who is the Head of State and symbolises its unity. The President is appointed by the Great Council of Chiefs after consultation by the Council with the Prime Minister. The President acts only on the advice of the Cabinet or a Minister when exercising executive authority. However, the President acts in his/her own judgement, when appointing as Prime Minister the member of the House of Representatives who can form a government that has the confidence of the House.

Compared to the 1990 Constitution, the 1997 Constitution Amendment is simpler in structure and more coherent. It is the first Constitution of Fiji to establish a set of non-discriminatory principles to guide the government. Although the principle of merit and equal opportunity is enshrined in the Constitution, there is a pro-indigenous Fijians clause concerning the composition of state services at all levels "to reflect as closely as possible the ethnic composition of the population, taking account when appropriate of occupational preferences". It is also stated that "the paramouncy of Fijian interests as a protective principle continues to apply, so as to ensure that the interests of the Fijian community are not subordinated to the interests of other communities." The 1997 Constitution still provides for the application of customary laws in dispute resolution and in cases concerning traditional land ownership. The Great Council of Chiefs (*Bose Levu Vakaturaga*) created by the Fijian Affairs Act, has been granted important powers by the 1997 Fiji Constitution, as it selects, under Section 64, 14 of the 32 members of the Senate, and under Section 90, the President.

The 1997 Constitution, under Section 42, established a Human Rights Commission to educate the public about the content of the Bill of Rights and to make recommendations to the Government about matters affecting compliance with human rights.

THE PRASAD CASE

On 4 July 2000, Chandrika Prasad, an Indo-Fijian farmer whose house had been looted and his crops destroyed following the unrest in the wake of the Speight coup, sought a court order declaring that the attempt to abrogate the Constitution was illegal. The case was heard before the Lautoka High Court by Justice Anthony Gates, on 24 August 2000. On 15 November 2000, the Court held that the Constitution was still in force and that the Parliament, as constituted prior to the events of May 2000 still held office. The interim civilian government appealed against the judgement of Justice Gates. The Court of Appeal denied the request of stay and the full Court of Appeal heard the case in February 2001. In a judgment delivered on 1 March 2001, the Court of Appeal first questioned the Court's jurisdiction to rule on whether the Constitution has been abrogated and, giving a positive answer, declared that the constitutional doctrine of necessity could not in this case justify the abrogation of the Constitution nor validate the interim civilian government.

The Court then examined whether the interim government was exercising control over the state with the acquiescence of the people. The Court concluded that the interim civilian government had not proved that it had the acquiescence of the Fiji people. The 1997 Constitution remained the supreme law of the Fiji Islands, the Parliament had not been dissolved and therefore its functions had been suspended on 27 May 2000 for six months. The office of the President had become vacant when Ratu Mara resigned on 15 December 2000.

The International Bar Association (IBA) observed the trial (19-22 February 2000) and reported the proceedings to be open, fair and independent.

The interim civilian government stated to the Court of Appeal before its decision that it "would accept the decision of the Court on whether the 1997 Constitution is still in existence". The lawful course, following the Court of Appeal decision should be that the Fiji parliament elected in May 1999 be recalled as soon as possible with the task of forming a government and choosing a Prime Minister. Otherwise, it should be dissolved and elections should be held. In the event, the pre-coup Parliament was not recalled, but was

dissolved and Mr. Qarase appointed a “caretaker” Prime Minister. Many challenge the constitutionality of the method used by President Iloilo, as he dissolved the Parliament without providing an opportunity to form a government and choose a Prime Minister. A challenge to the decision by the Citizens Constitutional Forum was largely rejected by the High Court (see below).

HUMAN RIGHTS ISSUES

Fiji is a state party to the UN Convention on the Elimination of All Forms of Racial Discrimination, the UN Convention on the Elimination of All Forms of Discrimination against Women, and the UN Convention on the Rights of the Child.

In May 2001, the Fiji Human Rights Commission stated that there had been a dramatic increase in the number of complaints lodged with it since the coup of the preceding year.

POLITICAL, EXTRAJUDICIAL KILLINGS AND POLICE ABUSE: IMPUNITY

Following the May 2000 coup, military Commander Bainimarama declared martial law, invoking the 1998 Emergency Powers Act, and attempted to abrogate the 1997 constitution. Since then, military and prison authorities have been involved in violations of fundamental human rights guaranteed in the military decrees.

On 2 November 2000, members of the Counter Revolutionary Warfare Unit (CRW) mutinied at the Queen Elizabeth Barracks in Suva. According to Amnesty International, some 30 people were injured and when regular army forces regained control of the barracks 8 CRW soldiers were beaten to death. Injured CRW soldiers have been denied family visits and international observers have not been granted access to the detained rebel soldiers. Representatives of the ICRC began visiting detained CRW members only on 11 April 2001, and according to local media reports, they raised the issue of detention conditions.

On 14 November 2000, the Chair of the Fiji Human Rights Commission announced the Commission's intention to inquire about the CRW soldiers' death during the mutiny at Queen Elizabeth barracks. However, no judicial action has so far been taken against the soldiers involved in the incident. In April 2001, the police criminal investigation Department announced that all

investigations related to the May 2000 coup would be completed before the August elections. Moreover, police abuse against detainees and suspects is common and it is believed that excessive force was used in the arrest of the Speight rebel group.

By April 2001, only a few coup supporters remained in prison awaiting trial, while charges against others were dismissed when prosecutors failed to appear in court or to produce sufficient evidence. The government has been unwilling to prosecute many of the persons responsible for coup-related human rights abuses.

THE SPEIGHT TRIAL

On 12 June 2001, the treason trial of Fiji coup leader George Speight was delayed for a third time after his new US-based "lawyer", Navin Naidu was refused admission to the Fiji Bar on the grounds that he was "patently unqualified". Speight announced on 5 June 2001 at the preliminary inquiry proceedings at the Suva Magistrates Court that he would be represented by Mr. Naidu, after his Fijian lawyer, Rabo Matebalavu withdrew. The University of London, from which Naidu claims he received his law degree in 1987, denied that Naidu has graduated with a law degree. Thereafter, Navin Naidu was remanded in custody and on 15 June 2001 appeared in court in Suva charged with "uttering a false document and perverting the course of justice". The prosecution has accused Speight of adopting delaying tactics. Following Chief Magistrate Temo's warning that the case would go ahead whether or not he had legal representation, Speight announced that local lawyer Kitione Vuetaki would represent him.

At the hearing, expected to last four months, prosecutors will present evidence supporting treason charges against Speight and his 12 followers. When the evidence has been heard, Chief Magistrate Temo will decide whether to send the men for a High Court treason trial, at which they could be sentenced to death by hanging if convicted. Capital punishment has not been carried out in Fiji since 1970.

Hearings against the Speight group were set to begin on 31 August 2001, but were again adjourned. Legal teams representing the government, Mr. Speight and his co-defendants agreed to bypass the pre-trial hearing of evidence. The defendants' lawyers apparently intend to challenge the withdrawal of the amnesty that was originally granted to the Speight group in exchange for the release of the hostages.

There is widespread speculation that the case will collapse due to a short-

age of prosecution resources and a lack of political will to carry out prosecution. Magistrates' courts around the country have been giving extremely lenient bail terms for those charged with crimes associated with the May 2000 take-over of the Parliament and the government. In many cases, bails have ranged from 50 USD to 100 USD. Reportedly, the Chief Magistrate Salesi Temo failed to declare that one of the persons charged with George Speight was related to him (Salesi Temo), and he withdrew from the case only upon objection from the prosecution. However, Temo continues to hear other related Magistrates' Court charges against the Speight group.

On July 2001, Speight and his co-suspect Ratu Timoci Silatolu lodged their nomination applications for the August 2001 elections. On 27 July 2001, the Suva High Court ruled that an order authorising the release of the two rebel suspects to process their candidature for elections at the Nausori region was invalid, as they were still facing treason charges in the High Court. There are concerns that the case will not come for full trial until the beginning of 2002, when Speight could be a member of the Parliament and could thus be granted immunity.

DISPLACEMENTS AND LAND ISSUES

According to local media reports, there has been an increase in outward migration from Fiji, mainly to Australia. Since the political crisis in May 2000, at least 15 doctors and more than 3,000 teachers have left the islands. It is mainly Fijians of Indian origin that are emigrating, as ethnic Indian families continue to be harassed, especially those living in rural areas.

Ethnically motivated social violence stems from land problems and usually leads to abuses including looting and destruction of property. Eighty-three percent of land is owned by ethnic Fijians and the state holds another eight percent. Indo-Fijians lease land from the ethnic Fijian landowners through the Native Land Trust Board.

THE JUDICIARY

The principle of the independence of the judiciary is clearly prescribed in the 1997 Constitution under Section 118, which states that "The Judges of the state are independent of the legislative and the executive branches of the government." According to Section 117 of the 1997 Constitution, the judicial power is vested in the High Court, the Court of Appeal, the Supreme Court and in such other courts as are created by law.

The Supreme Court is the final appellate Court in civil and criminal matters. It has exclusive jurisdiction to hear and determine appeals of all final judgements of the Court of Appeal, with leave of the Court of Appeal or special leave of the Supreme Court. The Supreme Court also has advisory jurisdiction.

The Court of Appeal has jurisdiction to hear and determine appeals from judgements of the High Court in matters arising under the Constitution or involving its interpretation, the interpretation of the Judicature Act 1988 or the fundamental rights provisions of the Constitution. A person who has been convicted on trial before the High Court may appeal to the Court of Appeal against conviction on any ground involving only a question of law, with leave of the Court of Appeal.

Under Section 120, the High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings. It has also original jurisdiction in any matter arising under the Constitution or involving its interpretation. The High Court has appellate jurisdiction concerning decisions of magistrate courts. The High Court consists of the Chief Justice and of a number of puisne judges that is not less than 10.

Magistrates courts are divided into three classes and have limited civil and criminal jurisdiction. They may refer any question of law to the High Court.

APPOINTMENT AND SECURITY OF TENURE

The Chief Justice is appointed by the President on the advice of the Prime Minister following consultation with the leader of the Opposition. The judges of the Supreme Court, the Justices of Appeal (including the President of the Court of Appeal) and the puisne judges are appointed by the President on the recommendation of the Judicial Service Commission following consultation with the Minister and the sector standing committee of the House of Representatives responsible for the administration of justice.

The Judicial Service Commission, under Section 131 of the Constitution, consists of the Chief Justice, who serves as the chairperson, the chairperson of the Public Service Commission and the President of the Fiji Law Society.

Section 134 of the Constitution prescribes that "the composition of the judiciary should, as far as practical, reflect the ethnic and gender balance of the community", imposing discriminatory practices against a judge on the grounds of race or national origin. The criteria for appointment to judicial office as prescribed in Section 134 fulfil the requirements of Article 10 of the

United Nations Basic Principles on the Independence of the Judiciary, which states that “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”.

Section 137 of the Constitution guarantees to judges security of tenure. The term of office of judges expires upon their reaching the age of 70. Judges may also be removed for incapacity or for misbehaviour. In such cases, the President appoints a medical board or a tribunal to enquire into the matter. If the medical board or the tribunal advises the President that the judge should be removed, the President may remove the judge from office, under Section 138. Section 136 also states that the remuneration of judges must not be reduced during their terms of office.

POST-COUP DEVELOPMENTS

Following the 19 May 2000 coup, the military Commander Bainimarama assumed executive authority and began to rule by decree. Apparently, the Chief Justice, Sir Timoci Tuivaga was involved in drafting the Administration of Justice Decree No.5 of 2000. The Fiji Law Society received information about the Chief Justice's offering advice to the military government and wrote on June 9 2000 to the Chief Justice to express its concern. In his response, Sir Timoci Tuivaga confirmed his involvement in drafting the Decree and justified his actions by arguing that he “took the opportunity that had presented itself to ensure that the Administration of Justice Decrees of the military government took cognisance of the freedom and independence of the courts to maintain a system of law and order and justice in the country”. The Chief Justice also stated that this was his pragmatic approach to the fact that “the 1997 Constitution has been unable to provide a solution to the current political and constitutional morass in the country.”

It seems that most lawyers in Fiji are still deeply dismayed at the Chief Justice's conduct. However, certain judges have supported the Chief Justice. Justice Michael Scott of the Suva High Court wrote individually to the Law Society in response to the Society's letter stating that there is no possible justification for the Law Society's “nasty, cliché-ridden, and almost hysterical” protest letter. Justice Scott went so far as to refuse to allow Ramesh Prakash, a senior lawyer, to appear before him in order to argue a case for a client. Apparently, Justice Scott's refusal is linked to the fact that Prakash was one of the eight members of the Law Society that endorsed the letter to the Chief

Justice. Justice Daniel Fatiaki criticised the Society's letter saying that it was "needlessly provocative, blatantly discourteous and unduly censorious".

It was also revealed that the Chief Justice interfered in the judicial process of a case with a constitutional dimension, in which he was one of the respondents. The applicant in this case was challenging the appointment of Justice Prakash to the bench of the High Court. The Chief Justice directed that the case be removed from Justice Antony Gates of the Lautoka High Court to a specific judge in Suva that the Chief Justice had nominated. This judge was Justice Michael Scott, one of the main supporters of Sir Timoci Tuivaga. Justice Antony Gates ignored the Chief Justice's direction as unlawful and even published his highly critical judgement of the Chief Justice's efforts to have the case removed to a judge of his choice in Suva.

The Chief Justice's actions after the 19 May 2001 events seem to be inconsistent with his response after the coup of May 1987, when he upheld the constitution and the rule of law. His position is characterised as even more contradictory, especially after the 1 May 2001 decision of the Court of Appeal that the 1997 Constitution remained the supreme law of the Fiji island.

THE ADMINISTRATION OF JUSTICE DECREE NO.5 OF 2000

The main features of the Chief Justice's Decree were the abolition of the Supreme Court, the declaration of the Court of Appeal as the final appellate court, the appointment of the Chief Justice to the Court of Appeal, and a 5-year extension of the Chief Justice's retiring age from 70 to 75 (the Chief Justice turns 70 in October 2001). Decree No.5 was replaced by the Judicature Decree, when the interim civilian government took over from the military government. The above-mentioned provisions remained in the later decree.

RESIGNATIONS OF JUDGES

Justice **Jai Ram Reddy**, the President of the Court of Appeal, resigned shortly after the promulgation of the above-mentioned Decree, as he could not uphold the abrogation of the 1997 Constitution, in the drafting of which he had played a significant role as a past Leader of the Opposition. Justice Reddy is setting up in private practice.

Justice **Ratu Jone Madraiwiwi**, a High Court judge and a known human rights advocate, also resigned from the bench of the High Court, as he

considered the modus operandi and the involvement of the Chief Justice Timoci in drafting military decrees “unacceptable”. Justice Ladarwiwi has joined a private law firm.

Adish Narayan, in his paper on the profession and the bench in Fiji after 19 May 2000 presented at a conference of POLA (Presidents of Lawyer's Associations of Asia and the Pacific) in October 2000, stated that two other magistrates have also resigned.

Since November 2000, the Fijian human rights group, Coalition on Human Rights, has urged President Iloilo to suspend three High Court judges and investigate them for alleged misconduct. The group claimed that the Chief Justice Timoci Tuivaga and Justices John Fatiaki and William Scott had violated the independence, impartiality and the integrity of the judiciary, since they wrongfully advised the then President, Ratu Sir Kamisese Mara on the abrogation of the 1997 Constitution following the Speight coup.

The response of the President's office was to the effect that no action would be taken on the complaint until after the election. The Chief Justice has reportedly declared, in a front-page report in the Fiji Daily Post dated 1 September 2001, that his critics were welcome to ask the President to constitute a tribunal of judges to investigate his actions. This is in fact what Section 138 of the Constitution prescribes in the case of allegations of judicial misbehaviour.

A DIVIDED JUDICIARY

On 19 March 2001, 152 members of the Fiji Law Society voted on whether to stay possible action against the Chief Justice for his alleged involvement in advising the President on matters which led to the dissolution of the Parliament and the dismissal of the Prime Minister. Responding to the mandate given to the Fiji Law Society's executive council to proceed “with appropriate action” against him, Sir Timoci said he had no regrets about his actions. He said he would resign once a full Parliament has been appointed after the general elections in August 2001. He said this decision has not been influenced by the Law Society. However, there is widespread doubt that he will follow this course. In the front-page Fiji Daily Post article of 1 September 2001 referred to above, he is reported to have said “I have got five years to go before I retire”, but that an earlier retirement will be dependent “on the situation of the country and how soon they can get my replacement...I am looking at June next year”. In the same article he described himself as “a fair, balanced judge and doing the best for the country though people don't

agree with the way I conducted my role". In the same article, Sir Timoci was reported as "strongly believing" that the Constitution needs changes. Sir Timoci has not denied or otherwise commented on the report.

In May 2001, the lobby group Citizens Constitutional Forum (CFF) filed a petition challenging the legality of Ratu Iloilo's decision to ignore the March 2001 Court of Appeal decision and instead appoint a caretaker government. The CFF was seeking a High Court ruling declaring the decision of the President illegal and stipulating that the announced August 2001 elections should be revoked.

On 14 May 2001, the CFF's lawyer, Sir Vijay Singh, issued a petition seeking the removal of Justice Fatiaki from hearing the case. Justices Nazat Shameem and John Byrne gave evidence against Justice Fatiaki, who was furious at the affidavits sworn by the two Justices. He called their action "a clumsy, unworthy attempt" to undermine him. Judge Fatiaki suppressed a key court document published by Agence France Presse, submitted as evidence before him, saying "it was not a document to be found in the gutter". This document was written three days after the Speight coup by the Chief Justice and Justices Fatiaki and Michael Scott and advised the President that "it was evident as the events continue to unfold that there will not be a return to the status quo ante and that the 1997 Constitution may have to be amended". Justice Fatiaki stopped the media from publishing details of this document. On 24 May 2001, Justice Fatiaki refused the forum's application to disqualify himself on the grounds of possible bias, but said he had decided to hand the case over to another judge because it was urgent and he would not be able to hear it until September or October 2001. He then took the unusual step of referring the file to the Chief Justice to reassign the case to another judge. On 25 May 2001, the CCF's lawyer wrote to the Court saying there would be no further attempt to disqualify certain judges from hearing its application and that the judge to be appointed replacing Judge Fatiaki should dispose of the case expeditiously. The CFF was aiming to achieve a quick resolution to its case, the result of which could have canceled the August 2001 elections.

On 11 July 2001, Justice Michael Scott, to whom the case was passed by the Chief Justice, largely dismissed the application of the CCF and supported actions taken by the President Iloilo calling for elections and appointing a caretaker government. Justice Scott gave the go-ahead for the August 2001 elections, despite acknowledging serious constitutional flaws in the way they had been called. The judge upheld arguments presented by the CCF that the country's president, who was installed by the military in the aftermath of the coup, did not have the right to dissolve parliament and call the elections.

Nevertheless, Justice Scott argued that President Iloilo's actions were justified under the doctrine of necessity, and that the alternative would have been a serious breakdown of law and order. It should be mentioned that only Justice Scott and Justice Fatiaki have been appointed to hear constitutional cases.

The court battle comes against the background of a worsening civil war within the High Court. The Chief Justice reportedly has refused to listen to lawyers of the Fiji Law Society who signed a petition seeking his removal over his advice to the government during the coup. Ms Florence Fenton, a member of the Fiji Law Society Council and a partner in a private law firm, has begun court proceedings against the Chief Justice over his action in barring her from appearing in his court. The Chief Justice had barred all but two Fiji Law Society Council members from appearing before him. This action followed the Fiji Law Society's public call for the resignation of the Chief Justice for his involvement in drafting the Administration of Justice Decree and his interference in constitutional cases. Ms Fenton says the decision was unconstitutional and that "in all circumstances, the decision is so unreasonable that no reasonable holder of the office of Chief Justice could have come to it."

CASES

Lord Cooke, Sir Gerard Brennan, Sir Moti Tikaram, Sir Anthony Mason and Justice Toohey [Judges of the Supreme Court]: They have all been summarily dismissed upon the abolition of the Supreme Court by a military decree in June 2000.

FRANCE

A general package to reform the judicial system has been under discussion since 1997. In June 2000, important legislation entered into force enhancing the presumption of innocence and the rights of victims. Political scandals continued to dominate French political life throughout 2000. The judiciary seems determined to accept its jurisdiction to prosecute prominent business and political figures. Debate is ongoing concerning whether the President of the Republic should be summoned as a witness.

The adoption of the Constitution of 4 October 1958 marked the beginning of the current Fifth Republic. The Constitution provides for an indivisible, secular, democratic and social republic. National sovereignty is vested in the people, who exercise it through their representatives, elected by universal, equal and secret suffrage. Several of the institutions established under the 1958 Constitution are generally characteristic of a parliamentary system. However, the French system is better described as mixed or semi-presidential, as the President is also elected by direct, popular suffrage.

Under the 1958 Constitution, the presidential term was fixed at seven years. In October 2000, French voters approved by referendum the reduction of the presidential term from seven years to five, the most substantial change to the Constitution in the last 40 years. The shorter term places parliamentary and presidential elections on the same schedule, reducing or potentially eliminating the "cohabitation" arrangement, which may feature a president and a prime minister from different parties at odds over policy planning. Prime Minister Lionel Jospin began a government of "cohabitation" with President Chirac, after his socialist party won the legislative elections in 1997. Jacques Chirac was elected President on 7 May 1995.

By virtue of Article 5 of the Constitution, the President is responsible for ensuring the proper functioning of the government and the continuity of the state. The President appoints the Prime Minister, and on his advice the other members of the government. The President presides over the Cabinet (*Conseil des Ministres*) and has the power to dissolve the National Assembly.

The Government, consisting of the Prime Minister and his Ministers, is the second organ of executive power. The Government is collectively

accountable to the Parliament in respect of its general policy. The Government determines and conducts the country's policy. The Prime Minister guides the action of the Government, and, with the exception of those powers granted to the President of the Republic, is vested with regulatory power. The executive branch has the right to enact regulations (*règlements*) which are called *décrets*, if they are issued by the Prime Minister or the President, and *arrêtés*, if they are issued by the rest of the executive.

Legislative power is vested in the Parliament, which is composed of the National Assembly and the Senate. The National Assembly consists of 577 deputies, who are elected under a single-member majoritarian system to serve a five-year term. The power to discuss and enact legislation is vested in the National Assembly, which may delegate to the government the authority to take measures, by way of *ordonnances*. The National Assembly debates and adopts the budget and financial legislation. It exercises control over the actions of the government by holding ministers to account. The 321 members of the Senate are elected for nine years by indirect universal suffrage and represent the Republic's communes, departments and overseas territories. The composition of the Senate is renewed in thirds every five years. As part of the Parliament, the Senate shares with the National Assembly in the exercise of all powers conferred on the Parliament by the Constitution. Senate members have the right to propose legislation. However, in the event of disagreement between the Senate and the National Assembly, a constitutional procedure may lead to the adoption of laws which have not been passed by the Senate. Laws passed by the Parliament are distinguished from those emanating from the government in that they are defined as statutes.

France is ruled by a strict hierarchy of norms, the Constitution, traditionally merged with the 1789 and 1946 declarations of rights, being at the apex. The Parliament adopts legislation (*les lois*) with an internal hierarchy: institutional act (*loi organique*), ordinary act (*loi ordinaire*) and ordinance (*ordonnance*). The Constitution may be amended by the legislature, if both the National Assembly and the Senate agree on the wording of the amendments, which must be approved by a three-fifths majority.

Institutional balance is ensured by the Constitution, which maintains the two traditional procedures by which the government's authority can be challenged, the motion of censure and the vote of confidence.

In December 2000, following the "Matignon Agreement" on the status of Corsica, the Assembly of Corsica approved a draft law aiming at transferring a range of regulatory and legislative powers to the island.

HUMAN RIGHTS

A number of offices and institutions have jurisdiction in matters related to human rights, including the Constitutional Court, ordinary courts, specialised courts, the *Cour d'Assises*, the Court of Cassation, appeal courts and the *Conseil d'Etat*. Remedies for violations may be pressed in the courts as well as through non-judicial procedures, such as the office of the Ombudsman. A wide variety of local and international NGOs operate freely, investigating and publishing their cases on human rights abuses. The National Consultative Commission on Human Rights, which is composed of non-governmental as well as government members, monitors complaints and advises the government on policies and legislation. Under the Constitution, treaties ratified by France take precedence over domestic law, and the provisions of international conventions are incorporated directly into French law.

France has drawn criticism for a pattern of ill-treatment by police of immigrants and asylum seekers. There have been allegations of use of excessive and even lethal force by police officers.

INTERNATIONAL HUMAN RIGHTS MECHANISMS

France is a party to the United Nations International Covenant on Civil and Political Rights (ICCPR), the First Optional Protocol to the ICCPR, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol, and the Convention on the Rights of the Child. On 6 September 2000, France ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, as well as the Optional Protocol on the sale of children, child prostitution and child pornography. France is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at the abolition of the death penalty.

France was admitted to the Organisation for Security and Co-operation in Europe (OSCE) on 25 June 1973. It is a member-state of the European Union and of the Council of Europe. France is bound by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The European Committee for the Prevention of Torture (CPT) carried out its last visit to France on 14-26 May 2000. Since 3 May 1974,

France has also been a state-party to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

On 19 April 2000, the Committee on the Elimination of Racial Discrimination considered the three periodic reports of France. The Committee expressed its concern as to the possible discriminatory effects in the implementation of laws providing for the removal of foreigners from French territory, including persons in possession of valid visas, and the delegation of responsibilities to be exercised by state officials. The Committee recommended that the State monitor all tendencies which may give rise to racial or ethnic segregation and counter the negative consequences of such tendencies, as well as reinforce the effectiveness of the remedies available to victims of racial discrimination. The Committee noted with satisfaction the re-organisation and extension of departmental anti-racism bureaux and the establishment of commissions on access to citizenship and to justice.

IMPUNITY

Judicial developments in several cases of ill-treatment and killings by law enforcement officers have highlighted concerns that courts are uneasy about handing down any but nominal sentences to police officers for crimes of violence or excessive force and that prosecutors are often too passive in applying the law, perpetuating a situation of effective impunity when police officers are concerned.

In January 2000, the Court of Cassation annulled an appeal court verdict against a gendarme, who in 1993, had shot dead Franck Moret, when he tried to escape a road check-point. In July 2000, two anti-crime Brigade officers were sentenced by the Correctional Court of Lille to a suspended seven-month prison term for "involuntary homicide" in connection with the death in custody of Congo-born Sydney Manoka Nzeza. He was apprehended in 1998 by a number of police officers during an argument with a car driver. According to the autopsy, the death was caused by thoracic compression. Three other officers were acquitted of failing to provide help. In October 2000, a judge ordered that charges of voluntary and involuntary homicide against police officers involved in the death of Mohamed Ali Saoud be dropped. In the course of a violent struggle in 1998, Mohamed Ali Saoud, who was suffering from a mental disability and needed urgent medical

attention, was shot with rubber bullets. The judge concluded that the officers had found themselves in a dangerous situation and had not acted criminally.

DETENTION AND PRISON CONDITIONS

French authorities have continued to practice administrative detention (*assignation à résidence*), pursuant to an *ordonnance* dating from 1945. Several refugees, asylum seekers and former prisoners were held under this form of administrative detention instead of being expelled. This form of detention restricts the detainee's movements to a specific and extremely limited geographical area. Detainees have no recourse to a court of law to contest the detention order. There have been reported cases of individuals who have been detained for more than six years far from their families.

On 19 July 2001, the European Committee on the Prevention of Torture (CPT) published its findings following a visit in May 2000 to several French prisons. The CPT delegation observed unacceptable conditions in several prisons, especially in the administrative detention centre of Marseille-Arenc and at the arrest centre of Lyon-Saint Paul. The CPT also received allegations of ill-treatment by police officers. Doctors at the Paris Medical-Judiciary Unit informed the CPT members that throughout 2000, five per cent of persons detained *en garde à vue* bore injuries that could be the result of police abuse. Thereafter, the CPT recommended that French authorities integrate human rights courses in the police training curricula. The CPT further advised the Government to revise the legislation governing access to medical files in prisons.

According to new legislation 2000-516 of 15 June 2000, the Ministry of Justice is to fulfil an obligation to implement the principle "one cell per prisoner" by 15 June 2003.

UNIVERSAL JURISDICTION: THE ALGERIAN WAR

On 24 November 2000, several military officers, including General Paul Aussaresses and Jacques Massu, publicly admitted their involvement in torture and extrajudicial killings of Algerians during the Algerian war. On 3 May 2001, General Aussaresses, a high-ranking military officer in the Algerian war and co-ordinator of the intelligence services during the battle of Algiers in 1957, published a book entitled "Services Spéciaux: 1955-1957", implicating a former French government in the torture and summary executions of Algerians. Human rights organisations called on the French

authorities to bring to trial those responsible for war crimes and crimes against humanity.

The Paris Public Prosecutor, Jean-Pierre Dintilhac, ordered a preliminary investigation in order to proceed to summons of General Aussaresses and his publisher Perrin. On 6 July 2001, the General was summoned to appear before the 17th Correctional chamber of the Paris tribunal to answer for “apology for war crimes”.

THE ANTI-SECT LAW

Freedom of religion in France remained contentious. On 30 May 2001, the so called “anti-sect” law was passed by the National Assembly. This law has caused concern among a number of religious groups and human rights NGOs, as it provides for the legal dissolution in a civil court of any group that would fulfil certain criteria. The law would apply in cases of organisations that pursue activities having the goal or result of creating, maintaining or exploiting a state of physical or psychological subjugation. The law would also be applicable if any of the listed penal sanctions have been imposed more than once against a certain entity or its actual or *de facto* leaders.

THE JUDICIARY

Title VIII (“*De L’Autorité Judiciaire*”) of the 1958 Constitution provides for the organisation of the judiciary. The principle of the independence of the judiciary is enshrined in Article 64. That article provides that the President of the Republic is the guarantor of this independence and is assisted by the Judicial Council. The organic law 58-1270 enacted on 22 December 1958, soon after the adoption of the Constitution, deals with the status and regulation of the judiciary. That law affirms the principles underlying the administration of justice, including equal and free access to justice, justice as a public service, the objectivity, neutrality and independence of judges, the secrecy of deliberations and the unity of the judicial body (standing and sitting judges). The law also prohibits judges from holding political or administrative offices.

THE COURT STRUCTURE

The judiciary is composed of a lower courts system (*tribunaux*), 35 regional Courts of Appeal (*Cour d’Appel*), the Court of Cassation (*Cour de Cassation*), the *Conseil d’Etat*, and the *Cour des Comptes*. The French system

makes a distinction between administrative courts and civil and criminal courts. The Court of Cassation is the final instance for civil and criminal cases and reviews questions of law, but not questions of fact, in appeals from the Courts of Appeal. The *Conseil d'Etat* is the highest court of appeal for cases concerning administrative acts. The *Cour des Comptes* controls matters related to the finances of the state.

Civil and Criminal Courts (L'ordre judiciaire)

The judicial order comprises three jurisdictions: the civil, the criminal, and the special jurisdiction.

Civil courts include courts of first instance applying general law or exercising special jurisdiction. The courts applying general law include 473 district courts (*tribunaux d'instance*), which have jurisdiction over civil actions involving small claims and criminal cases involving minor offences (*contraventions*), and 181 courts of major jurisdiction (*Tribunaux de grande instance*). These courts have jurisdiction over all cases with the exception of those reserved by law to a specialised court. They have civil and criminal jurisdiction over matters involving lower serious offences (*délits*). Criminal offences are tried by the *tribunaux correctionnels*, which are courts hearing intermediate criminal offences, e.g. theft and fraud, and *tribunaux de police* that have jurisdiction over petty offences. The courts with special jurisdiction comprise the commercial courts, the labour courts, the social security tribunals and the joint agricultural tenancy tribunals.

The Juvenile Court Judges (*Juges des enfants*), the Juvenile Courts (139 *Tribunaux pour enfants*) and the *Cours d'Assises* for Juveniles have jurisdiction over minors

There also exist military courts that have jurisdiction over military matters in peacetime.

Courts of appeal are the only courts of second instance that are competent to hear appeals against any decision of a civil or criminal court of first instance, whether of general or special jurisdiction. It is the responsibility of the indictment department within each court of appeal to monitor the progress of the inquiries conducted by investigating magistrates. That division examines the lawfulness of procedures brought to its attention and rules on complaints lodged against orders by investigating magistrates.

The *Cours d'Assises*, normally sitting in the same place as each court of appeal or in the district capital, have jurisdiction over most serious crimes

(*crimes*). The *Cour d'Assises* is composed of three professional judges accompanied by nine lay members serving as jurors. According to Article 698-6 of the Code of Penal Procedure, jurors are not required to be present in certain types of cases, as laid down by legislation. As of 1 January 2001, rulings of the *Cours d'Assises* are subject to appeal to another *Cour d'Assises* (law 2000-516 of 15 June 2000).

The Court of Cassation, the highest court in the judicial hierarchy, safeguards the precise and uniform application of the law by reviewing questions of law in decisions handed down in courts of last resort. The procedure (*pourvoi en cassation*) in that court is organised by Articles 567 and following of the Code of Penal Procedure. If the Court of Cassation concludes that there has been a violation of law, it quashes (*casse*) the decision. The Court may refer the case for re-trial to a different court than that which issued the initial decision.

Administrative Courts

The administrative court system is composed of 35 administrative courts of first instance (*tribunaux administratifs*), seven administrative courts of appeal (*cours administratifs d'appel*) and the *Conseil d'Etat*.

Administrative courts have jurisdiction over administrative actions and decisions. Any individual who has suffered an illegal infringement of his fundamental rights by a public servant may seek annulment of the decision by applying to an administrative court. The aggrieved party may also seek reparation for injuries or damages. Any French or foreign citizen is entitled to appeal against an administrative action, even if his or her interest in seeking annulment is purely a matter of principle. A complaint may be lodged even without a lawyer at all levels of courts. The petitioner must base the application on lack of jurisdiction, procedural irregularity, misuse of power or inequality. Any annulment granted by the court is universally applicable and has effect from the date the contested decision was taken.

The *Conseil d'Etat* is the highest body within the administrative court system and issues final judgements about the legality of administrative acts. It has original and final jurisdiction over applications to quash decrees and major ministerial decisions. It also hears individual claims involving the rights of civil servants, officials or military personnel appointed by the President of the Republic. It is competent to rule on applications to quash administrative decisions taken by collective bodies with national jurisdiction.

A *Tribunal des Conflits* exists to resolve jurisdictional conflicts between the judicial courts and the administrative courts. It is composed of an equal number of members of the *Cour de Cassation* and the *Conseil d'Etat* and is headed by the Minister of Justice, who casts the final vote.

Two courts have been established to judge, if necessary, the President of the Republic and governmental ministers. The High Court of Justice (*Haute Cour de la Justice*) is the only competent jurisdiction to deal with cases of high treason against the President of the Republic. It is composed of 24 judges, half of whom are elected from the National Assembly and the other half from the Senate. Reference of a case to the court is by a majority of the two chambers of the legislature. Investigation is carried out by a commission of judges of the *Cour de Cassation* and the *Procureur Général* of the court prosecutes. The *Cour de Justice de la République* has jurisdiction over crimes committed by governmental ministers in the exercise of their functions. It is composed of 15 judges, six members of each chamber of the legislature and three judges from the Court of Cassation. Complaints against a minister may be brought by the *Procureur Général* of the Court of Cassation or by a private individual and filtered through a special commission to the *Procureur Général*.

Article 56 of the 1958 Constitution provides for a Constitutional Council (*Conseil Constitutionnel*). The Constitutional Council has two main functions. It hands down decisions in election disputes and rules on the constitutionality of laws. It also has competency to determine the capacity, including physical or mental, of the President of the Republic to continue to discharge his or her functions. It has control over the exercise of emergency powers by the President under Article 16 of the Constitution. With regard to the elections, the Constitutional Council has jurisdiction over presidential, general and senate elections, along with referendums. The Council's ruling on constitutionality is mandatory with respect to the rules of procedure of the Parliament and institutional acts, but optional in the case of ordinary statutes and international treaties and obligations. Its decisions are binding on all administrative and public authorities, as they have the force of *res judicata*, and there is no possibility of appeal against them.

The Constitutional Council has nine members, each of whom are appointed for a non-renewable nine-year term. One third of the Council membership is renewed every three years. Three of its members are appointed by the president of the Republic, three by the Speaker of the National Assembly and three by the Speaker of the Senate. In addition to its nine members, former Presidents of the Republic are *ex officio* lifetime members of the Council. The

President of the Council is appointed by the president of the Republic and, in case of a divided opinion, casts the deciding vote. The President of the Republic, the Prime Minister, the Speaker of the National Assembly, the Speaker of the Senate, 60 deputies or 60 senators may submit to the Council any legislation, before its promulgation, in order to review its constitutionality. This provision allows opposition parties to refer legislation endorsed by the parliamentary majority to the Constitutional Council. Citizens do not have access to the Constitutional Council, as only the legislature or the President can bring questions to the Council's attention.

ADMINISTRATION OF THE JUDICIAL INSTITUTION

The French judicial system is administered by the Ministry of Justice (*Chancellerie*), which is composed of six directories and two services. The Minister of Justice, the *Garde des Sceaux*, is the head of the *Chancellerie*. The Ministry administers the personnel, the funds, and the equipment and is in charge of preparing the text of certain proposed legislative measures, especially on family law, French nationality issues and penal law. Furthermore, the *Chancellerie* defines the public policy on judicial issues and guarantees implementation on matters with regard to judicial aid, reparation of damages, access to law and justice and measures against organised crime.

Appointment and security of tenure

French judges are specially trained and pursue a judicial career. Since 1958, the training has been carried out by the *Ecole Nationale de la Magistrature* (ENM) at Bordeaux. The ENM is under the administrative control of the Minister of Justice. Entry to the ENM is by examination for three categories of candidate, the main category comprising those who have successfully completed four years of law school. Training lasts 31 months and trainees are paid a monthly salary. Graduates from the ENM (*auditeurs de la justice*) enter the judiciary at the approximate age of 30. They are nominated to judicial posts with the approval of the Superior Judicial Council.

Since 1958, there have been five career levels for the judiciary. There are two grades, each divided into two groups, surmounted by a level *hors hiérarchie*. Some 65 per cent of the judges are in the second grade (lower), while only five per cent are on the top level. Judges are reviewed every two years by the heads of their jurisdiction, and these reviews are used by the Ministry of Judges for the purpose of proposals for advancement which go to the

Judiciary Council for approval. Judges are appointed by the President of the Republic with the consent of the Judicial Council (*Conseil Supérieur de la Magistrature*). However, the Judicial Council has the power to propose names for Justices of the Court of Cassation and the Presidents of the Courts of Appeal to the President. The President of the Republic appoints one of the persons proposed. The Judicial Council is also the disciplinary authority within the judiciary for judges. Disciplinary measures are provided for in the 1958 organic law dealing with the status and regulation of the judiciary. This law specifies the disciplinary measures available in the case of judicial fault. There is a right to appeal against disciplinary decisions of the Judiciary Council to the Conseil d'Etat.

With regard to the appointment and discipline of public prosecutors, the Judicial Council may only give its opinion, which is not binding, to the Minister of Justice (*Garde de Sceaux*), who holds power to appoint, transfer and apply disciplinary measures over public prosecutors.

The High Council of the Judiciary is established by Article 65 of the Constitution to assist the President of the Republic in the guardianship of the independence of the judiciary. It is composed of the President of the Republic and the Minister of Justice as *ex officio* members, and ten other members. It works in two sections, each of which is competent to deal with issues related to judges or public prosecutors respectively. The first section is composed of the President of the Republic and the Minister of Justice, as well as five judges and one public prosecutor, one member of the Council of State and three other persons with a high moral reputation. The second section is composed of the President and the Minister of Justice, in addition to five public prosecutors and one judge, one member of the Council of State and the three persons of high moral reputation mentioned above. Each of these sections exercises the powers of the Judiciary Council in regard to judges or prosecutors respectively.

Article 64 of the Constitution guarantees to judges security of tenure. A similar guarantee with regard to prosecutors does not exist. However, French judges (*magistrats du siège*) and prosecutors (*magistrats du parquet*) share the same professional status. They receive the same training in the ENM and they are organised in similar hierarchies. Prosecutors are answerable to and may be dismissed by the Minister for Justice. Unlike judges, they operate under the direction and control of their hierarchical superiors. It should be noted that French prosecutors function as representatives of society and as such have important civil responsibilities, particularly in relation to personal status (guardianship, adoption) and commercial issues.

THE OMBUDSMAN

The office of the Ombudsman (*Médiateur*) was established under a 1973 Act as a non-judicial mechanism for the protection of fundamental freedoms. The Ombudsman is an independent authority, appointed by decree of the Cabinet for a non-renewable term of six years. The Ombudsman receives complaints concerning relations between individuals and the state administration, municipalities or other public service bodies. The Ombudsman seeks to settle disputes amicably and is vested with investigative authority.

REFORMING THE JUDICIARY: LAW 2000-516 OF 15 JUNE 2000 ON THE PRESUMPTION OF INNOCENCE AND THE RIGHTS OF THE VICTIMS

This legislation aims to implement the principle of equality of arms within the criminal procedure by reinforcing the rights of the defendant from the beginning of the investigation. It also provides for proper compensation for those mistakenly found guilty. The law would allow arrested persons under *garde à vue* access to their lawyers from the first hour of their detention and throughout the entire criminal procedure. This measure does not affect those suspected of terrorism-related crimes or of drug trafficking, whose lawyers may still not visit them until after 72 hours. It also provides for the families of the detainees to be informed without delay. Indicted individuals would have the right to request the judge to order the production of all evidence necessary for their defence. According to this law, only suspects may be detained *en garde à vue*, while witnesses may be detained no longer than the required time for the testimony. Most importantly, the bill provides that the investigating judge no longer is the sole judicial authority to decide on matters regarding the provisional detention of the suspect or accused. The investigating judge will have to request the detention from the judge of detention issues (*Juge des libertés et de la détention*), who will take a decision on the matter.

Concerning freedom of the press and the rights of suspects, the law would prohibit the dissemination of images of handcuffed or arrested individuals without their consent. From June 2001, video recordings of police interrogation of minors will be introduced. The law also establishes a national commission on security ethics to oversee the actions of law enforcement officials and to investigate complaints of police abuse from witnesses or victims.

This law forms part of a general package of laws to reform the judicial system that has been discussed since 1997, when a special commission, the

Truché Commission, presented its report. Following these recommendations, legislative measures have already been adopted aimed at making the judiciary more accessible, effective and trustworthy for the citizens. These measures included reforms on the friendly settlement of disputes, on simplifying and expediting the penal procedure and on reinforcing the summary procedure (*référé*) before the administrative courts.

The proposed reforms include a constitutional amendment on the composition and powers of the Judicial Council. There is also a project law providing for constitutional amendments on the status of judges. Discussion is ongoing regarding project-laws reforming the *tribunaux de commerce*. On 8 November 2000, at the inauguration ceremony of the newly established School for prison officers, the Prime Minister announced the elaboration of a project law for reforming the penitentiary system, focusing on the rights of detainees and the exterior control of prisons by an office of prison inspectors.

The French judiciary and lengthy proceedings

During the period covered by this report, the European Court of Human Rights in several cases found France to be in violation of Article 6, para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), providing for a fair and public hearing within a reasonable time. The Court determined that in most of these cases the duration of the proceedings, including in administrative trials, was unreasonable (*Malve v. France*, *Tricard v. France*, *Versini v. France* and *Mortier v. France*). The Caloc case illustrates this practice. In July 2000, the European Court on Human Rights rejected Caloc's argument that he had been treated in an inhuman or degrading manner by police authorities when he was arrested in 1998, but the Court ruled that Caloc's complaint against the police had not been heard within a reasonable amount of time. Because of lengthy police investigations and numerous appeals, it took more than seven years for Caloc to obtain a final decision on his complaint, thus resulting in a violation of Article 6 of the ECHR.

The methods of France's specialised anti-terrorism investigating judges and of the 14th section of the Paris prosecution service continued to be called into question by a number of court decisions, particularly with regard to the abusive use of provisional detention and to a catch-all conspiracy charge "criminal association with a terrorist enterprise".

RESOURCES

According to statistics of the Ministry of Justice, the 2000 judicial budget amounted to 27,3 FF million. There are 63,031 officials in the French judiciary including 6,721 judges.

On 19 January 2001, some 500 French judges protested against working conditions outside the Ministry of Justice. Judges flung their red and blue legal texts on the pavement and urged action from the Minister of Justice, Marylise Lebranchu. The Secretary-General of the magistrates' trade union remarked that "the justice system's budget is a budget of destitution".

On 9 March 2001, some 1,000 French judges and other legal workers protested outside the Prime Minister's office demanding greater resources for the judicial system. The protesters, dressed in black robes and white ties and wielding placards that read "No to tortoise justice" were demanding more clerks and judges to help carry out legal reforms enacted earlier this year. Judges stated that France's 6,000 judges are overwhelmed with too many cases and the backlog had been increasing. The Secretary-General of the Syndicated Union of Magistrates said that "people can not wait three years for a divorce". The leaders of the major judges' unions were denied a hearing with the Prime Minister and instead spoke briefly with his judicial advisers. A spokesperson for the Minister of Justice acknowledged that the new reform laws have generated some difficulties for judges.

FRENCH JUDGES AND THE POLITICAL SCANDALS

Investigating magistrates have emerged in the past decade who have shed the traditional reluctance to charge prominent politicians. Consequently, approximately 500 politicians have been indicted in corruption cases. As Eva Joly, the judge who investigated 20 senior figures in the Elf case, says "in France, high-class financial crimes were not really considered a crime". It should be noted that Eva Joly, who led the investigations into the payoffs and thievery that surrounded the formerly state-owned Elf, has received death threats and is now accompanied by bodyguards. The will of these magistrates has restored public confidence in the judicial authority.

The Dumas case

On 30 May 2001, Roland Dumas, France's high-profile Foreign Minister under President Mitterrand, was sentenced to six months in jail for receiving funds via Christine Deviers-Joncour, his partner at the time, from Elf, the

major French oil company. The most prominent French politician to draw a jail sentence in recent years was also given an additional two-years suspended sentence and ordered to pay a fine of one million francs. Pending the appeal, he was left free from detention.

Mr. Dumas was the President of the Constitutional Council until February 2000, when he was forced to resign after the investigating judges decided to bring the case before the criminal tribunal for the formal opening of procedures. In focusing on Mr. Dumas, French prosecutors and investigating magistrates sought to demonstrate the prevalence of systematic corruption at the highest levels of French business and government. He was convicted of receiving illegal gifts without any evidence that he had been influenced, as the prosecution stressed that Mr. Dumas could not have failed to realise that he was benefiting from corporate corruption. In court, Mr. Dumas said that "no effort has been spared to try to dirty a public figure" and threatened to "settle" with magistrates who he felt were persecuting him.

The Chirac case

On 27 April 2001, Eric Halphen, the judge who for seven years has been investigating the suspected illicit funding of President Chirac's political party, Rally for the Republic, said he had plausible evidence of the President's involvement in a corruption scandal from the time he served as mayor of Paris. The case involved a system of kickbacks for municipal housing contracts in Paris in the early 1990s. Judge Halphen broadened the investigation after a videotape became public in which a former party official, who had recorded the cassette prior to his death, accused President Chirac of personally organising the system of kickbacks. In February 2001, Judge Halphen broke new constitutional ground in France by summoning Chirac to give evidence. The President refused, and his office insisted that the summons was unconstitutional. The judge concluded that presidential immunity protected Chirac from prosecution or even further investigation while he was still in office.

On 30 August 2001, voiding the case against Mr. Chirac on procedural grounds, the Paris Court of Appeal postponed any major proceedings in the case until after the presidential election in May 2002. In its ruling, the Court of Appeal overruled Mr. Halphen's subpoena. The Court of Appeal also ruled that Judge Halphen had acted improperly in his handling of the posthumous video cassette and removed him from the case. During the seven years he has been working on the case, Judge Halphen reportedly had often complained about political pressures aimed at halting his investigations.

(In another case, in late June 2001, investigating magistrates suspected President Chirac of having used illegal money to finance trips for himself and his entourage, including his wife Bernadette and his daughter Claude. The cash payments were apparently uncovered by investigating magistrates looking into an unrelated inquiry, which involved a complaint by a pilot's union that there was a system of illegal favours at Air France. The judges asked the Paris prosecutor to advise on how to proceed, including whether to ask the President to testify. The Paris Public Prosecutor, Jean Pierre Dintilhac, recommended that the State Attorney General's Office call President Chirac as a witness. He believes that Mr. Chirac testifying as "*témoign assisté*" does not amount to levelling charges of wrongdoing against him. Jean-Louis Nadal, the Attorney General stated that the President should not testify, but the Public Prosecutor declined to follow the Attorney General's opinion. On 19 July 2001, the magistrates stated that although they believed they may have evidence that the President was implicated in graft, they lack authority to question him. Mr. Chirac believes that subjecting a sitting President to such an ordeal would "weaken the state of France".)

On October 10, 2001, France's highest court of appeal, the Court of Cassation, validated President Chirac's claim that he cannot be forced to answer questions on the aforementioned claims against him while he remains president. The 19 appeal judges accepted that Mr. Chirac had immunity from prosecution and questioning in connection with the anti-corruption inquiry, allowing only that the president could appear as a witness if he chose to, but he could not be summoned. The appeal judges' decision means the corruption allegations may be pressed when he leaves the Elysee Palace.

CASES

Isabelle Coutant-Peyre [lawyer]:In May 2001, Ms. Isabelle Coutant-Peyre, one of the lawyers who during the 1998 "Chalabi" trial defended alleged members of support networks for Algerian armed opposition groups, was fined by a Paris court for defaming the national police. She had publicly described mass arrests preceding the trial in 1994 and 1995 as "raids worthy of the methods of the Gestapo and Militia, at all hours of the day and night, against whole families, including children". The Court concluded that the lawyer had impugned the honour of the police.

GIBRALTAR

A prosecution, with possible political overtones, was undertaken against the Chief Justice of Gibraltar for a minor traffic violation.

Gibraltar was captured by Britain during the War of the Spanish Succession in 1704 and its sovereignty was ceded to Britain by Spain under the Terms of the Treaty of Utrecht in 1713. In 1830 Gibraltar was declared a Crown Colony and civil rights were bestowed on its inhabitants. In 1921 a City Council was established to handle matters of a municipal nature. Due to local demands for more self-government, Gibraltar's first Legislative Council was established in 1950 and in 1969 a new Constitution, the Gibraltar Constitution Order 1969, was adopted and remains in force to this day.

Spain has never accepted the loss of Gibraltar and has made several unsuccessful attempts to recapture the territory. In a 1967 referendum, the population of Gibraltar overwhelmingly voted for continued association with Great Britain. Gibraltar entered the European Economic Community in 1973 as a dependant territory in Europe at the same time as Britain.

The Chief of State is Queen Elizabeth II, who appoints a Governor and Commander-in-Chief to represent her in Gibraltar. David Durie has held this post since 5 April 2000. The head of Government is the Chief Minister, who is appointed by the Governor as the elected member of the Assembly most likely to command the support of the majority of the elected members of the Assembly. Peter Caruana, the leader of the Gibraltar Social Democrats, has been Chief Minister since 17 May 1996. The cabinet of Gibraltar is the Council of Ministers, which consists of the Chief Minister and a number of additional Ministers, who are appointed from among the 15 elected members of the House of Assembly by the Governor in consultation with the Chief Minister. There is also a Gibraltar Council that advises the Governor.

The legislative branch of Gibraltar consists of the Governor and the Assembly. The unicameral House of Assembly is composed of 18 seats. One of these is appointed for the Speaker by the Governor after consultation with the Chief Minister and the Leader of the Opposition, 15 are elected by popular vote and two seats are taken by the Attorney-General and the Financial and Development Secretary, who are ex-officio members of the Assembly.

They serve a four-year term. The last elections were held on 10 February 2000. The Gibraltar Social Democrats won for the second time in succession, with 54 per cent, followed by the Gibraltar Socialist Alliance with 40 per cent.

Chapter I of the Constitution of Gibraltar contains provisions which guarantee the protection of fundamental rights and freedoms of the individual. This chapter derives directly from the European Convention on Human Rights. Among those legally enforceable provisions are the right to life; the right to personal liberty; protection from inhuman treatment; protection of freedom of movement; protection of privacy of the home and other property; protection of freedom of expression, including freedom of the press; protection of freedom of assembly and association; and ensuring protection of the law, which includes the right to a fair trial, and all related safeguards, in both criminal and civil matters.

THE JUDICIARY

The judicial system of Gibraltar is based on the English system, with some minor modifications. Gibraltar has a Magistrates Court, a Supreme Court, with criminal and civil jurisdiction, and a Court of Appeal.

The Magistrates' Court is presided by a Stipendiary Magistrate or, in his absence, by lay Magistrates. Criminal cases in the Supreme Court are tried by jury, while civil cases are typically tried by judges alone. The Supreme Court consists of two judges. One of those Judges is the Chief Justice, who is the head of the Judiciary. The Chief Justice has the responsibility for the administration of justice and of all courts in Gibraltar. The legally qualified Registrar of the Supreme Court also holds the office of Admiralty Marshal and is in charge of the admiralty jurisdiction of the Supreme Court. The Court of Appeal is not resident in Gibraltar, but holds three sessions each year. It consists of a President and two Justices of Appeal. The Chief Justice is an ex-officio member of the Court of Appeal for all purposes except for appeals from his own decision. The Justices of Appeal are mainly drawn from the English Court of Appeal.

The Attorney General combines the functions of the Attorney General and the Director of Public Prosecution. He is the legal adviser to the Crown and an ex-officio member of the House of Assembly. The Attorney General's Chambers have a number of Crown Counsels.

APPOINTMENT AND DISMISSAL

According to Article 58 (1) of the Gibraltar Constitution Order 1969, the Chief Justice, the President of the Court of Appeal and the Justices of Appeal are appointed by the Governor pursuant to instructions given by Her Majesty through a Secretary of State.

Article 58. (2) Gibraltar Constitution Order 1969 specifies the requirements for qualification to be appointed Chief Justice, President of the Court of Appeal or Justice of Appeal. The appointee must have been a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in the Republic of Ireland, or of a court having jurisdiction in appeals from any such court; or must be entitled to practise as an advocate in such a court and must have had this entitlement for not less than ten years.

Article 60. (2) of the Gibraltar Constitution Order 1969 enumerates the possible grounds for the removal from office of the Chief Justice, the President of the Court of Appeal, and a Justice of Appeal. They may be removed by the Governor for inability to discharge the functions of their office, arising from infirmity of body, mind or any other cause, or for misbehaviour. If the Governor intends to do so, he must appoint a tribunal to inquire into the matter and advise him whether he should proceed. In such cases the Governor must request the Crown to refer the question of the removal of the judge to the Judicial Committee of her Majesty's Privy Council, under section 4 of the Judicial Committee Act 1833. The Judicial Committee then advises the Crown to remove the judge for inability or misbehaviour. In such cases the Governor would remove the judge after having after requested permission for removal from the Crown and advice in support of removal had been received from the Judicial Committee of the Privy Council.

SECURITY OF TENURE

According to Article 60. (1) of the Gibraltar Constitution Order 1969, the office of the Chief Justice must in principal be vacated by the holder when he attains the age of 67 years. However, subsections (a) and (b) allow for the Governor to prolong the duration of the office under certain circumstances, at a maximum until the holder reaches the age of 72 years.

CASES

Derek Schofield [Chief Justice of Gibraltar]:

In October 1999, at the opening of the Legal Year, the Chief Justice, Derek Schofield, expressed concern that the Government of Gibraltar had held back funding for the judiciary in a manner that potentially might adversely affect the administration of justice. After a public exchange with the Executive, played out in the media, the Chief Justice commented that governmental control over judicial appointments and funding could affect the administration of justice. The Governor replied that the Chief Justice had gone beyond his judicial duty with these remarks. By the end of November 1999 the public dispute had receded.

In March 2000 the Chief Justice's housekeeper reported to the Government that she was being paid below minimum wage. The Chief Justice acknowledged that he had failed to regularise the social security and tax benefits of his employee, but also stated that this mistake was not an uncommon one. The matter was presented to the Governor in May 2000 to determine whether an independent tribunal would be necessary to examine the case. In October 2000 the Governor announced that the housekeeper's employment was properly registered and that at this point all outstanding payments had been met. Furthermore, the Governor stated that it was not apparent that the Chief Justice deliberately attempted to avoid his obligations, and formal action was not necessary.

On 28 July 2000 the Chief Justice was stopped by a police officer and notified that he did not have a valid MOT vehicle registration. The matter was resolved and there was no indication that the incident would be pursued any further. However, on 16 August two police officers visited the home of the Chief Justice and stated that an offence had been committed. The Chief Justice notified the police officers that he had previously filed for registration, but the application was delayed because of the registry's administrative backlog. In addition, the Chief Justice noted that at the time of the offence, fines were not imposed because there was a grace period due to a new system.

On 24 August 2000 the Chief Justice received a written caution for "No Valid MOT" and "No Valid Road Tax". The Attorney General issued a letter to the Chief Justice's counsel inquiring whether he was prepared to accept the caution. Mr. Schofield's counsel answered that the letter merely informed the Chief Justice that the Commissioner of the Police had taken a lenient view of the offences and that no further action would be taken, hence the question of accepting or rejecting the caution did not arise. Upon request the Commissioner of the Police sent a detailed description of the alleged

offences. He stated that there is sufficient evidence to prosecute for the offence, but that, because a 28 July 2000 press release had specified that motorists would be prosecuted beginning on 1 August 2000, no further action would be taken. The letter further acknowledged that the Chief Justice clearly committed an offence. The Commissioner of the Police stated that he was prepared to issue a formal caution with respect to the MOT certificate that was out of date by over six months, unless the Chief Justice acknowledged that he had transgressed the law. A further exchange of the positions led to a letter by the Commissioner of the Police that stated that because the Chief Justice did not accept his guilt in relation to the MOT traffic offence, he was left with no alternative but to resolve the matter by other means.

The International Commission of Jurists (ICJ) observed the proceedings of the trial of the Chief Justice on the minor motor vehicles charge between 26 and 28 July 2001. The Chief Justice applied to the court for a stay of prosecution arguing that his prosecution would constitute an abuse prosecution, since the letter issued on behalf of the Commissioner of Police on 17 August 2000 had indicated that the Chief Justice was simply being cautioned, not prosecuted, for the alleged offence. At trial, the Stipendiary Magistrate ruled against the Chief Justice's application.

The trial was conducted fairly and in accordance with international standards. The ICJ was concerned, however, that the Court suggested in its ruling that the Chief Justice had proposed that his Office should bring "a degree of advantage" based solely on the basis of his position. Contrary to the court's construction of the Chief Justice's submission, the ICJ had observed that, consistent with the principle that all citizens are equal before the law, neither prosecution nor defence counsel asserted that the office of the defendant (i.e. Chief Justice) was material to proceedings.

The final dispensation of the case remained unresolved at the time of this writing.

GUATEMALA

Human rights conditions for lawyers and members of the judiciary in Guatemala have deteriorated. A marked increase has been reported in instances of intimidation, criminal assault and killing of lawyers and judges, especially those who have been active in pursuing violators of human rights during the internal conflict. A substantial decrease in the budget for the judiciary endangers its efficient functioning. The implementation of the Law of the Judicial Career and the judgement in the case of Bishop Gerardi were among the positive steps the country has taken during this period.

BACKGROUND

The 1985 Constitution (amended in 1993) states that Guatemala is a democratic and representative republic and provides for the division of powers among the executive, the legislature and the judiciary. The hierarchy of sources of law in the civil tradition, with which the Guatemala legal system accords, is the Constitution, legislation and regulations. The President of the Republic, who is the head of the Government and chief of State, exercises executive power. The President is elected by universal and secret suffrage for a non-renewable period of four years. A 113-deputy unicameral Congress exercises legislative power. Deputies are elected for a renewable four-year period using a system of proportional representation based on population, through election of 91 deputies from districts and 22 from a national list. The Constitution provides for an independent judiciary and a court system.

In January 2000, the conservative Guatemalan Republican Front (FRG) candidate, Alfonso Portillo Cabrera, assumed power, pursuant to the outcome of the 1999 elections. The FRG also obtained a majority in the Congress (56 per cent) and the former Revolutionary Guatemalan National Unity (URNG) guerrillas became a political party and competed in the elections, obtaining eight per cent of the seats. The working majority the ruling party enjoys allowed its current leader, former *de facto* President (1982-1983) Efraín Ríos Montt, to become the President of the Congress. Ríos Montt's influence is viewed with mistrust because during his tenure as head of State and commander of the armed forces, the army killed tens of thousands of

indigenous peasants, in collaboration with unofficial security units and civil patrols.

During the period covered by this report, the country experienced substantial political instability. Together with controversial tax reforms sponsored by the Government, evident tension between the presidency and the FRG leadership contributed to the difficult political situation. Furthermore, there arose repeated rumours of a coup d'etat and of the imminent resignation of the President following accusations of corruption.

HUMAN RIGHTS ISSUES

The overall human rights situation in Guatemala has deteriorated. There has been an increase in intimidation, criminal assaults, extrajudicial killings and forced disappearances. Torture carried out by the National Civil Police continue to be a matter of concern. Lawyers, prosecutors and judges, especially those who have tried to bring to account persons responsible for human rights violations during the internal conflict, have come under attack. According to Guatemalan NGOs, the purpose of these attacks is to weaken the institutional structure of the country so as to create a political and ideological environment hostile to democratic reform and to obstruct the fulfilment of the peace accords. Moreover, there have been reports of participation by State agents in the perpetration of such acts. This situation has led to the general belief that Guatemala is facing a reverse in the democratic progress, which had incrementally advanced during recent years.

Although President Portillo promised to give priority to the 1996 peace accords that ended the 36-year Guatemalan internal conflict, steps towards their fulfilment have been slow and sometimes backwards. One example is the approbation of the decree that allowed the military to assist the National Civil Police (PNC) in fighting common crime, which disrespects the provision of the accords that restricted the army's mission to external defence. President Portillo has also failed to implement the recommendations of the 1998 report of the Guatemalan Church's Recuperation of the Historical Memory (REMHI) project, and of the UN-sponsored Historical Clarification Commission (CEH). Among the recommendations contained in the CEH report of 1999, were the establishment of a programme to exhume the bodies of those killed in the civil war, the founding of a commission to review the actions of military members during the conflict, and the establishment of the fate of the disappeared.

In December 2000, the UN Committee against Torture (CAT) analysed the periodic report of Guatemala. The CAT expressed concern at the increase of acts of intimidation, harassment and death threats against judges, prosecutors, complainants, witnesses and members of human rights bodies and organisations of victims and journalists. These acts serve to obstruct the submission of complaints in politically sensitive cases and in those involving military officials. The existence of parallel investigations tacitly authorised or agreed to by the State and conducted by Government bodies clandestinely was said to affect the autonomy and independence of the judiciary. The CAT concluded that it was absolutely necessary to prohibit this practice. The Service for the Protection of Persons involved in Proceedings and Persons (*Servicio de Protección de Sujetos Procesales y Personas Vinculadas a la Administración de Justicia*) connected with the Administration of Justice, was considered to be inadequate and ineffective.

The CAT also raised concerns about the lack of an independent commission with broad-ranging powers and resources to investigate on a case-by-case basis the circumstances of the kidnapping of disappeared persons and to locate their remains. The CAT reiterated that articles 201 and 425 of the Penal Code should be amended to bring the definition of torture into compliance with the Convention Against Torture, and, finally, the Committee recommended the State to modernise the system of administration of justice and to strengthen its independence.

In June 2001, the UN Committee on the Rights of the Child (CRC) issued its recommendations after considering the periodic report of Guatemala. The CRC noted that there was a lack of proper investigation on alleged involvement of the National Civil Police in some of the cases of violence against children.

In July 2001, the UN Human Rights Committee (HRC) analysed the second periodic report of Guatemala. The HRC expressed concern at the absence of a policy directed to ensure judgement, punishment and compensation for cases of human rights violations. The HRC emphasised that the Law of National Reconciliation should be applied in a restrictive way so as to exclude from its scope crimes against humanity. The Committee also recommended that an independent commission with the mandate to investigate cases of forced disappearances should be established and that compensation for victims should be provided.

The HRC called upon the Government to investigate cases of involvement of military and police officers in human rights violations. It added that dismissal of such officers would not be enough; instead, human rights violators

should be judged and punished. The Committee also expressed deep concern about cases of lynching and called upon the Government to protect the personal security of judicial officers in the carrying out of their functions. The HRC took note of the harassment, intimidation and killings directed at various sectors of society, particularly members of the judicial branch, lawyers, human rights activists and trade union leaders. The HRC recommended that the Government should take all necessary preventive and protective measures to guarantee that such persons can carry out their functions without any intimidation whatsoever. Finally, the HRC expressed concern at the great number of persons under preventive detention, a practice which violates the right to be presumed innocent.

In May 2001, the UN Special Rapporteur on the Independence of Judges and Lawyers undertook a brief follow-up mission to the country. In April 2001, the Inter-American Commission of Human Rights (IACHR) issued a report on the human rights situation in Guatemala following a visit that took place in November 1998.

Impunity

In June 2001, two army officers were sentenced for their participation in the killing of Bishop Juan José Gerardi. In April 1998, Bishop Gerardi, aged 75, had been battered to death two days after he had submitted the Guatemalan church's report on the internal conflict, which denounced army sponsored human rights violations (*Guatemala: Nunca Más*). The case had become a symbol of impunity because of the death threats made against the investigating team, case judges, the witnesses (a number of whom had to flee the country), prosecutors, and the Archbishop's Human Rights Office (ODHA). The Guatemalan tribunal found retired army Col. Disrael Lima Estrada and his army captain son Byron Lima Oliva guilty of murder and sentenced them each to 30 years in prison. Also convicted were former presidential bodyguard José Obdulio Villanueva and Catholic priest Mario Orantes. This verdict constituted the first time that a military officer was successfully prosecuted for human rights abuses. The defendants appealed the judgement.

In May 2000, a lawsuit was filed on behalf of 10 communities in Quiché and Chimaltenango, whose citizens were massacred by security forces between 1981 and 1982. The lawsuit alleges crimes, including genocide, committed by then *de facto* President Fernando Lucas Romeo García. This action was the first genocide case brought to a Guatemalan court. In 2001, a similar lawsuit was filed against the members of the military junta that removed Romeo García. Efraín Ríos Montt, then head of State and current leader of the ruling party and president of the Congress, is one of the accused.

No substantial progress has been observed in the 2000-2001 period in the Myrna Mack case. The Guatemalan anthropologist was assassinated in September 1990, allegedly pursuant to a command from the army's presidential-security wing (*Estado Mayor Presidencial* - EMP) while she was continuing research on the displacement and destruction of indigenous populations during the armed conflict. The legal defence team of the accused military officers has allegedly conducted delaying tactics, and the judicial authorities have not ruled on the defence's petitions expeditiously, even when these are manifestly inadmissible. To date, an ex-sergeant was convicted in this case, and a retired General and two Colonels are being tried for their role as the masterminds of the assassination.

The IACHR received information of interference by State agencies in the proper development of judicial proceedings. The Minister of Defence has refused to submit information on investigations that are being carried out by courts. The Ministry of Defence's decision is based on article 30 of the Constitution, which establishes the general rule that acts of the Government are public, except in military, diplomatic and national security matters. However, the Criminal Procedural Code establishes that the judge is the one that decides whether any document requires confidentiality.

Following the end of the internal conflict, the Guatemalan Congress adopted the Law of National Reconciliation (*Ley de Reconciliación Nacional*) in 1996. This legislation includes an amnesty for crimes committed during the war. However, the amnesty does not cover crimes such as torture, genocide or forced disappearances, and crimes that have no statute of limitations or crimes in which criminal liability may not be lifted under domestic law and international treaties ratified by Guatemala. In December 1982, a brutal massacre of more than 350 indigenous villagers was carried out by the Army's special counterinsurgency force, called Kaibil, in Dos Erres, El Petén. In 2001, the Constitutional Court held that taking into account that the alleged crimes were committed during the internal conflict and were carried out by members of the armed forces, the Dos Erres case could be studied in the context of the amnesty provisions of the Law of National Reconciliation. By ruling on an *amparo* petition (a legal petition in order to seek protection for fundamental rights), the Constitutional Court ordered a lower court, which had dismissed *prima facie* the defendants' petition to apply the mentioned law in the case, to study the petition of amnesty. This case could result in the application of the amnesty provisions to cases of serious human rights violations, or in the establishment of a precedent that the Law of Reconciliation does not apply to these kinds of offences. Regardless of the outcome, Guatemala maintains the obligation

under international law to prosecute the responsible persons for the Dos Erres massacre, according to human rights treaties ratified by Guatemala and international customary law.

Human rights defenders faced an escalating number of attacks in the period covered by this report including murder, robbery, anonymous telephone threats, surveillance of workplaces and residences, and loss of reputation. Certain Government officials have characterised NGOs as destabilizers, and even terrorists, when the groups have tried to organise demonstrations. Casa Alianza, the Citizens Movement for Justice and Democracy (*Movimiento Ciudadano por la Justicia y la Democracia*), the Centre for Legal Action in Human Rights (*Centro para la Acción Legal en Derechos Humanos*), the Relatives of the Disappeared People in Guatemala (*Familiares de los Detenidos y Desaparecidos de Guatemala*), the Centre for Studies, Information and Basis for Social Action (*Centro de Estudios, Investigación y Bases para la Acción Social*), the Guatemalan Shanty-Town Dwellers Association (*Frente de Pobladores de Guatemala*), an Amnesty International delegate, and the Myrna Mack Foundation have all reported attacks and harassment during the period under review.

Finally, lynching continued to be a concern in Guatemala. Thirty-five cases were reported in 2000 involving a total of 47 victims. The judicial system has only been able to solve 2,3 per cent of the total lynching cases. The Special Rapporteur on the Independence of Judges and Lawyers considered impunity to be one of the causes of this phenomenon.

THE JUDICIARY

The judiciary clearly failed to protect human rights during the Guatemalan internal conflict, given the large number of abuses that were neither investigated nor judged by the State. Subordination of the judiciary to the executive and disrespect of basic principles were the general rule during the internal conflict. The 1996 peace accords called upon the judiciary to play a key role in the reconciliation and democratisation process. Among the challenges to be addressed by the Guatemalan judiciary were impunity, land and property disputes and recognition of indigenous costumes. Although some steps have been taken towards this purpose, the administration of justice continues to suffer various of the problems that undermined it in the past. In 2001, the IACHR stated that the Guatemalan judiciary continues to uphold impunity in cases of human rights violations and common crimes.

Article 203 of the Constitution provides that magistrates and judges are independent in the exercise of their functions and are subject solely to the Constitution and the laws. Whoever attempts to undermine the independence of the judiciary would face the penalties set by the Penal Code and be barred from exercising any public office. However, the judicial system has often failed to carry out fair trials because of inefficiency, corruption, insufficient personnel and funds and intimidation of justice system operators. Political pressure and fears for personal security endanger the independence of the judiciary.

STRUCTURE

The organisation and functioning of the judiciary is governed by the Constitution, the Law of the Judicial Organism (*Ley del Organismo Judicial-Decree 2-89*) and the 1999 Law of the Judicial Career (*Ley de la Carrera Judicial - Decree 41-99 - LJC*), which is still in the process of implementation. The Guatemalan Constitution provides guarantees for the judiciary such as, functional and economic independence, the security of tenure of magistrates and first instance judges and free selection of its personnel. Since 1994 the Government has expanded the presence of the judiciary throughout the country. By the end of 2000, there were judges in more than 300 of the 331 municipalities in Guatemala.

The judiciary is composed of the Supreme Court, Appellate Courts and lower courts, including the courts of peace (*Juzgados de Paz*) and the communal courts of peace (*Juzgados de Paz Comunitarios*). There are also specialised tribunals for juvenile and labour issues. The 13-member Supreme Court has both administrative and judicial competency.

The Courts of Peace are composed of one judge (*Juez de Paz*) and deal with traffic infractions and with other major offences only in emergency cases, which are later submitted to the higher courts. By September 2001, there were 378 courts of peace thorough the country. The Communal courts of Peace are composed of three judges who are elected by the local community. These courts are permitted to use alternative dispute resolution methods and so far only five have been established in the country on an experimental basis.

There is also a Constitutional Court, which has as its primary function the defence of the constitutional system. The Constitutional Court is composed of five magistrates, with five alternates, who serve a term of five years and are elected individually by the Supreme Court, Congress, the President of the

Republic, the University of San Carlos and the Bar Association respectively. The number of magistrates of the Constitutional Court increases to seven in cases of disputes over constitutional issues with the Supreme Court. In such cases, the two other magistrates are elected at random among the alternates.

According to the Constitution, the Prosecutor's Office (*Ministerio Público*) collaborates with the administration of justice. The Attorney General is mandated to prosecute and investigate criminal offences. The President elects the Attorney General for a four-year term from a list of six candidates proposed by a commission similar to that involved in the election of the magistrates of the Supreme Court.

APPOINTMENT AND SECURITY OF TENURE

The Constitution (Article 208) and the 1999 Law of the Judicial Career (Article 3), provide for security of tenure for judges and magistrates. The Law of Judicial career formulates the system that regulates the entrance, permanence, promotion, training and discipline of all judges and magistrates, in order to guarantee their dignity, independence and professional excellence. Magistrates and first instance judges serve a five-year term. The former can be re-elected and the latter re-appointed. During that term they cannot be removed or suspended, except as provided by law (see below). The recommendations by the Special Rapporteur on the Independence of Judges and Lawyers and the IACHR that the term of magistrates of judges should be extended to ten years, and that there should not be provisions for re-election, have not been fulfilled. The current five-year period for judges and magistrates is too short, however to extend the term of serving judges requires a constitutional amendment.

Article 4 of the Law of Judicial Career states that the organs in charge of the administration of the judicial career system are the Council of Judicial Career (*Consejo de la Carrera Judicial*), the Board of Judicial Discipline (*Junta de Disciplina Judicial*), the Nominations Commissions (*Comisiones de Postulación*) and the Training Unit (*Unidad de Capacitación Institucional*).

The Council of Judicial Career began to function in July 2000. This Council is formed by 1) the President of the Supreme Court, 2) the Head of the Human Resources Unit, 3) the Head of the Unit of Institutional Training, 4) a representative of the judges, and 5) a representative of the magistrates. The Council has the competency to call for and conduct public merit-based contests for the positions of judges or magistrates, and to review their

performance (Articles 5 and 6 LJC). Among the objectives of the Council is to incorporate all judges and magistrates into the judicial career system by the end of 2005.

The Board of Judicial Discipline has competency for disciplinary control over judges and magistrates. This Board consists of two magistrates of the Court of Appeals and a judge of the Court of First Instance appointed for a one-year term. The General Court of Supervision is responsible for the investigation (Articles 7 and 8 LJC). The Nominations Commissions, described in articles 215 and 217 of the Constitution, have the power to submit lists of candidates for positions of magistrates at the Supreme Court and Appeals Courts. The Training Unit is in charge of planning, executing and facilitating the training of judges, magistrates and other judicial officers (*See below*).

APPOINTMENTS

The Supreme Court magistrates are elected by the Congress for a five-year period from a list of 26 candidates proposed by one of the Nominations Commissions composed of representatives of sectors related to the administration of justice, such as universities, faculties of law, bar associations and lower tribunals.

Magistrates of the Appeals Courts are elected by Congress for a five year-term from a list submitted by another Nominations Commission, which has a similar composition as that involved in the election of the magistrates of the Supreme Court, but with the Supreme Court also participating in the election of these magistrates.

Appointments of first instance judges and judges of Courts of Peace are carried out by the Supreme Court following the completion of a training course in the Unit of Judicial Training (*Unidad de Capacitación Institucional*-Articles 18-19 LJC). This Unit plans, executes and facilitates the training of all judicial officers. Candidates are called to apply through announcements in the official and the most widely circulated newspapers. The Unit has the responsibility of evaluating the candidates based on personal interviews and tests. Once the evaluation is over, the Unit numbers the eligible aspirants according to the grades obtained by them. Those applicants who have been considered eligible must undertake the training course, the length of which can not be less than six months. The Supreme Court then appoints those who were successful either as judges of the peace or judges of first instance.

Concerning the training of judges, there are several serious impediments to the establishment of a permanent and working training program. Judges cannot leave their courts for long periods of time, and there is insufficient personnel to replace them while they carry out the training. A program called Virtual Classrooms was devised to address this problem. Currently, it is functioning as a pilot plan in some of the municipalities of the department of Guatemala. A critical problem faced is the lack of infrastructure. There are courts in the country's interior that have neither telephones nor computers. Additionally, there is no clear policy or systematised scheme regarding training. To conduct these training programmes, it is necessary to create a judge's profile and develop the training programs on that basis.

DISCIPLINARY SANCTIONS AND REMOVAL PROCEDURES

Sanctions against judges and magistrates can only be imposed after a disciplinary proceeding, which must observe principles such as the right to a hearing and the right to conduct their defence personally or with the help of legal counsel (Arts. 47-53 LJC). The sanctions that can be imposed for disciplinary faults, which are defined as light, serious and very serious, range from oral admonition to dismissal (Arts. 37-46 LJC).

The Board of Judicial Discipline (*Junta de Disciplina Judicial*) exercises disciplinary control over the judiciary, including the imposition of sanctions. However, if the sanction imposed after a disciplinary proceeding against magistrates or judges is dismissal, the Board of Judicial Discipline can only recommend such a measure to the authority that appointed the magistrate or judge (Congress in the case of Supreme Court and Appeals Courts magistrates, and the Supreme Court with regards to judges of first instance and judges of the peace) – Article 8 LJC.

It is too early to evaluate the efficiency of the Board of Judicial Discipline and the General Court of Supervision, as they have only been recently established. However, some members of the judiciary have expressed concern that these institutions may try to intervene in the exercise of their jurisdiction. This happened recently with the Second Judge of Penal Petition, whose ruling in favour of the arrest of several bank executives was reviewed by the General Court of Supervision.

RESOURCES

The Supreme Court administers the resources of the Judiciary. It draws up the annual budget and directs its execution. The 2001 budget, which was

destined for the justice sector was severely decreased. The Government estimated a decrease in the ordinary income of the State and, therefore, reduced the contribution to the Judicial Body by 54 per cent from what had been allocated in 2000. It represented a substantial reduction in the sum given to the Constitutional Court, whose budget must correspond to five per cent of the total given to the judiciary. Although the Court itself annulled this reduction of the Constitutional Court's budget, it constituted a clear attempt to leave this institution short of resources.

Similar economic constraints have been imposed on the Public Ministry. For the full implementation of the Law for Protection of Individuals under Legal Process, a higher budget is needed, since the persons involved in penal processes are typically destitute and supporting a large family. The situation of the Institute of Public Penal Defence (IDPP) also remains critical. Due to lack of resources there is a shortage of staff lawyers, limited technological resources, absence of investigators, limited number of social workers and interpreters, little national coverage and scarce growth. Current budgetary allotments do not allow the DPP to function effectively. However, a loan granted by the Inter-American Bank of Development, which will end in 2004, has allowed the office to survive.

CORRUPTION

In response to increasing incidents of corruption, the District Attorney's Office against Corruption was created in 1999 within the structure of the Public Ministry. Its mission was to investigate and prosecute offences of corruption involving officials or public employees. Despite the high rates of corruption in Guatemala, this office has not yet achieved results. No officer has been accused or brought to justice, and it is unknown whether the current district attorney has officially undertaken any investigation. The Special Rapporteur's recommendation that an independent enforcement agency with powers to investigate complaints of corruption in public office, including the judiciary, and refer prosecutions should be set up, has not been fulfilled. In 2001, the IACHR, reiterated the Special Rapporteur's calls for the establishment of this agency.

An illustrative case of political interference in the independence of the judiciary and the difficulties of tackling corruption, involved the alteration of the law of taxes on alcohol (*Ley de Impuesto de Bebidas Alcohólicas*). In this case, members of the ruling party, the FRG, were accused of having altered the law after Congress had approved it. The Supreme Court lifted the parliamentary immunity enjoyed by the deputies involved in the case and ordered

legal proceedings against those implicated. During the whole case, members of the Congress belonging to the FRG carried out a defamation war against the Supreme Court. Subsequently, the case prosecutor did not carry out any investigation and joined the defence's arguments by successfully asking the termination of the proceedings and the exoneration of the accused. Following this case, the defendants' lawyer was elected as an alternate member of the Constitutional Court and the Congress approved a severe decrease in the budget of the Court.

On 17 June 2001, a dispute took place between the Supreme Court and four judges of Escuintla over the alleged collaboration of the judges in the escape of 78 prisoners. The Minister of Government accused the judges of transferring the masterminds of the escape in order to bring them together to coordinate the escape. One of the judges, Delmy Castañeda, was accused of prior acts of corruption and a number of irregularities. The Supreme Court suspended her and the judge alleged persecution. The concerns raised by this case have led the Supreme Court to evaluate the possibility of reforming the Law of Judicial Career, considered to be too soft and the source of slow proceedings.

Such an amendment would constitute a step backwards in Guatemala. The law of the Judicial Career has achieved modernisation of the judiciary, and the due process guarantees provided by it should not be perceived as shortcomings.

One positive development has been improvement of the filing system in the courts. This reform has increased efficiency while decreasing corruption and the incidence of disappearance of case files. The number of missing cases has thus dropped from 1000 to three per year. Disappearance of files had been an impetus for corruption because by paying money to court officials, any person could buy the "loss" of a file and secure impunity for himself in a particular case, or cause a person to be held in jail indefinitely. In its 2001 report, the IACHR welcome this development and recommended that these measures should be applied in all Guatemalan courts.

INDIGENOUS PEOPLES

Concerning the enhancement of access to justice for indigenous populations, the Supreme Court has developed programs in training and selection of assistants for the courts, among whom are translators of Mayan languages. The programmes that allowed the establishment of Judges of the Peace around the country have constituted an improvement in this matter, as they

include bilingual judicial officers. While this development is positive, the program lacks judicial interpreters in all regions of the country. In many instances, non-Spanish speakers are tried without the assistance of an interpreter. In 2001, the IACHR recommended that Guatemala intensify its efforts to provide for interpretation services during trials for indigenous peoples.

Members of the indigenous community have asked the Government to integrate indigenous customary law and law practices into the mainstream jurisprudence. The Special Rapporteur on the Protection of Judges and Lawyers said that although the Government should take this request into account, it is necessary that the inclusion of these procedural customs not violate internationally recognised principles of due process. In its 2001 report, the IACHR called upon the Government to take steps towards the respect of indigenous positive traditional practices regarding the resolution of disputes.

Fulfilment of the 2000 Recommendations of the Special Rapporteur on the Independence of Judges and Lawyers.

In contravention of the recommendations of the Special Rapporteur with regards to impunity, several persons accused of violating human rights, have been appointed to different key positions in the public administration. Furthermore, the State has failed to consider seriously the establishment of an international commission to study the main obstacles impeding the clarification of homicide cases, especially those of great social impact. In its 2001 report, the IACHR had endorsed the Special Rapporteur's recommendation to this effect.

The Special Rapporteur recommended that university education should be reorganised to create a programme of professional training for graduates, previous to an admission exam to the exercise of law practice. This proposal caused widespread rejection, especially from the Lawyer and Notaries Association of Guatemala, because it would represent one more obstacle to obtaining the university degree.

Government Decree 310-200 allowed the National Commission for the Continuation and Support to the Strengthening of Justice to continue operating. This Commission is mandated to continue proposing reforms of the judiciary, taking into account the recommendations of the Special Rapporteur. In August 2000, this agency reached agreements with the United States and the United Nation Development Programme to carry out diverse plans in order to improve the administration of justice.

Contrary to the recommendation of the Special Rapporteur, the Government suspended the effect of the Child and Youth Code, arguing that

the State did not have the basic infrastructure to implement special administrative and judicial proceedings for their application. It also argued its lack of economical and human resources. Because of this suspension, the former Children's Code is still in force, (Decree 78-79 of the National Congress). This Code, based upon the doctrine of "irregular situation", considers children and youth as persons who need protection rather than persons who have rights. The application of this Code contravenes the Constitution and the Convention on the Rights of the Child.

The Special Rapporteur on the Independence of Judges and Lawyers undertook a short follow-up mission to the country in May 2001. The Special Rapporteur met with various Government officials, the judiciary, the public prosecutor, the bar association, and NGOs. On the last day of his visit, he expressed his preliminary impressions during a press conference, noting that only some of his recommendations were being implemented. He highlighted as positive aspects the establishment of the National Commission for a Follow-up of the Strengthening of Justice to advise on the implementation of his recommendations, the establishment of the Council of the Judicial Career and the appointment of a Special Prosecutor for the investigations of threats to judges and lawyer.

The Special Rapporteur mentioned as negative aspects the rise in threats against judges, prosecutors and lawyers, especially those against the then President of the Constitutional Court when the tribunal was dealing with petitions involving some members of Congress; the lynching of judge Martínez Pérez; the pressure against judges that the "trials by newspapers" impose; and the inadequacy in addressing impunity and the widespread belief that the Government lacked the political will to solve this problem.

THREATS AND ATTACKS

At least thirteen lawyers were killed between 2000 and March 2001. The jurists targeted most frequently are those involved in cases on human rights violations that occurred during the internal conflict, Judges of the Peace (*Jueces de Paz*), and lawyers dealing with cases of illegal adoption. During the period under review, the HRC, the CAT and the IACHR expressed concern at death threats, intimidation and killings against members of the judiciary and lawyers related to the carrying out of their functions. These human rights instruments recommended that Guatemala take the necessary measures to protect those who were continuously intimidated.

The Government's response to the increase in attacks has been deficient. The recommendations of the Special Rapporteur on the Independence of Judges and Lawyers have not been fulfilled. In 2001, the IACHR concluded that the Law for the Protection of Individuals under Legal Process (Decree 70-96) had not been implemented due to the lack of political will and resources. Due to the growing state of insecurity, the authorities have taken some isolated measures, which do not correspond to a planned policy. For example, no serious official study of the problem has been undertaken to identify the most vulnerable groups, the most frequent intimidation methods, or the identity of the possible perpetrators. In 2001, The Public Ministry created a Special Prosecutor's Office to handle cases related to these matters (*Fiscalía de Amenazas*). However, no progress on the investigations has been reported. The cases have not even been updated.

The Supreme Court has reinitiated proceedings to provide judges with a plan of medical insurance and benefits. However, efforts to supply judges with life insurance, as recommended in 2000 by the Special Rapporteur, have been inadequate, owing largely to the fact that insurance companies consider judges to be a high-risk group and due to the decreased budget of the judiciary.

CASES

Maura Ofelia Paniagua Corzantes [Lawyer]: Ms. Paniagua was the civil law coordinator for the law clinic at the University of San Carlos. In October 2000, she was murdered. She was in charge of receiving complaints of violence against women on behalf of the University. The day before her killing, a person who had come to see her was turned away by her maid. The next day, the same person returned and shot her repeatedly. The case is under current investigation in order to establish motives and suspects.

Conchita Mazariegos [Judge]: Ms. Mazariegos was a justice of the Constitutional Court in 1996-2001 and President of this body during 2000-2001. During her tenure as President of the Constitutional Court, she had disputes with the ruling party as a result of the congressional reduction of 60 per cent of the budget of the Court. The reduction was believed to have been undertaken as a reprisal for the decisions that the Constitutional Court took against 23 members of Congress in corruption cases. On 23 March 2001, two weeks before finishing her period as justice of the Constitutional Court, Ms. Mazariegos was the victim of an armed attack. Unknown persons fired at her house. On 29 March 2001, the IACHR issued preventive measure in favour of Ms. Mazariegos.

Francisco Javier Mazariegos Cifuentes [lawyer]: On 24 January 2001, he was killed by two unidentified men in Quetzaltenango. Among other cases, Mr. Mazariegos was defending five people accused of drug-trafficking. His wife reported that he had received death threats, but did not know their motive.

Miriam Patricia Castellanos Fuentes de Aguilar [lawyer]: On 21 February 2001, she was murdered while driving her car accompanied by her five-year old daughter and a baby-sitter, in Guatemala City. This killing apparently resulted from mistaken identity, as the killers seemed to be after another woman. On May 16 2001, Francisco Aguilar, Mrs. Castellanos' husband,, was also murdered.

Sonia Urréa Bercián [lawyer]: Ms. Urréa worked with tax law cases. An unknown man waiting near her residence in Guatemala City shot and killed her on 2 March 2001.

Alvaro Hugo Martínez Pérez [Judge of the Peace]: On 3 March 2001, Mr. Martínez was lynched. Prior to his death, he was beaten, stoned and attacked with machetes in the municipality of Senahú, Alta Verapaz. Approximately 200 people surrounded the Court of Peace and for more than 12 hours harassed the judge before killing him. The judge had managed to hide in the toilet, but the crowd put rocks on the roof until it collapsed on him. At the beginning of the aggression the judge had tried to defend himself and shot at the crowd, causing wounds to two men participating in the lynching. After the death of the judge, the crowd, having grown to some 500 persons, destroyed the offices of the National Civil Police and the municipality. No authority, including the mayor who was present, intervened to prevent the lynching. The few police officers in the zone retreated because they did not get additional support. Neither the governor nor the armed forces appeared.

The reason for the lynching is not clear. According to some accounts, some local persons grew angry because the judge had freed an alleged sexual abuser of minors. However, this version has not been confirmed. Other sources indicate that the lynching was not spontaneous, but the outcome of a plan. The judge's relatives agreed with this hypothesis and pointed to several elements before the lynching that support this view. The number of police officers was reduced to four, the communication by radio and telephone were interrupted, the rocks that were put on the roof were brought by a truck because such rocks did not exist in the place of the murder, and the authorities restrained from taking any action and only claimed knowledge of what had happened hours after the lynching had occurred.

Beatriz Estrada de Martínez and Hugo Martínez [lawyers]: parties to the process for the murder of Judge Martínez Pérez, have reportedly received numerous death threats.

Berta Julia Morales [Prosecutor]: She belongs to the Unit against Organised Crime, specifically responsible for cases related to robbery of banks. She has received multiple threats, including one made on 30 March 2001.

Silvia Consuelo Ruiz Cajas [Judge]: Ms. Ruiz is a judge in Quetzaltenango. She issued a warrant of arrest against the departmental chief of police, Gerson López, accusing him of falsifying material and conducting an illegal search. She received death threats after the warrant was issued. The judge reported the threats on 25 May 2001.

Rosalba Corzantes Zúñiga, Thelma Aldana Hernández and Carlos Rubén García [Judges]: They are members of the Board of Judicial Discipline. They reported on 17 August 2001 that they had received numerous death threats related to the disciplinary procedures carried out by them against judges accused of improprieties.

Fausto Corado Morán [Prosecutor]: On 29 June 2001, Mr. Corado received several death threats that were thought to emanate from the kidnapping gang AR-15. Prosecutor Corado has been in charge of the prosecution in cases resulting in the imprisonment of several members of the group.

Ana Patricia Lainfiesta [Prosecutor]: On 29 June 2001, Ms. Lainfiesta asked for increased protection. She feared attack from Manuel Rogelio Camposano Castillo, who had been sentenced to death for the kidnapping and murder of businessman Jorge Abelino Villanueva and who escaped from the prison where he was awaiting his execution.

Eduardo Adilio Juárez Contreras [Lawyer]: On 17 July 2001, Mr. Juárez reported to have received death threats related to the case of Kimberly Pineda Albizúrez, a girl who had been illegally adopted by a Spanish couple and later recovered. Mr. Juárez is party to the process and has said that two family members of the girl have been murdered.

Hector Dionicio Godínez [Lawyer]: Mr. Dionicio Godínez is the legal co-ordinator of the Legal Assistance Programme of *Casa Alianza*. On 10 September 2001, a car tried to run him off of the road. On the same day, he received a telephoned death threat at home. On 26 September 2001, two unidentified men entered his car and tried to steal it while it was parked in front of his office. The day before, Mr. Dionicio Godínez had received two

death threats by telephone. (*Casa Alianza* is a human rights NGO working with street children, which handles more than 400 criminal cases, many involving police officers and other State-agents. *Casa Alianza* has been subject of continuous harassment.)

Baldemar Barrera [Ombudsman]: Mr. Barrera is head of the human rights ombudsman office (*Procuraduría de los Derechos Humanos - HROO*) in Puerto Barrios, Izabal. Since September 2001, lawyer Barrera has constantly received death threats and been subject to surveillance. The attacks started when the ombudsman began investigations into the murder of journalist Jorge Alegría, which occurred on 8 September 2001. The Human Rights Ombudsman's Office concluded that Mr. Alegría had been murdered due to his radio program, through which he revealed cases of corruption allegedly committed by local authorities in Portuaria, Santo Tomás de Castilla.

Urías Bautista [Ombudsman]: Mr. Bautista is head of the Human Rights Ombudsman's Office (HROO) in Sololá. The HROO investigated the murder of the peasant Teodoro Saloj, member of the National Council of Peasants' Organisations. On 10 October 2000, Mr. Saloj was killed while taking part in a demonstration that included a road block of a major road leading to Sololá. The HROO concluded that officers of the National Civil Police had provoked the death of Mr. Saloj when they began shooting indiscriminately at the crowd. After members of the National Civil Police were sentenced, lawyer Urías Bautista and the Sololá HROO staff were threatened and harassed repeatedly. The HROO blames the National Civil Police for these attacks.

Jorge Ríos [Ombudsman]: Mr. Ríos is the head of the HROO of Quetzaltenango. The Office, directed by Mr. Ríos, investigated accusations against Gersón López, Chief of the National Civil Police in Quetzaltenango. The charges against Mr. López included corruption, abuses and unlawful detentions and led to his dismissal and to criminal proceedings against him. Mr. Ríos has received written death threats, responsibility for which he attributes to Mr. Gersón López. The now former Police Chief has also been implicated in death threats against Ms. Silvia Consuelo Ruiz Cajas (see above).

Julio Cesar Miranda [Ombudsman]: Mr. Miranda works in the HROO of Chimaltenango. He reported on 9 November 2001 that he had been subject to several acts of harassment and death threats. His car was searched, its windows destroyed, and some items stolen in the course of two different events. He has also received death threats at his office and residence. Mr. Miranda has investigated several cases against police officers. He also is in charge of a case involving teachers, students and parents of the Pedro Molina School, and the Guatemalan Army. (In the 1980s, the army occupied lands that belonged

to the school and established a Military Zone. The army and the community are currently negotiating the eventual redistribution of the land.)

Bishop Gerardi Case

In 2000 and 2001, threats continued against those involved in the investigation of the Bishop Gerardi murder:

Eduardo Cojulón Sánchez [Judge]: Mr. Cojulón is the President of the Third Criminal Tribunal on drug-trafficking and environmental crimes. This Tribunal carried out the trial concerning the murder of Bishop Gerardi. From 3 to 20 February 2001, the judge received death threats through pamphlets that circulated within judicial circles. On 28 April 2001, Mr. Cojulón received a letter in which threats were made to his life and subsequently asked to abandon the case. On 8 June 2001, after the tribunal pronounced sentencing in the case, the judge received fresh death threats by telephone.

Iris Yasmín Barrios Aguilar [Judge]: Ms. Barrios is Judge of the Third Criminal Tribunal, handling drug-trafficking and crimes against the environment. Between 3 and 5 February 2001, the judge reported death threats. On 19 March 2001, she allegedly received further threats, after which several individuals attempted to enter her house. On 21 March, the night before the public hearing, the Judge's residence was attacked with grenades, causing substantial damage to her house.

Leopoldo Zeissig Ramírez [Prosecutor]: Mr. Zeissig was subject to a number of acts of intimidation throughout 2000. On 5 January 2001, he received death threats by telephone. From 16 to 22 January 2001, a pickup truck, similar to those used by the EMP, remained parked in front of the Attorney's office. On 5, 10 and 20 February 2001, the attorney and his assistants received further death threats by telephone and through anonymous pamphlets. On 22 and 23 March 2001, Zeissig was pursued by cars and was again threatened. Additional threats were reported on 2 April 2001. In July Mr. Zeissig fled the country due to the continuous death threats he had received. On 6 August 2001, the ICJ sent a letter to the President of the Republic of Guatemala, asking the Government to take the necessary steps to guarantee that Mr. Zeissig and other lawyers, prosecutors and members of the judiciary would be able to work in an atmosphere in which their lives were not constantly threatened.

Nery Rodenas Paredes [lawyer]: Mr. Rodenas is the director of the Archbishop's Human Rights Office (ODHA), which was involved in the Gerardi Case in representation of the Guatemalan Church. Mr. Rodenas has received multiple threats throughout the process. On 22 February, he alleged-

ly received death threats and reported that unknown persons were surveying his residence. In April 2001 he was threatened by one of the accused, Captain Byron Lima Oliva.

Mynor Melgar Valenzuela [lawyer]: Mr. Melgar is also a lawyer in the ODHA. In December 2000 unknown armed intruders threatened and beat him while searching his house. The intruders also demanded that he abandon the case. On 4 April 2001, he reported having received a threatening anonymous letter. A member of the army, Alvaro Ramírez, was reported to have signed another such letter received later.

INDIA

The independence of the judiciary continued generally to be respected in India, but the judicial system remained overburdened and financially dependent on the executive. At the beginning of 2000, protests by lawyers over proposed changes to the rules of practice turned violent, and the Government appointed a commission to investigate the extreme response of the police and security forces. Debate continued regarding the imbalance in representation at the higher courts, particularly with respect to lower castes and indigenous populations. Violations of human rights continued throughout the country, especially in the regions of Jammu and Kashmir and Bihar, and particularly against religious minorities, members of lower castes and women.

India gained its independence from British rule in 1947, and its Constitution came into force in January 1950. The Constitution encompasses the separation of powers and establishes India as a "Sovereign, Socialist, Secular Democratic Republic". The Constitution creates a federal union of 28 states and seven union territories.

The executive power of the Union is formally vested in the President, as head of state. However, in practice, executive power rests with the Council of Ministers, headed by the Prime Minister, who is the head of government. The President is obliged to follow the Council of Minister's advice. Although largely a ceremonial position, the President may exercise influence over the selection of the appropriate candidate for Prime Minister and can require the Government to submit to confidence motions, which may result in its dissolution.

The President is elected indirectly by a special electoral college for a five-year term, and is eligible for re-election. The current President is Kocheril Raman (K.R.) Narayanan. Members of the Council of Ministers are appointed by the President on the advice of the Prime Minister, who is the leader of the political party or coalition that holds the majority in parliament. The Council of Ministers is composed of members of both houses of parliament and is responsible to the *Lok Sabha*, or House of the People.

Parliament consists of the President and two separate houses, the Council of States (*Rajya Sabha*) and the House of the People (*Lok Sabha*). The Council of States is composed of twelve members appointed by the President and 233 representatives elected by the legislative assemblies of the states and union territories. The House of the People consists of 543 members directly elected in the states and union territories through a system of proportional representation. The President may also appoint an additional two members to represent the Anglo-Indian community, if the President is of the opinion that that community is under-represented. The Council of States cannot be dissolved and its members are elected in staggered biennial elections, for six-year terms. The members of the House of the People serve five-year terms, unless the House is dissolved sooner.

Each state has its own legislature, consisting of the Governor and either a unicameral or bicameral parliament. The head of government at the state level is called the Chief Minister, and serves the same functions at a state level as the Prime Minister does at the federal level. Article 356 of the Constitution allows the President to assume any of the functions of a state's government, and to declare that the powers of the legislature of a state be exercised by the Union parliament. Pursuant to Article 356, the President may invoke "President's rule" upon receipt of a report from the state governor, or if otherwise satisfied "that the government of a state cannot be carried on in accordance with the Constitution."

The most recent federal elections were held in September 1999 after the Government lost a confidence vote in the House of the People in April of that year. The Bharatiya Janata Party (BJP) led the thirteen-party National Democratic Alliance coalition to victory. The Government was sworn in October 1999 with Shri Atal Bihari (A.B.) Vajpayee again serving as Prime Minister.

HUMAN RIGHTS BACKGROUND

The Constitution mandates that certain fundamental rights be respected. Part III of the Constitution enumerates these rights in Articles 14 to 30. Article 32 guarantees the right to petition the Supreme Court for the enforcement of the fundamental rights contained in the Constitution. The Supreme Court has also developed the concept of public interest litigation, whereby an individual or public interest group may petition the Court on behalf of a socially and/or economically disadvantaged group that has suffered a legal wrong.

India is a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Racial Discrimination. India has signed, but not yet ratified, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Despite several requests, the Government has repeatedly denied permission to both the UN Special Rapporteur on Torture and the UN Special Rapporteur on Extrajudicial Killings to visit India. The UN Special Rapporteur on the Independence of Judges and Lawyers, Dato' Param Cumaraswamy, requested permission to visit India in 2000, but the Government has not yet granted permission for this visit. Such country visits by UN Rapporteurs are only made when an invitation is extended by the government. Sadako Ogata, UN High Commissioner for Refugees, did make a visit in May, 2000.

The Committee on the Elimination of Discrimination against Women examined India's initial report during its January/February 2000 session. The Committee on the Rights of the Child also considered India's initial report in January, 2000. In 2000, thematic working groups and Special Rapporteurs of the Commission on Human Rights also made reference to the human rights situation and violations of human rights in India, including, inter alia, the Working Group on Arbitrary Detention, the Working Group on Disappearances, the Special Rapporteur on Religious Intolerance, the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, and the Special Rapporteur on Torture.

Human rights violations

Serious human rights violations have persisted in India. These violations are particularly virulent in the states of Jammu and Kashmir, Punjab and the other northeastern states. Most human rights violations occur in areas marked by internal armed conflict or result from religious and racial discrimination and violence. Security forces, government-supported military forces and armed opposition groups all commit serious abuses, including torture, extrajudicial killings, rape and disappearances in the regions where conflict continues.

On 20 March 2000, 92 Sikh men were shot to death in Chattisin ghpura, Anantnag district by a group of unidentified gunmen, some of whom

reportedly were in Indian army uniform. It was the first time that the Sikh minority had been targeted in Jammu and Kashmir. Following the massacre, both Sikh and Muslim citizens in the region protested. Two armed Islamist groups were held responsible by the Indian and state governments, even though no official inquiry had been launched at the time. Those groups have denied involvement and some individuals and groups have implicated Government forces. Soon after the 20 March massacre, a group consisting of members of the Indian army's Special Operations Group (SOG) killed five men in Panchalthan-Pathribal village, Anantnag district. The official account stated that the five men were militants responsible for the 20 March massacre. However, this version of events was widely disputed. Many local people protested the killings and demanded the exhumation of the bodies, charging that they had been victims of a staged encounter. Several Muslims were allegedly "disappeared" following the Chattisinghpura massacre.

The protests continued, and grew in intensity as the government failed to act. On 3 April 2000 at least seven people were killed in Brakpora district when the police opened fire during one of the protests on unarmed protesters, reportedly after youths provoked them with stone throwing. Finally, on 6 April 2000 the bodies were exhumed and DNA tests were undertaken, the results of which have not been released. An inquiry into the spate of killings was demanded, and in response the government agreed to set up commissions of inquiry to investigate both the Chattisinghpura and Brakpora incidents. While the inquiries were made, the Government had yet to act on the conclusions and reports as of the time of this writing.

In addition to human rights abuses in particular regions, human rights violations continue to be committed against particular groups. Caste violence continues to occur, in particular against *Dalits* (formerly called "untouchables") and indigenous populations. In the state of Bihar there were several incidents of caste violence, including the murder of four *Dalits* in April and the massacre of 34 lower caste people in June. There were also incidents of arson that left whole families homeless. Caste violence is not confined to Bihar. A report emerged according to which an entire Dalit family was burned alive in Karnataka state in March, 2000. Many of these attacks are said to have been taken in reprisal for violence against upper castes. In July 2001 a prominent Dalit Member of Parliament, Phoolan Devi, was murdered. An investigation into the circumstances of her murder was being carried out.

Religious minorities in various states are also frequently targeted. Attacks against Christians in particular continue to rise in many states, as has been the trend since the BJP assumed power in 1998. Gujarat and Uttar Pradesh have

been the venue of most of the anti-Christian violence, and over 35 such attacks were reported throughout the country for the year 2000. The violence has included direct attacks on persons, ransacking of Christian missionary schools and bombings of churches. Many of these attacks were reportedly committed by Hindu groups affiliated with the BJP. In addition, both Sikhs and Hindus have been the victims of violence in Jammu and Kashmir in the past few years. Muslims have also been the subject of attack, including police brutality. In Delhi in April, a group of police entered a Muslim post-secondary institution searching for two criminal suspects, and subsequently assaulted the students, destroying their property and the mosque.

The death penalty still forms part of the scale of punishment in India. The number of offences which carry a maximum sentence of death has progressively increased, and in 2000 legislation to extend it to crimes of rape was pending. According to Amnesty International, the death penalty was ordered in at least 30 cases in 2000, and at least 60 persons remained on death row. There was no information concerning executions that may have been carried out in 2000, as the Government does not keep the relevant statistics. In July 2000 a conference attended by eminent jurists and human rights campaigners urged the central and state governments of India to abolish the death penalty in both law and practice.

Domestic Human Rights Commission

The National Human Rights Commission (NHRC) was established under the Protection of Human Rights Act, 1993 (PHRA). The NHRC is empowered to intervene in legal proceedings and to inquire into alleged violations of human rights. However, it is not entitled to investigate human rights violations directly, but only to advance recommendations. The NHRC may use the services of relevant government investigation agencies with the consent of the government for the purposes of conducting an investigation. The Act authorises the creation of State Human Rights Commissions with similar functions and powers as the National Commission. Similarly, the Act provides for the creation of Human Rights Courts, which have since been established in Tamil Nadu, Uttar Pradesh and Andhra Pradesh. These courts are not established as separate courts, but rather hear cases in special hearings of Sessions Courts.

There are numerous limitations to the mandate of the NHRC. For example, it has no power to prosecute violators nor to compensate victims. It may not inquire into incidents older than one year, and it has limited powers to summon witnesses and to require the production of public documents. In addition, the NHRC is not authorised to inquire into allegations of human

rights violations by members of any of the federal armed forces but may only request a report from the government and make recommendations based on that report. Its inquiry powers are also restricted in relation to Jammu and Kashmir. It may only inquire into matters relating to entries in List I and III of the Seventh Schedule of the Constitution, thereby excluding from its jurisdiction violations related to the police, prisons and the public order of a state. These various limitations were criticised by the UN Human Rights Committee in 1997 (see *Attacks on Justice 1998*) and were noted by the UN Human Rights Commission's Working Group on Disappearances in its 2000 report.

These limitations have been frustrating for the NHRC, particularly those that impose a one-year limitation period on its investigations and those that limit its ability to investigate allegations of human rights violations committed by armed and paramilitary forces. In 2000 the NHRC submitted recommendations, pursuant to the assessment of an Advisory Committee to the Government, to amend its enabling statute. The Government had yet to respond to the recommendations at the time of this writing.

Restrictive Legislation

Several legislative acts have served to contribute to continued impunity in India. The Armed Forces (Special Powers) Act of 1958 (AFSPA) and the Disturbed Areas Act continue to be in effect in several states. The AFSPA gives the army and army officers sweeping powers over the regions where it is applied. It confers on officers the right to use lethal force in response to a suspicion of, or the commission of, an offence against a law prohibiting freedom of assembly or the carrying of weapons or objects capable of being used as weapons. Such force can be used after the issuance of such prior warning as is considered necessary by the officer in order to maintain public order. The AFSPA also allows the army to arrest without a warrant, using such force as is necessary, anyone suspected of, or who has committed or is about to commit, any offence. Where prior consent has not been given by the government, section 6 of the AFSPA restricts the commencement of proceedings against members of the armed forces acting under AFSPA. Like section 6 of the AFSPA, section 197 of the Criminal Procedure Code (CPC) prohibits the commencement of legal proceedings against members of the armed forces and public servants acting in their official capacity where the government has not given its prior consent to such legal proceedings.

The Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA) lapsed in 1995. That Act had met with severe criticism by human rights

organisations, UN mechanisms, the NHRC, lawyers and others due to the widespread human rights violations that it encouraged. Many human rights violations had occurred under the auspices of the TADA, including torture, and it has been reported that the Act is still being used in Jammu and Kashmir to detain people retroactively, an allegation which the Government has denied. In April 2000 the Law Commission of India submitted to the Government a draft Prevention of Terrorism Bill 2000, which was intended to replace the TADA and is drafted as a modified version of the 1995 Act. The NHRC and human rights NGOs expressed opposition to the Bill, arguing that it would result in human rights violations and violate international human rights norms. Several sections of the proposed legislation, which has yet to be introduced into Parliament, have been cited as conflicting with India's human right obligations.

The Jammu and Kashmir Public Safety Act 1978 (PSA) has also been frequently cited as prone to abuse, resulting in human rights violations. For example, the PSA permits the detention without charge of persons considered to be a security risk, involving detention periods of up to a year, subject to approval by three High Court judges after seven weeks of detention.

JUDICIARY

India's legal system has developed under the influence of the common law traditions of the United Kingdom, and India remains essentially a common law jurisdiction. The judiciary plays a central role within the Indian constitutional structure. Article 32 of the Constitution guarantees the right to apply to the Supreme Court for the enforcement of those fundamental rights contained in the Constitution.

Under the terms of List III, Schedule 7 of the Constitution, the central and state governments enjoy concurrent responsibility for the administration of justice, jurisdiction and powers of all courts (except the Supreme Court, over which the central government retains jurisdiction), criminal law and procedure and civil procedure. However, the organisation of the Supreme Court and High Courts remains the exclusive jurisdiction of the central government, while the provisions regarding officers and servants of the High Courts fall within state power. In addition, the central government retains exclusive jurisdiction for offences against laws over which it alone has jurisdiction (List I of Schedule 7) and all matters involving the development or use of any armed forces of the Union or the use of civil power. Similarly, states have exclusive competence with respect to offences against laws over which states have

exclusive jurisdiction (List II of Schedule 7), police and public order. The Attorney General is responsible for providing advice to the government on all legal matters and for the performance of all duties of a legal character that may be assigned by the President.

Despite the numerous constitutional provisions related to the judiciary, in Jammu and Kashmir the judicial system remains constantly under attack. Judges and witnesses are frequently threatened by militant forces. In addition, judges are not always independent and are often tolerant of the Government's actions. Court orders are not always respected by the security and armed forces. Very few cases involving terrorist crimes are even brought before the courts.

Court Structure

Chapter IV of Part V of the Constitution deals with the union judiciary. Article 124 concerns the establishment and constitution of the Supreme Court, which is the final court. It is composed of 26 justices, one of whom serves as Chief Justice. Its decisions are binding on all lower courts. Article 130 stipulates that the seat of the Court is in Delhi. Article 131 gives the Supreme Court original jurisdiction to hear any dispute between the Government and the states, or between states "if and insofar as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends." The Supreme Court has appellate jurisdiction on any judgement, decree or final order of a High Court, if the High Court certifies that a party can appeal under Article 134A, in the following cases:

- civil, criminal or other proceedings, if the case involves a substantial question of law as to the interpretation of the Constitution (Article 132);
- civil proceedings that involve a substantial question of law of general importance (Article 133);
- criminal proceedings where the High Court has, on appeal, reversed an order of acquittal, or withdrawn a case from a subordinate court for trial before itself and subsequently convicted the person, and then sentenced the person to death, or if the High Court believes the case to be fit for appeal to the Supreme Court (Article 134).

Article 136 provides the Supreme Court with discretionary power to grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed by or made by a court or tribunal in the territory of India. The President may also request an advisory opinion from

the Supreme Court pursuant to Article 143, on a question of law or fact that has arisen or is likely to arise. Cases involving the determination of a substantial question of law as to the interpretation of the Constitution, and requests for an opinion under Article 143 must be heard by a panel of at least five judges.

Chapter V of Part VI of the Constitution creates a High Court of Record for each state. Article 241 in Part VIII extends the provisions of Chapter V, Part VI to any High Courts created for union territories as well. Each existing High Court, subject to the Constitution, has the same jurisdiction as it had before the coming into force of the Constitution. All High Courts have such jurisdiction as may be conferred on them by the central or state governments on subject matters within the latter's legislative competencies. High Courts also have original jurisdiction to issue writs and orders for the enforcement of the fundamental rights contained in Part II of the Constitution. State High Courts have a supervisory power over all subordinate courts and tribunals in areas where they exercise jurisdiction. There are currently 18 High Courts.

Chapter VI of Part VI of the Constitution relates to the creation and jurisdiction over subordinate courts. The power to establish subordinate courts falls under the jurisdiction of both the central and state governments. Article 235 places the administrative control of all district and other subordinate courts in the High Court of that state. Special tribunals and courts are under the judicial control of the High Courts and the Supreme Court.

Section 6 of the Criminal Procedure Code 1973 requires that the following criminal courts, in descending order of superiority, be created in each state: Courts of Sessions, Judicial Magistrates of the First Class, Judicial Magistrates of the Second Class and Executive Magistrates. Similarly, the Civil Procedure Code 1908 requires the establishment of a District Court. The Sessions and District Courts are the principal courts of original jurisdiction in civil and criminal matters subordinate to the High Court. The precise jurisdiction of these courts and their names may vary from state to state.

JUDGES

Extensive constitutional provisions are intended to safeguard the independence of judges, including articles regarding selection, conditions of tenure and removal of judges at both the Supreme Court and the High Courts. The overburdened court system and the lack of enforcement of court decisions in regions where there is armed conflict pose the greatest threats to judicial independence.

Selection

Article 124(2) of the Constitution provides that “(e)very judge of the Supreme Court shall be appointed by the President ... after consultation with such of the judges of the Supreme Court and of the High Courts in the State as the President may deem necessary...”. In the case of appointments other than that of the Chief Justice, the Chief Justice is always to be consulted. In accordance with Article 217, every judge of a High Court shall be appointed by the President after consultation with the Chief Justice of India and the Governor of the state, and in the case of appointments other than the Chief Justice of a High Court, the Chief Justice of that court.

The Supreme Court of India, in *Supreme Court Advocates-on-Record Association v. Union of India* 1993(4) S.C. 441 (the Second Judges Case), made a significant ruling on the selection process for judges. The Court held that the Chief Justice has a pre-eminent position in the appointment process. The Chief Justice is responsible for the initiation of the process, and no appointment can be made without the consent of the Chief Justice. In *Special Reference No. 1 of 1998*, JT 1998(5) the Court set out in detail the procedures for appointment and transfer of judges. The Court further determined that “consultation with the Chief Justice” amounted to consultation by the Chief Justice with the four most senior judges of the Supreme Court in regard to appointments. The individual opinion of the Chief Justice, therefore, was not sufficient to be considered as a consultation.

Chapter VI of Part VI of the Constitution governs the appointment of judges to subordinate courts. Article 233 provides that the appointment of district judges shall be made by the Governor of the state in which the court sits, in consultation with the High Court of that state. Pursuant to Article 234, appointments of persons other than district judges to the judicial service of a state shall be made by the Governor in accordance with rules made by him/her after consultation with the State Public Service Commission and the High Court of that state. The provisions of this Chapter can be extended to any class of magistrate upon public notification by the Governor.

The parliamentary Committee on the Welfare of Scheduled Castes and Scheduled Tribes has underscored the shortage of members in the judiciary from the Scheduled Castes and Scheduled Tribes. In its second report, released in October, 2000, the Committee noted that there are only 15 Scheduled Caste judges, and five Scheduled Tribe judges among the 481 High Court judges sitting throughout the country. In addition, the first Supreme Court appointment from the two groups occurred in July 2000 when Mr. Justice K.G. Balakrishnan was appointed. The report recommended that

the Government take positive steps towards ameliorating this situation, and even suggested amendments to Articles 124 and 217 to promote increased representation from these groups.

Conditions of Tenure

Articles 124 and 217 provide that Supreme Court and High Court judges shall hold office until attaining the ages of 65 and 62 years respectively. Articles 125 and 218, in conjunction with Part D of the Second Schedule, provide that judges of the Supreme and High Courts shall be paid a salary and be entitled to such privileges, allowances and rights as may be determined by law. The latter benefits may not be altered to their disadvantage after their appointment to office. Controversy has arisen recently in respect of the fact that judges' remuneration and the budget of the judiciary is controlled by the executive. The Chief Justice of India, Dr. A.S. Anand stated that greater financial and administrative autonomy for the judiciary was required and would help improve the administration of justice in the country. In July 2000 the central government advised the state and union territory governments to undertake changes to improve the financial autonomy of the judiciary. This initiative followed the comments made by the Chief Justice, as well as those of a three-judge committee set up by the Chief Justice to consider the issue, and recommendations made at the Chief Justices conference in December, 1999.

Removal

Articles 124(4) and 217(1)(b) provide that Supreme and High Court judges respectively, cannot be removed from office except by an order of the President confirmed in the same session after an address by each house of parliament, supported by a majority of the total membership of that house, and by a majority of not less than two thirds of those voting and present. A judge may only be removed on the grounds of proved misbehaviour or incapacity.

Under the Judges (Inquiry) Act 1968, 100 members of the House of the People (*Lok Sabha*) or 50 members of the Council of States (*Rajya Sabha*) may request their respective Speaker or Chairman of the House to consider material relating to accusations of misbehaviour or incapacity. A committee consisting of a Supreme Court judge, a Chief Justice of a High Court, and an eminent jurist is formed to apprise the judge of the charges against him or her and to allow for the preparation of a defense. If the committee concludes that

misbehaviour or incapacity has been proved, it will report this finding to Parliament for action. Members of the judiciary of the subordinate courts may only be removed by the High Court, in its administrative capacity.

Measures to Improve the Justice System

It has been reported that there are well over 20 million cases pending throughout the country, including at the district courts, High Courts (over 3.3 million) and the Supreme Court (almost 20,000 in 1998). In addition, there are only some 11 judges for every million citizens, which is apparently the lowest ratio in the world. At any one time, 25 percent of the 608 judicial posts at the High Courts stand vacant. Thirty thousand cases per million people are pending.

Due to this notorious backlog of cases in the country, the Government announced on 3 March 2001 three initiatives for improving the administration of justice in India. The Department of Justice reported that it had approved a recommendation of the XIth Finance Commission for the creation of 1,734 additional 'fast track' (sessions) courts to deal with long pending sessions as well as other cases. Funds have been allotted for a five year period, up to 2005. The scheme started functioning on 1 April 2001 and began by considering cases that had been pending for two years or more and cases of under trials in jails. So far, approximately 500 'fast track' courts have been set up since the scheme commenced in April. It is expected that in the first year of the program all cases under trial will have been concluded. The Government anticipates that approximately two million cases will be dealt with by these additional courts by 2005, which will result not only in addressing the human rights situation, but will also amount to considerable savings for the government as those awaiting trial in jail are released and their cases dealt with.

The second initiative is the computerisation of the city courts in Delhi, Mumbai, Chennai and Calcutta. This development will allow parties to file their complaints by computer as well as to inquire into pending cases at central facilitation centres. It is also anticipated that creating a computer network will streamline the system for allocation of cases to particular judges, and will speed up the administration of justice generally. The final initiative being undertaken by the Department of Justice in 2001-2002 is the networking of the Department with the Supreme Court, the High Courts and the Law Departments of the State Governments. It is expected that this process will assist those bodies involved in judicial reforms, as well as improve access to information.

LAWYERS

In late 1999 and early 2000, lawyers held mass protests and strikes against proposed changes to the Code of Civil Procedure by the Code of Civil Procedure (Amendment) Bill 1999, as well as changes to the Advocates Act 1961. The Government had argued that the changes were intended to alleviate excessive delays in the administration of justice, improve the quality of legal services and incorporate changes required by the General Agreement on Trade and Services. Many lawyers were concerned about two changes in particular: the proposal that advocates be subjected to an assessment every five years in order for their licence to be renewed, and suggested changes to allow foreign firms and individuals to practice in India.

Members of the legal professions staged two large protests in Delhi, on 21 December 1999 and 24 February 2000. During these protests lawyers were arrested and some were injured when the police responded using tear gas and a lathi charge (see *Attacks on Justice 10th edition*). Three junior police officers were suspended by the Delhi Government on 15 March 2000, and two Assistant Commissioners of Police were transferred as a result of the police response to the 24 February protest.

On 28 March 2000 the Government announced the appointment of an inquiry commission into the use of force by police during the 24 February 2000 demonstration. The Commission was to have been headed by retired Justice of the Rajasthan High Court N.C. Kochlar, but after he reportedly expressed doubt as to his ability to conduct the inquiry, he was replaced by former Supreme Court Justice G.T. Nanavati at the end of April, 2000.

On 17 April 2000 the Delhi High Court held that lawyers did not have the right to strike, following a public interest litigation petition which had challenged the strike that had taken place on 24 February 2000. The Division Bench of the High Court held that a strike by lawyers infringed the fundamental rights of the litigants to have their cases heard within a satisfactory amount of time. However, Chief Justice Devender Gupta and Mr. Justice Cyriac Joseph, who heard the case, also criticised the Government for its "half-hearted" decision to suspend and transfer the three policemen. In the videotapes of the protest, the policemen could be seen beating the lawyers, despite the absence of any provocation by the lawyers. With respect to the lawyers' strike, the Court held that there was no reason for its continuation, as the Commission of Inquiry had since been established. In addition, the Court held that lawyers should not need to resort to a strike, as this action disrupted court proceedings and other forms of protest that did not affect litigants were more appropriate. It also held that the inquiry commission was to begin its

work by 25 April 2000 and stated that it would not rule on the justifiability of the use of force, as that was the mandate of the Commission of Inquiry.

As a result of the Delhi High Court's decision, the Nanavati Commission held its first sitting on 25 April 2000. The Commission called on all those individuals and organisations who had direct or indirect knowledge of the events of 24 February 2000 to make submissions. While the Commission was to have submitted its report within three months of its first sitting, the Government has already extended the term of the Commission several times. The original extension was for two months, which meant that the term was to have expired on 23 September 2000. However, the Commission was given an extension of two additional months due to holidays of the High Court and in order to take the Bar Council of India's submissions after the latter decided to participate in the Commission, having earlier refused to cooperate. The Commission's deadline have since been repeatedly extended.

On 28 August 2001, over 1,000 lawyers from Western Upper Pradesh also conducted a protest in support of their demand for the establishment of a bench of Allahabad High Court in the region. The lawyers set up a road blockade on a national highway and burnt effigies of Law Minister Arun Jaitley and UP Chief Minister Rajnath Singh. The lawyers said they would continue their protests until 31 August and boycott all courts in the region. The protests were said to be peaceful, however the police reportedly resorted to heavy-handed tactics in response.

CASES

(I) ATTACKS ON LAWYERS

Raghubir Sharan Verma [lawyer] and Madhu Verma: Mr. Verma was a prominent criminal lawyer in the city of Patna in the north Bihar district of Siwan. He and his wife were shot to death by a group of armed assailants while sitting in their garden in April, 2000. Their 20-year-old daughter, Shilpi, was also a victim of the attack, but survived her bullet wounds and was given security protection by the Government only after Patna High Court lawyers so demanded. The Vermas' son, Sumit, had been killed two years earlier, allegedly by the same group of people. Mr. Verma had alleged in proceedings in the Siwan District Court that one of the close associates of a Mr. Shahabuddin, Rashtriya Janata Dal (RJD) Member of Parliament for Siwan and a powerful figure in the area, was responsible for his son's murder, and had thereby incurred the wrath of a powerful group in the area.

It is alleged that Mr. Shahabuddin runs the district through his crime syndicate, although Mr. Shahabuddin himself contends that he has brought peace to Siwan. He has been accused in connection with a number of criminal cases but has never been convicted. In March 2001, a shootout between police and Mr. Shahabuddin's supporters resulted in the death of 10 persons, including two police officers. The State Government in Patna subsequently ordered a judicial inquiry into the shootout. Mr. Shahabuddin had yet to be charged with the murder of Mr. and Mrs. Verma. However, he and ten others were charged by Delhi Police on 28 August 2001 with conspiring to murder *tehelka.com* chief Tarun Tejpal and his colleague Aniruddha Bahal. Mr. Shahabuddin has been linked with the leader of the RJD, Mr. Laloo Prasad Yadav, who himself has also been the subject of criminal investigations and corruption scandals in Bihar, although no case has been successful against him (see *Attacks on Justice 9th edition*). Following Mr. and Mrs Verma's murder, the Patna High Court lawyers met and agreed that they would not take up the cases of politically powerful individuals accused of these and similar murders of lawyers. Due to the fear that has gripped the region recently, only about 50 persons attended the funeral of the Vermas, and less than 10 attended the condolence meeting at the court.

Bhupendra Kumar [lawyer]: Mr. Kumar was a special public prosecutor and was conducting the case of the alleged rape of the wife of a senior Indian Administrative Service (IAS) official. The RJD president, Mr. Laloo Prasad Yadav, was one of the accused, as was Mr. Tulsi Singh, a former Minister in the Government. Following the murder of Mr. Verma (see above), Mr. Kumar resigned from his position, and subsequently quit the bar after 38 years as a lawyer. While Mr. Kumar stated in a letter to the Bar Council that the reason for his resignation was the murder of Mr. Verma and his wife, there were suggestions that Mr. Kumar himself had also received threats. A news report noted that an independent Member of the Legislative Assembly, Mr. Surajbhan, apparently had issued a statement implying a grave threat to Mr. Kumar's life.

Sangita Sharma [lawyer]: Ms Sharma was an Andhra Pradesh High Court advocate who committed suicide on 15 June 2000. An inquiry by the National Commission for Women into the incident reported that she was driven to suicide as a result of sexual harassment by her senior male colleagues. The inquiry revealed that Ms Sharma had received a number of anonymous phone calls prior to her death, some of which had contained threats to abduct her son and parents. Two of the men alleged to have been involved in the harassment have subsequently been charged over the matter, a Mr. Vijay Kumar and a Mr. Narahimha Naidu.

(II) CASES RELATING TO JUDICIAL INDEPENDENCE
AND ACCOUNTABILITY

Dismissals and transfers of judges

JW Singh [judge]: Mr. Singh was a sessions judge who was dismissed after being accused of having connections with the underworld. His case is currently before a special court convened under the Maharashtra Control of Organised Crime Act.

Subhash Raghuvir Jaiswal [judge]: Mr. Jaiswal was a judge of the Bombay City Civil and Sessions Court, who was dismissed from office after the Bombay Law and Judiciary Department issued an order made on the recommendation of the Bombay High Court administration. The official reason cited in the order was that the dismissal resulted from his inability to 'successfully complete his probation'. However, newspaper reports have indicated that he was involved in serious misconduct, including setting fire to a property he owned in order to evict tenants. He is facing a High Court inquiry in relation to this latter incident.

Mr. N.K. Jain [judge]: Mr. Jain, formerly Chief Justice of the Madras High Court, received a notice of transfer to Karnataka High Court in August 2001. Despite this transfer order, the Judge continued to carry out his judicial duties in the Madras High Court and, as a result, a number of lawyers approached the Madras Court with petitions to restrain the Chief Justice from further discharging his duties. The petitioners argued that the action of the Chief Justice would erode public faith and confidence in the judiciary. The Advocate-General, Mr. V. T. Goplan, was asked to submit an opinion about the matter to the court, but in his resulting submission stated he had been advised by the Union Government to inform the court that it could not give any executive direction to the judiciary in matters of transfers and appointments and that the issue should be resolved by the court itself.

Mr. M S Menon [lawyer]: Mr. Menon was found guilty of committing contempt of court by the Bombay High Court on 12 March 2001, following remarks made by him against Metropolitan Magistrate B. A. Shellar. Mr. Menon reportedly made a statement that the presiding magistrate intentionally chose to overlook evidence in a criminal case because he had filed a complaint with the Special Investigation Department and the Chief Metropolitan Magistrate. Mr. Menon apologised to the court and was ordered to pay a fine of 2,000 rupees.

Mr. S K Sundaram [lawyer]: Mr. Sundaram was sentenced to six months' imprisonment for 'gross criminal contempt of court'. The lawyer had sent a telegram to the Chief Justice of India demanding that he step down on the grounds that he had already attained the age of superannuation. In the telegram, Mr. Sundaram accused the Chief Justice of committing offences such as cheating, criminal breach of trust and falsification of records.

INDONESIA

The process of legal and judicial reform, which began in May 1998, has stalled somewhat during the recent period of political upheaval. However, the Constitution has been amended to limit the power of the President and in favour of greater parliamentary control. The courts are no longer under the administration of the executive, but are now situated under the administration and supervision of the Supreme Court. Nevertheless, corruption in the judiciary remained endemic and popular distrust of judicial institutions persisted.

Indonesia became formally independent from the Netherlands in 1949. According to Article 1 of the 1945 Constitution, Indonesia is a unitary state, which takes the form of a republic. The Constitution of Indonesia vests sovereignty in the people. Popular sovereignty is exercised by the *Majelis Permusyawaratan Rakyat* (MPR), a People's Consultative Assembly consisting of members of the *Dewan Perwakilan Rakyat* (DPR), the Indonesian parliament, together with delegates from regional and special interest groups provided for by statute. The most important of these groups is the Indonesian military. The MPR meets at least once every five years and takes decisions by majority vote. It deliberates and decides upon the Constitution and the policy guidelines of the State. The MPR appoints the President and the Vice-President for a five-year term. Candidates may only be re-elected once.

The President of Indonesia is the head of state and the head of government and is assisted by the Vice-President. The President has extensive powers as the Supreme Commander of the army, the navy and the air force. According to Article 12 of the Constitution, the President may declare states of emergency, appoints and dismisses the Ministers of State and may exercise a veto over legislation submitted by the DPR. However, if the Parliament passes a bill and the President does not approve it within one month, the bill automatically enters into force. Article 25 of the Constitution in accordance with law 14/1970 provides that the President appoints and dismisses judges. The President may issue decrees having the standing of law, and in the event of an emergency the President may issue regulations in lieu of laws.

The Constitution of Indonesia of 1945 was amended significantly following the fall of President Soeharto in 1998. Through these fundamental

changes the formerly extensive role of the President was altered and the powers of the Parliament were broadened. MPR decree no 7/MPR/2000, for example, provides that the appointment and dismissal of the Supreme Commander of the joint staff of the armed forces, and the chief of the police is no longer solely to be decided by the President, parliamentary approval is also necessary. Another significant change was made with regard to the autonomy of the region. Article 18 of the Constitution now explicitly mentions that the regional government has wide-ranging autonomous powers, except in certain matters under reserve to central authority.

The DPR comprises 500 seats, 462 of which are elected by popular vote and 38 reserved for appointed military representatives. The members of the DPR serve for a period of five years. In August 2000 the MPR voted to extend the allocation of 38 seats to the Indonesian military (*Tentera Nasional Indonesia - TNI*) until 2009.

The last general elections on 7 June 1999 were won by an alliance of the three leading opposition parties, the Indonesian Democratic Party (PDI-P) of Megawati Soekarnoputri, the National Awakening Party (PKB) of Abdurahman Wahid and the National Mandate Party (PAN) of Amien Rais. Abdurahman Wahid became President, but throughout 2000 he came under increasing criticism by members of the DPR and MPR for his allegedly erratic style of decision-making, his handling of Indonesia's separatist and sectarian conflicts (in regions such as Aceh, West Papua, Sulawesi and the Moluccas) and lagging economic reform. In May 2000, the so-called Bulog (state logistic agency) affair emerged, involving the alleged misappropriation of US \$ 4.1 million from the Bulog pension fund by President Wahid's masseur, Anpeng Sui, and a Bulog official, both claiming that they had acted with Wahid's authorisation. A second financial scandal concerned the disappearance of US \$ 2 million donated to President Wahid by the Sultan Hassanal Bolkiah of Brunei for humanitarian relief in Aceh. In September 2000 the DPR appointed a 50-member committee to investigate the two financial scandals. The conflict between President Wahid and the parliament (DPR) deepened in January 2001 when President Wahid declined to cooperate with the inquiry committee. On 31 January 2001 the committee concluded that President Wahid had probably been involved in the Bulog scandal and had made misleading statements with regard to the Brunei donation.

On 1 February 2001, the DPR by a vote of 393-4 censured President Wahid, following the report of the committee of inquiry. President Wahid refused the censure and the TNI rejected his proposal to declare a state of emergency. On 30 April 2001 the DPR issued a second censure against

President Wahid by a vote of 363 - 52 with 42 abstentions. On 30 May 2001 the DPR voted by 365-4 to convene a special session of the MPR to initiate impeachment proceedings against President Wahid. President Wahid insisted that the legislature did not have the constitutional right to remove the president and threatened to declare a state of emergency. On 22 July 2001 he declared a state of emergency, thereby dissolving the Parliament hours before the beginning of the special session of the MPR. Security forces refused to implement his orders and the MPR convened an emergency session on 23 July 2001, at which it overwhelmingly voted to end President's Wahid's mandate and to install Vice-President Megawati Sukarnoputri as President.

President Megawati, the leader of the nationalist PDI-P and daughter of Indonesia's founding president, Sukarno, has close links with the armed forces and is known to have favoured strong military action against separatists in Aceh and West Papua. Although she apologised in her first major speech to the parliament for past human rights abuses committed by the military in combating the two separatist rebellions, in Aceh and Papua, and called on the armed forces to reform itself, she declared that she would not allow Aceh or West Papua to break away from Indonesia.

HUMAN RIGHTS BACKGROUND

Indonesia is not a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. While Indonesians in most parts of the country have enjoyed increased civil and political liberties, the human rights situation in the regions opposing Indonesian rule deteriorated throughout the period covered by this report. Among the victims of arbitrary detentions, extrajudicial killing, and torture were political activists, human rights defenders and civilians. Freedom of the press was enhanced by the 6 June 2000 decision of a panel of three judges of the Central Jakarta District Court that an article published in 1999 stating the Soeharto family had accumulated some US \$ 15 billion was based on facts and not libellous.

The Constitution was amended by the MPR in August 2000 to contain more elaborate provisions on the protection of human rights. Articles 28 a) to 28 j) guarantee, *inter alia*, the right to legal protection and to fair and equal treatment before the law; the right to protection of private life, family, dignity and property; the right to life; freedom from torture; freedom of thought and conscience; and freedom of religion. A ban on the retroactive application of legislation was also included. Neither the Criminal Code nor the Criminal

Procedural Code were amended as planned. Both codes need to be reformed significantly in order to comply with international standards of a fair trial. The provisions currently guaranteeing rights of detainees are often not implemented.

The National Human Rights Commission (Komnas HAM) continued to examine reported human rights violations. The Government appointed the original chairman of the Commission who then appointed the other 24 initial members. Law number 39/1999 gives the Commission statutory authority and increases its membership to 35 persons. The Commission highlights abuses and recommends legal and regulatory changes. Although Law number 39/1999 gives the Commission subpoena powers, it does not give the Commission the power to enforce its recommendation or to recommend government action.

Since 1989, a conflict has been ongoing between the Indonesian military and the armed separatist opposition group Free Aceh Movement (Gerakan Aceh Merdeka, GAM) in Aceh in the north of the province of Sumatra. In 2001 a law was adopted to grant Aceh status as a special province with its own Islamic court of Justice (*Mahkamah Syariah*), and receipt of 55 per cent of the proceeds of the gas and oil production and 40 per cent of the natural gas production from Aceh. Throughout the period covered by this report police and military operations against the armed separatist opposition group GAM continued. Hundreds of extrajudicial executions took place. GAM activists and many civilians were ill-treated and tortured in police and military custody and there were reports of many people being detained or disappeared due to their alleged connection with the GAM. Reports of unlawful killings, abductions and torture by members of the GAM also surfaced.

The former Dutch colony of West New Guinea came under Indonesian rule in 1963 as Irian Jaya after a transitional UN administration. The popular consultative process which confirmed the incorporation into Indonesia in 1969 was widely regarded as flawed. On 18 December 1999, the DPR agreed to change the name Irian Jaya to West Papua without acceding to demands for independence for the province. In 2001 the Indonesian authorities took an increasingly forceful stance against pro-independence activities in West Papua and the level of human rights violations escalated. Independence supporters, whether peaceful or armed, faced unlawful killings, disappearances, torture, and arbitrary detention.

Since January 1999 violent conflict between Christians and Muslims in the Moluccase has produced an estimated 3,000 casualties. On 26 June 2000

President Wahid declared a state of civil emergency in the provinces of Maluku and North Maluku in an attempt to bring an end to the escalating sectarian violence in the region. Fighting between Muslims and Christians in Ambon nevertheless continued. The Indonesian Government has been criticised by groups inside and outside the country for not ensuring the neutrality of the troops it sent to end the violence.

The Soeharto cases

The corruption trial of former President Soeharto on charges of embezzling some US\$ 571 million of state funds opened on 31 August 2000 in Jakarta. Soeharto failed to attend on grounds of ill health. On 28 September 2000 a panel of independent court-appointed doctors determined that a series of strokes had rendered Soeharto physically and mentally unfit to stand trial, resulting in the dismissal of charges by the panel of five judges. The decision triggered violent clashes between protesters and supporters of Soeharto outside the court, resulting in at least one death and many injured. The Attorney General Marzuki Darusman appealed the decision on 5 October 2000 and President Wahid urged the Supreme Court to reopen the case, suggesting that judges had been bribed. On 8 November 2000 the High Court in Jakarta upheld a prosecution appeal against the decision by the lower court in September. The High Court judges ordered Soeharto to appear and threatened otherwise to try him in *absentia*. On 5 February 2001 the Supreme Court formally declared that Soeharto was medically unfit to stand trial on corruption charges.

In another development, the Supreme Court of Indonesia on 27 September 2000 found Soeharto's youngest son Hutomo "Tommy" Mandala Putra guilty of corruption in a land deal which had caused the state losses of Rp 95.4 billion. The verdict of a lower court was thereby overturned and he was sentenced to a term of 18 months in prison. On 3 October 2000 Tommy Soeharto admitted his guilt and made an appeal for clemency to President Wahid, who denied the appeal the next day and imposed a one-year travel ban against him. His lawyers appealed the court decision on 31 October 2000. Wahid formally rejected Tommy Soeharto's plea for clemency via a presidential decree on 2 November 2000. Tommy Soeharto failed to appear in the Attorney General's office and disappeared. A nationwide police search for him started, which culminated in his detention in December 2001. He is also being held in connection with alleged involvement in the killing on 26 July 2001 of Syafiuddin Kartasasmita, the Supreme Court judge who had issued his sentence (see cases below).

Aceh and West Papua

Although investigations into human rights abuses in Aceh and West Papua have been carried out, since the beginning of 2000 there has only been one trial of military officials accused of committing violations. The trial of 24 soldiers and one civilian before a joint panel of military and civilian judges in Banda Aceh for carrying out a massacre in 1999 in a village in West Aceh began on 19 April 2000. The court convicted the 25 accused on 17 May 2000 of the massacre of 57 villagers. They received sentences of between eight and a half and 10 years. The proceedings reportedly did not meet with international standards for a fair trial, and the result has been criticised because those convicted were low-ranking soldiers, while no military officers with command responsibility have been charged in connection with the massacres.

East Timor

In September and October 2000, the Attorney General named 23 persons as suspects in connection with crimes committed by Indonesian militias in East Timor in 1999. However, senior army officers, including then commander-in-chief of the Indonesian armed forces, General Wiranto, were not included in the list. On 4 May 2001 a court in Jakarta sentenced six former members of an East Timorese pro-Indonesia militia to sentences of between 10 and 20 months in connection with the murder of three UNHCR workers at a refugee camp at Atambua, West Timor in September 2000. They were found guilty of "violence against people and property", not murder. The judge held that their direct responsibility for the murders could not be proven, as the accused had acted as part of a mob. A UNHCR statement called the lenient sentences a mockery of justice.

On 23 April 2001 President Wahid, acting pursuant to a parliamentary recommendation, issued a presidential decree to establish *ad hoc* Human Rights Courts on East Timor and on the 1984 Tanjung Priok case, in which dozens of Muslim protesters were unlawfully killed, disappeared or imprisoned. The decree was criticised because it restricted jurisdiction to events in East Timor after 30 August 1999. One of President Megawati's first acts was to issue an amendment on the decision to establish an *ad hoc* Human Rights Court on East Timor. However, the amended decree limited the jurisdiction of the court to covering the two months of April and September 1999 and just three out of 13 districts in East Timor.

THE JUDICIARY

The 1945 Constitution makes reference to the judiciary in Articles 24 and 25. However, the nature of judicial power, the content of its exercise and the tenure of those who exercise it is regulated principally by statute rather than by constitutional provisions.

Indonesia has been built upon the principles of "Pancasila", the official state ideology. The principles of Pancasila are set out in the Preamble of the Constitution as follows:

The national independence of Indonesia shall be formulated into a constitution of the sovereign Republic of Indonesia which is based on the belief in the One and Only God, just and civilised humanity, the unity of Indonesia, democracy guided by the inner wisdom of deliberations amongst representatives and the realisation of social justice for all the people of Indonesia.

The ideology of Pancasila is founded upon the five broad principles enunciated in the Preamble. It is accepted in Indonesian constitutional theory that the Constitution's provisions, and the provisions of all statute law, should be interpreted so as to be consistent with these principles. The principles are so broad, however, that they may require fine interpretation when applied to particular cases. Such interpretation has tended to be undertaken by the executive rather than the judicial organs of the Government. The President has therefore been able to act in circumstances outside of the law by declaring certain actions or omissions to be contrary to, or in conformity with, Pancasila.

Given these circumstances, the Constitution has had little impact in constraining the executive power. However, since the departure of President Soeharto, the Constitution has been amended to provide for broader control of the executive over the President and a clearer separation of powers between the executive and the judiciary. The judiciary no longer depends upon the executive in legal and administrative terms. Under Article 11 of the former Law 14/1970, each of the branches of the judiciary was subject in their organisation, administration and finance to the ministry in relation to which their jurisdiction was primarily concerned. This substantial threat to the independence of the judiciary in Indonesia has now been removed. The newly enacted Law number 35/1999 amended Law number 14/1970 Article 11 and all the branches of the judiciary are now under the control of the Supreme Court as regards their organisation, administration and finances. Thus, the judiciary is no longer accountable to the executive,

and the executive power has been stripped of the authority of the executive to intervene in the decisions of these courts.

Structure

The Supreme Court (*Mahkamah Agung*) stands at the apex of the judicial system. The General Courts of Justice (*Peradilan Umum*) have jurisdiction to try civil and criminal cases; special courts, such as a Child Court, Economic Courts, the Islamic Courts of Justice (*Peradilan Agama*) have jurisdiction to consider civil cases related to the Islamic religion; the Military Courts of Justice (*Peradilan Militer*) have jurisdiction to try any crime committed by military officers; and the Administrative Courts of Justice (*Peradilan Tata Usaha Negara*) have jurisdiction to deal with administrative cases. The right of appeal from District to High Court to Supreme Court exists in all four systems. The Supreme Court does not review questions of fact, but only the lower courts' application of law.

According to the new Law number 35/1999, a crime committed by a military officer together with a civilian is to be tried in a general court, unless the Chief Justice of the Supreme Court decides that the case should be tried in a military Court of Justice. Under the old Law 8/1981 this decision was made by two members of the executive, the Minister of Law and Legislation (formerly the Minister of Justice) together with the Minister of Defence and Security. This change indicates the shift of authority from the executive to legal assessment by a court. If the case is tried in a General Court of Justice, the panel of judges is to be mixed: two judges, including the President, are civilian judges and one is a military judge. This procedure is called "Peradilan Koneksitas".

The People's Assembly (MPR) has the power to review the constitutionality of legislation.

Article 26 of Law 14/1970 carries negative consequences for judicial independence as it provides that the Supreme Court is empowered only to review the validity of regulations and other inferior statutory instruments. However, a statute is currently under discussion which would provide for the Supreme Court also to be authorised to deal with constitutional issues. In addition, regulations adopted by the Government and by presidential decree may now be examined by the Supreme Court with regard to their constitutionality.

Human Rights Court

In November 2000, the Parliament passed the Law on Human Rights Courts (Law 26/2000). This law was mandated by Human Rights Law 39/1999, which had been adopted by parliament on 8 September 1999. Law 26/2000 creates four new district courts to adjudicate gross violations of human rights. Each court is composed of five members, of which three must be human rights judges appointed for a five-year term by the President upon nomination by the Supreme Court. Cases will be appealed to the High Court and the Supreme Court, but the law requires that those courts include three human rights judges sitting on an *ad hoc* basis when hearing human rights cases. The law contains internationally recognised definitions of genocide, crimes against humanity, and command responsibility as core elements of gross human rights violations. The Attorney General will be the sole investigating and prosecuting authority and will appoint *ad hoc* investigators and prosecutors. The Law also empowers the President, upon recommendation of the Parliament, to create an *ad hoc* bench within one of the new human rights courts for gross human rights violations that occurred before enactment of the law.

The adoption of the new law creating Human Rights Courts constitutes a positive step towards combating impunity. However, the role of the executive in appointing judges and prosecutors and deciding whether or not a Human Rights Court should be set up in cases of gross human rights violations which occurred before the enactment of the law could severely hamper the independence of the courts. Other matters of concern are the fact that the law provides for the death penalty as a maximum sentence for those convicted of genocide, murder and torture and that some provisions are inconsistent with international standards of the right to a fair trial. In addition, the law does not provide for security of tenure for the judges. They may be appointed for an initial term of five years, renewable once. Judges should be appointed for a non-renewable term in order to guarantee their independence.

Appointment, promotion and dismissal

The position of judges may be prejudiced when their mode of appointment and dismissal is considered. In accordance with Article 31 of Law 14/1970, judges are to be appointed and dismissed by the President without further consultation or approval by either the legislature or the judiciary itself. Article 16 of Law 2/1986 Concerning the General Judicial System elaborates on the provisions of Law 14/1970. Article 16 elaborates on Article 31 of Law 14/1970 by providing that:

A judge of a court is appointed and discharged by the President in his capacity as head of state on the proposal of the Minister of Justice and based on consultation with the Chief Justice of the Supreme Court.

Promotion within the judiciary may be made in Indonesia only from within and only from the ranks of judges in the courts immediately below. There is no possibility for the appointment of a judge to a senior judicial office from outside the ranks of the existing judiciary. Within this system, in which judges rely completely on the Minister of Justice and the President for their promotion, judges are prone to take decisions they consider will be in conformity with the latter's interests.

According to Article 13 of Law 2/1986, judges may be dishonourably discharged from office when they have: committed a crime; engaged in improper behaviour; neglected their duties or violated their oath of office.

The definitions of improper conduct and neglect of duty, however, are exceedingly vague. Improper conduct is described as conduct, whether in court or out of court, that dishonours a judge's dignity. Duty, with respect to neglect of duty, is defined simply as all duties entrusted to the judge concerned. The decision as to whether these murky criteria are met and whether dismissal should follow rests entirely with the Minister of Justice and the President.

With respect to appointment, dismissal, transfer and remuneration of judges in the Islamic Courts, the Administrative Courts and the Military Courts, the same legislative foundation is applicable, except that regarding the Military Courts the Minister of Defence makes decisions instead of the Minister of Justice.

ICJ's report on its mission to Indonesia, *Rulers Law*, which covers the situation up until April 1999, states the following in this respect:

The most persistent complaint we received was that the Minister of Justice has used his authority with respect to the appointment, promotion, transfer, and remuneration of judges in order to reward judges whose decisions the Minister approved and penalise those whose decisions he disapproved. In the alternative, the complaint was framed in terms of judges at all levels below the Supreme Court having been unwilling to take difficult decisions adverse to the Government for fear of having their prospects for promotion and desired geographic location prejudiced by adverse Ministerial response.

Problems confronting the Indonesian judiciary

Corruption has been institutionalised in the judiciary, especially in the Supreme Court, an institution notorious in this regard. The ICJ has received information in a number of cases according to which judges had received financial rewards in exchange for a favourable decision.

In an effort to improve Indonesia's discredited judiciary, sixteen new Supreme Court justices were selected in September 2000. However, no plan for a systematic overhaul of the courts has as yet been put forward.

One factor that gives rise to judicial corruption is the extremely low scale of judicial remuneration as compared with that provided in the private sector. Another problem is the entrenched distrust much of the general public have for the police and the legal system as a whole after more than three decades of authoritarian rule. Persons having lost confidence in the judiciary tend to take justice into their own hands. According to some estimates, more than 1,000 suspected thieves were slain by mobs in the year 2000. As Indonesian legal institutions struggle to cope with the transition of the country to the rule of law and human rights, they create an enforcement void that is filled by increasing anarchy on the part of the public.

LAWYERS

In ordinary cases, an investigator, prosecutor or prison official is not permitted to listen to the content of the discussion between a lawyer and his/her client. According to Article 71 (2) of the Criminal Procedure Code, officials may listen to such conversation when crimes against state security are involved. Because of the enhanced penalties involved in national security cases, confidentiality between lawyer and client may be conceived as all the more important.

According to Article 115 b of the Criminal Procedure Code, when an examination is conducted in national security cases, the lawyer may be present to watch, but not to listen to the examination of the suspect. This limitation clearly hampers the minimum rights of a suspect.

Article 56 (1) of the Criminal Procedure Code provides that only in cases where the accused is being tried for an offence punishable by imprisonment of at least five years, and does not have his or her own counsel, is an investigator, prosecutor or judge obliged to assign a lawyer.

The Criminal Procedures Code does not provide for witness immunity or for the defence power of subpoena. Therefore, witnesses are often reluctant

to testify against the authorities. Forced convictions are common, and defendants do not have the right to remain silent and may be obliged to testify against themselves.

CASES

Syafiuddin Kartasasmita [judge of the Supreme Court]: Justice Syafiuddin Kartasasmita was the head of general crime cases at the Supreme Court and the presiding Supreme Court judge who sentenced Soeharto's son, "Tommy" Hutomo Mandala Putera, to an 18-month sentence of imprisonment on charges relating to corruption. Judge Kartasasmita was killed on 26 July 2001 by four men on motorcycles as he drove to work. According to the police, the murder was carried out by professional assassins, and they have repeatedly stated that Tommy Soeharto masterminded the assassination. He had disappeared after his conviction but was detained in December 2001. He is also alleged to be involved with several other acts of violence. President Wahid had accused him in the bombing of the Jakarta Stock Exchange, in which 15 people died.

Sianturi [judge of the Medan District Court]: On 2 May 2001 Judge Sianturi adjourned the trial of Edward Horas Harahap, who was charged with the murder of Ms. Srikandi, a prominent PDI-P (Indonesian Democratic Party of Struggle) and PP (Pancasila Youth) member, because Harahap's defence lawyer was absent. Dozens of PDI-I and PP members allegedly ran amok and smashed the Judge's bench and overturned tables and seats inside the courtroom. Judge Sianturi and his two panel members were forced to flee the courtroom for their safety. The head of the Medan District Court announced that he had asked the Medan City police to press charges.

Jafar Siddiq Hamzah [lawyer and human rights activist in Aceh]: Jafar Siddiq Hamzah disappeared on 5 August 2000. In early September 2000 his corpse was found, marked with signs of torture. At the time of this writing, no suspects had been identified by the police.

Sufrin Sulaiman [lawyer]: On 29 March 2001, the human rights worker Teungku Al-Kamal, his lawyer Sufrin Sulaiman and their driver were shot dead in South Aceh. They were returning from a police questioning of Teungku Al-Kamal about his role in assisting a group of women who alleged that they had been raped by Brimob. The Indonesian police have accused human rights activists who were assisting these women of defamation and kidnapping. At the time of writing, the Indonesian authorities had not mounted any serious investigation into the killings.

IRAN

The judiciary in Iran remained heavily under the influence of executive and religious government authorities. The functioning of Islamic Revolutionary Courts severely undermined judicial authority in the country. Lawyers were not adequately protected in exercising their functions by an effective professional association.

The Islamic Republic of Iran was established in 1979 after a populist revolution overthrew the Pahlavi monarchy. The 1979 Constitution, as amended in 1989, established a theocratic republic.

The Supreme Leader of the Islamic Revolution, Ayatollah Ali Khamenei, is the Head of State and constitutionally the highest authority in the country. He was chosen as Ayatollah Khomeini's successor in June 1989 by the Assembly of the Experts, a popularly elected group of senior religious scholars and pious laymen. The Supreme Leader maintains direct control over all internal security and police forces, the judiciary and the state broadcasters. He is the commander-in-chief and officially appoints the President, following popular elections. According to Article 57 of the Constitution, the legislature, the judiciary and the executive, all must function under the "absolute rule of the Supreme Leader." The unlimited term of the Supreme Leader and extremely wide powers vested in that office have been the source of popular dissatisfaction. Calls are increasing, especially within the ranks of the clergy, for the office of the Supreme Leader to be made elective and for a limited term. (See *Special Court for Clergy*).

President Mohammad Khatami was elected in February 1997 for a four-year term and was re-elected by a large majority in the June 2001 election. According to Article 113 of the Constitution, the President is second in line after the Supreme Leader and is responsible for implementing the Constitution. He is the Chief of the executive power, "except in matters directly concerned with (the office of) the Leadership." The Leader may dismiss the President "after the Supreme Court holds him guilty of the violation of his constitutional duties or after a vote of the Islamic Consultative Assembly testifying to his incompetence."

The Islamic Consultative Assembly, or *Majles*, is a 290-seat unicameral legislative body, popularly elected for a four-year term. The February 2000

Parliamentary election resulted in a landslide victory for candidates associated with the reformist faction. Although the reformist faction presently constitutes the majority of the Parliament, the legislation adopted by them is often vetoed by the Council of Guardians.

The Council of Guardians, which is composed of six clerical members appointed by the Supreme Leader and six lay jurists nominated by the head of the judiciary and approved by the Parliament, exercises great influence on the Parliament and is in charge of reviewing the compatibility of all the legislation passed by the Parliament with Islamic and constitutional principles. The Council is also responsible for the supervision of the elections. The Council construes Article 99 of the Constitution, which grants it "the responsibility of supervising the elections," to include approval of the qualification of candidates for all elected offices. This construction is considered unconstitutional by many leading legal authorities. Furthermore, the Council refuses to provide clear legally based reasons for disqualifying candidates, and its decisions are widely considered to be intended to block the election of persons holding political views not in conformity with the official ideology. In the February 2000 parliamentary election, the Council annulled the results in a number of electoral divisions won by reformists, without presenting supporting evidence and in spite of the fact that the Interior Ministry had found no reason for the annulment.

The Expediency Council (*Majma'e Tashkhis-e Maslahat*) is in charge of breaking any deadlock between the Parliament and the Council of Guardians. The 1989 constitutional amendment instituted the Expediency Council as an advisory board to the Supreme Leader. In 1997, the Expediency Council was empowered with far reaching responsibilities, such as determining the major policies of the state, and Hashemi-Rafsanjani, the former President, was appointed by the Supreme Leader as the chairman of the Council.

HUMAN RIGHTS BACKGROUND

Despite the acknowledgment by high ranking officials of an urgent need for reform in respect of human rights, the past year has been marked by negative developments, especially in the areas of freedom of expression and association. A number of murders of intellectuals and political dissidents have remained unsolved. Illegal detentions, disappearances in the justice system, and broad use of torture by law enforcement agencies have increased dramatically, while impunity has remained widespread. The Secretary of the Islamic Human Rights Commission in Iran has confirmed the existence of

illegal detention centres in the country. Extrajudicial groups and semi-official vigilante forces, such as the *Basiji* and *Ansar-i Hezbollah*, have continued to engage in violent attacks against students, journalists and individuals suspected of "anti-revolutionary" activities. International standards of fair trial continued to be disregarded by the judiciary. Some 130 executions occurred between January and July 2000 alone, including the execution of a woman in the presence of her two children. The Supreme Court upheld more than 310 execution sentences during the year 2001. Despite widescale public protest, public executions and floggings have substantially increased since the re-election of the President Khatami.

In December 1997, the Commission for the Implementation of the Constitution and Constitutional Supervision was appointed by President Khatami to review complaints regarding rights violations. The Commission, however, did not function in an active manner. In its report of 30 November 1999, the Commission declared that it had received more than four hundred complaints but did not find them appropriate for consideration.

Independent political parties are non-existent and the Government maintains a monopoly on all television and radio broadcasting facilities. Since the election of President Khatami in 1997, the independent press has played an important role in providing a diverse forum for wide-ranging opinion and debate. However, during the past year, the independent press has been silenced and leading reformist journalists, politicians and human rights defenders were jailed pursuant to decisions by ultra-conservative elements within the judiciary. On 23 April 2000, 12 journals were arbitrarily closed without hearings, by order of the judiciary, in contravention of both the Iranian press law and international standards of fair trial. (see *The Judiciary*) More than 40 newspapers and magazines have been closed. In August 2000, efforts by the new Parliament to amend the Press Law were halted by unprecedented intervention in parliamentary affairs by the Supreme Leader. Despite the objections of the President and reformist parliament members, virtually all the reformist press has now been closed down and dozens of journalists and editors have been detained for prolonged periods without trial or access to legal council. Others have been sentenced on arbitrary charges to punishments ranging from the death penalty to long imprisonment terms (see *Unfair Trials*).

Mere criticism of the Supreme Leader's actions or even of the criminal law codes, including the death penalty and other cruel and degrading punishments, was regarded by the judiciary as an offense and was punished for "harming the basis of the Islamic Republic," or insulting the Islamic system."

In December 2000, Ata'ollah Mohajerani, Minister of Culture and Islamic Guidance, resigned from his office in protest at the constant attacks on the judiciary.

Investigations into the murders of several prominent Iranian dissidents and intellectual figures ("Serial Murders" case) that prompted public outrage in Iran in late 1998 and early 1999 have moved exceedingly slowly. Several intellectuals among the 134 signatories of the 1994 Declaration of Iranian Writers, declaring a collective intent to work for the removal of barriers to freedom of thought and expression, have been killed and disappeared. In March 2000, Saeed Hajjarian, a senior political adviser to President Khatami, escaped an assassination attempt linked to the serial murders that left him confined to a wheelchair. Minister of Intelligence Qorban Ali Dori-Najafabadi and several of his senior deputies resigned after it was revealed in an official inquiry, supported by President Khatami that, some senior officials of the Ministry of Intelligence had carried out the killings. In late December, the trial of 18 state officials accused of involvement in murders began in the Tehran Military Court behind closed doors, allegedly for "security reasons," and they were convicted in January 2001. However, the fairness of these trials has been called into question. (See *Unfair Prosecutions and Trials*)

Vigilantes accelerated their assaults on reformists, breaking up demonstrations and cultural events following supportive statements made by the highest political and judicial authorities, including the Supreme Leader and the head of the Judiciary, legitimising their extrajudicial activities. On the anniversary of the student demonstrations that took place in July 1999, where four students were killed and several hundred arrested and wounded, students marched and expressed their frustration at the unsolved murders of their classmates and the poor economic conditions. The protesters were beaten and forcibly dispersed by Ansari Hezbollah.

THE JUDICIARY

According to Article 61 of the Constitution, judicial power shall be exercised through courts of justice, in accordance with Islamic criteria, acting to decide in cases of dispute, to protect public rights, to further the administration of justice and to uphold the divine jurisdiction. According to Article 4, all the laws and regulations must be based on Islamic criteria.

The judiciary in Iran is not free from government influence. Religious minorities, women and men are not treated equally before the courts.

Although the Constitution endorses certain rights of fair trial, these are not respected in practice. In his report to the 2000 session of the UN Commission on Human Rights, the Special Rapporteur identified the following difficulties: ill-treatment in pre-trial detention; forced confessions; overcrowding in the prison system; the continuing existence of detention centres outside the official prison system; the denial of fair trial; denial of the right of the defense to call witnesses; issuance of judgment without provision of adequate time for the submission of the defense; making statements about cases which do not fall within the jurisdiction of the court; jailing defense lawyers for such actions as protesting the judge's refusal to allow them to call witnesses.

In December 1999, the head of the judiciary announced an initiative to reform the judicial system, remarking that the country is "still a long way off from having a reformed and developed judicial organization." He also declared that 40 judges, clerks, and "middle-men" had been arrested on corruption charges.

Structure of the courts

By a constitutional amendment in 1989, the High Judicial Council (HJC) was abolished and all the duties and responsibilities of HJC were conferred to the head of the judiciary, who is appointed directly by the Supreme Leader for a period of five years. The head of the judiciary appoints half the members of the Council of Guardians, all members of the Supreme Court, and the chief judges in all of Iran's provinces. According to Articles 157 and 162 of the Constitution, the head of the judiciary, the chief of the Supreme Court and the Prosecutor-General all must be members of the clergy. Ayatollah Mahmoud Hashemi Shahrudi was appointed by the Supreme Leader in August 1999 as the head of the judiciary.

The head of the judiciary exercises extraordinary powers for determining the professional career of judges. According to Article 158 of the Constitution, the head of the judiciary is authorized to appoint, dismiss, transfer, promote and discipline judges, and to make all similar administrative decisions, in accordance with the law. (See Qualification, Appointment, Dismissal.)

The Law of Establishment of General and Revolutionary Courts made several widely criticised changes to the judiciary system. The office of the Prosecutor was omitted from the institution of the judiciary. Hence, the chief judges of the jurisdictions, who are at the same time the chief justices of the Courts of First Instance, function now both as prosecutor and judge in the

same case. Chief judges of the Courts of First Instance, who should be impartial and presume the innocence of defendants, are in charge of the investigatory procedures in cases, including interrogation of the defendant, collection evidence of the crime and accusing the defendant.

Another problematic change introduced is the establishment of "the General Courts," thus abolishing the conventional system of civil and criminal courts. In the former system, courts were divided according to their adjudicative specialization in civil and criminal offenses. In the new system, "the General Courts" deal with all types of cases, thus placing a severe burden on the caseload of the courts and decreasing the quality of the juridical profession.

The Constitution also establishes Military Courts, the Court of Administrative Justice, and the Supreme Court. Military Courts, which investigate crimes committed in connection with military or security duties by members of the Army, the Gendarmerie, the police and the Islamic Revolutionary Guard Corps. The Court of Administrative Justice investigates complaints, grievances and objections by the public with respect to government officials, organs and statutes. The Supreme Court supervises the correct implementation of the laws by these courts, ensuring uniformity of judicial procedure and fulfilling any other responsibilities assigned to it by law.

Islamic revolutionary courts

These courts were established in 1979 by the Revolutionary Council to adjudicate offenses regarded as potentially "threatening to the Islamic Republic," including offenses against internal and external security, narcotic crimes, economic crimes, and official corruption. The legitimacy of the Revolutionary Courts is questionable, as they are not established in the Constitution, and were only created by the Revolutionary Council, which temporarily functioned as the legislature at the beginning of the Revolution. It was not until three years after their establishment that the Revolutionary Courts were approved by a law adopted by the Parliament.

Trials in these courts are notorious for their disregard of international standards of fair trial. In addition to those shared by the Islamic Revolutionary Courts with courts in general, these courts have the following deficiencies: the judges are chosen in part based on their ideological commitment; defendants are detained for prolong periods without access to a lawyer and the right to confront their accusers; secret or summary trials take place; defendants are often indicted for vaguely defined offenses such as "insulting

Islamic tenets”, “insulting the Supreme Leader”, “anti-revolutionary behaviour”, “moral corruption”, and “propaganda against the state.” The abuses associated with the Islamic Revolutionary Courts appear to be so numerous and so entrenched as to be nearly beyond reform.

The Special Court for the Clergy

The Special Court for the Clergy (SCC), established to deal with all criminal acts committed by clergy, has become an instrument to discipline and prosecute dissident clerics. The cases are to be argued on the basis of religious law. Appeals are heard by another chamber of the Cleric's Court. The Supreme Court has no jurisdiction to review the SCC cases.

The Court tries the reformist clerics, in sessions closed to the public, for deviating from Islamic orthodoxy, and may sentence them to severe punishment, including the death penalty. The defense counsel in a trial before a SCC must be chosen from designated clergy. In his report to the 1999 session of the U.N Commission on Human Rights, the U.N Special Representative on Iran recommended the abolition of the SCC, finding it be an arbitrary and secretive tribunal that denies its defendants the right to a fair trial.

The SCC is another extra-constitutional judicial body, yet the violations of the Constitution in the case of the SCC are more remarkable. Some of the major deficiencies of the SCC are as follows:

- The SCC lacks legitimacy, having been established only by decree of Ayatollah Khomeini and subsequently ratified by Ayatollah Khamene'i.
- A special court only for a single class of people may violate the constitutional principle of equality before the law (Article 2).
- The SCC functions under the supervision of the Supreme Leader and all the judges and prosecutors of this court are appointed by the Supreme Leader, not the judiciary. Moreover, the SCC does not follow the general legal principles and criminal procedure laws applicable in the other courts. The establishment of a court outside of the judicial system is in a clear violation of Article 61 of the Constitution, which provides that only the General Courts of Justice have jurisdiction to perform the functions of the judiciary.
- According to Article 13 § (1) of the Decree of the SCC, “[t]he SCC and its office of the Prosecutor have a jurisdiction to adjudicate all cases entrusted to it by the Supreme Leader.” Thus, the SCC prosecutes all individuals and all cases viewed by the Supreme Leader himself as involving

- a “crime”, rendering its own judgment as to the criteria for criminal prosecution.
- The SCC is in a position of hierarchy vis-à-vis the other courts. According to Article 13 of the Decree of the SCC, “[a]ll the judicial departments should adjudicate the files sent to them by the office of the SCC Prosecutor.”
 - In clear contravention of Article 167 of the Constitution that places the Islamic sources and verdicts as secondary to the codified laws, the SCC considers these sources as equal. In a further step, the SCC considers even the Penal Codes as secondary in line to the Islamic law.
 - Judges are empowered to “give sentences based on their own personal opinions,” in the case of dealing with “a crime which does not have a defined punishment in the Shari’a and the law.” Such broad powers given to judges in criminal cases clearly violate international standards of fair trial, as well Article 36 of the Constitution, which provides that “the passing and execution of a sentence must be only by a competent court and in accordance with law.”
 - In contravention of Article 168 of the Constitution that establishes the General Courts as being the only judicial authority that has jurisdiction to review press offenses, the SCC recently has dealt also with press offenses, on the grounds that “the defendant is a member of the clergy.”

Press Courts

The Press Court is a branch of the General Courts that handles offenses related to the press. According to Article 168 of the Constitution, trials for press offenses should be held openly and in the presence of a jury, whose composition is determined in the Press Law. However, prosecution of critics of the government and harassment of a number of independent journalists and writers by the judiciary increased dramatically during the past year. One of the main factors conditioning this attack is the lack of legal protection for freedom of expression and association in Iranian Law.

In contradiction of international standards, the Press Law, enacted in 1985, significantly restricts freedom of expression by determining narrow roles for the media and setting up sweeping prohibitions. Article 6 of the Press Law, for instance, prohibits the press from publishing materials that “harm the basis of the Islamic Republic” or “create division among the different strata of society.” The law establishes the Press Supervisory Board,

dominated by members of the executive branch of the government, as the responsible official body for issuing press licenses and examining complaints filed against publications or journalists, editors and publishers. According to the Press Law, and in a violation of Article 14 (1) of the ICCPR, the Board enjoys semi-judicial powers to determine violations of the Press Law and may close newspapers or magazines solely by administrative order.

In the case of referral of some of the complaints to the judiciary by the Press Supervisory Board, the Press Court, a special tribunal within the judiciary, hears such complaints. The jury of the Press Court is in charge of making recommendations to the judge regarding the guilt or innocence of defendants and the severity of any penalty to be imposed. In tens of cases against the newspapers and journalists, the recommendations of the jury for lenient penalties were disregarded by the judges of the Press Court in favour of harsher measures. Most of the press cases were brought before the Revolutionary Courts and Special Clerical Courts, which do not have jurisdiction to hear press cases, and where defendants enjoy fewer legal protections. In most of the press cases, newspapers or magazines were closed down before trial as a result of unprecedented and highly criticized creation of irrelevant laws by the judiciary.

Unfair prosecutions and trials

There were several violations of the right to a fair trial in the "Serial Murders" cases. Among the accused high-ranking security agents was Saeed Emami, former Deputy Minister of Intelligence, who, according to the state's report, committed suicide in prison before the beginning of the trial. Only five defendants, who were accused of being the main perpetrators of the killings, were in custody, whereas other suspected accomplices remained free on bail. The lawyers of the victims' families were denied access to the case files. The identity of the defendants and the specific charges against them are still not known. Furthermore, any criticism of the actions of the judiciary and the conditions of the trial received harsh punishments from the judiciary. Several citizens, including journalists and lawyers of the victims' families were arrested and prosecuted merely for criticising the actions of the judiciary in connection with the case. (See *Cases*)

The largely peaceful student demonstration of July 1999, which was conducted to protest the closure of the popular Salam newspaper, was followed by an attack on Tehran University dormitories by uniformed security forces and members of *Ansar-i Hezbollah*. At least four students were killed and 300 were wounded, when paramilitary forces threw them from the dormitory's

windows. Although investigations by the Parliament and the National Security Council indicated that the raid had taken place without authorization from the Ministry of Interior and that "police officers and non-military personnel" were responsible for the attack on students, no criminal proceedings were conducted. According to a declaration by the head of the Tehran Revolutionary Court, Hojatoleslam Gholamhossein Rahbarpour, in September 1999, 1,500 students were arrested during the riots, 500 were released after questioning, 800 were released subsequently and formal investigations were undertaken against 200. Four students were sentenced to death by a Revolutionary Court for their role in the demonstrations, but the sentences were commuted to terms of imprisonment. While 98 policemen and senior officers were arrested for their actions, only 20 went on trial. In February 2000, the court released all but two of the accused officers. However, scores of students who were arrested during the demonstrations are still in prison.

In October 2000, Amir Farshad Ibrahim, a former member of a vigilante group, was sentenced to two year imprisonment for defamation after he stated in a videotape that *Ansar-i Hezbollah* vigilantes had received payments from senior clerics and conservative politicians to carry out attacks on reformist personalities and to disrupt public events and demonstrations. His lawyer, Shirin Ebadi, and another lawyer, Mohsen Rahami were also prosecuted and received suspended imprisonment in relation with this case. (See *Cases*)

Some 17 leading Iranian reformist intellectuals and politicians who attended an international conference on Iran held in April 2000 in Berlin were arrested and some were detained incommunicado. In October 2001, they were brought before a Revolutionary Court in Tehran, and on January 13, 2001, behind closed doors, the court convicted seven of them on vague charges concerning "national security," "propaganda against the state," and "insulting Islam."

Mr. Amir Entezam, former Deputy Prime Minister, aged 68, was released after 17 years detention in the notorious Evin Prison in Tehran. He had spent much of the past 20 years in and out of prison on charges of collaboration with the United States, and his appeals for a fair and public trial were denied. He was re-arrested in December 1999 after an interview was published in an Iranian newspaper, in which he made critical statements about Mr. Assadollah Lajevardi, an assassinated prosecutor and former chief warden of Evin. His imprisonment was renewed after his refusal to sign a "confession." The trial of Mr. Amir Entezam included several overt violations of Iranian law and international rules concerning a fair trial, including denial of counsel

and access to the allegedly incriminating evidence against him. Mr. Entezam was not allowed to attend the first hearing, and the judge stated that he did not know the reason for his detention, which subsequently was prolonged for 10 more months to receive accusations. Having been a frequent victim of torture in prison and denied proper medical treatment, Mr. Entezami has serious health problems and was the victim of an assassination attempt during a transfer. Foreign observer missions, including The International Commission of Jurists (ICJ), were barred from attending judicial proceedings.

On March 18, 2001, The Tehran Revolutionary Court closed down the Iran Freedom Movement, an unlicensed political party, whose several members, including Mehdi Bazargan, (former Prime Minister), had participated in the first government of the Islamic Republic in 1979, on the grounds that the party was attempting to "overthrow the Islamic regime." The Court's action was in a clear violation of Iran's Political Parties Law, which provides that the courts may take action against a political party only after receiving an official complaint from a special committee, known as an "Article 10 Commission," in charge of reviewing the activities of political parties. Apparently no such complaint had been made against the Freedom Movement. The Court also ordered the detention of dozens of other independent political activists, legal scholars, engineers and physicians around the country on suspicion of being associated with the Freedom Movement. Most of the detainees have been held incommunicado on unknown charges, without access to medical treatment, and their families have had no information regarding the places of their detention.

Iran's reformist-dominated Parliament has recently filed suit against several hard-line judiciary members, including senior judges, for violations of the Constitution. The Parliamentary Committee in charge of investigating complaints against the state recently declared that the judiciary had constantly disregarded the Constitution in the arrest or detention of political activists and journalists. In an open letter read out in the Parliament by a member, Davoud Hassan-zadegan, the names of 50 activists are mentioned as having been denied access to lawyers, some of whom had been held in "temporary" solitary confinement for more than five months.

The infamous trial of 13 Iranian Jews, accused of espionage for Israel, failed to meet international standards of a fair trial. The accused were arrested without warrant in 1999, have been detained for over one year in solitary confinement, without official charges or access to lawyers and relatives. Furthermore, trials held behind closed doors and the courts used televised confessions by the defendants. In July 2000, they received prison sentences

ranging from four to 13 years, which were reduced subsequently by the Court of Appeals to between two and nine years' imprisonment.

Qualification, appointment and dismissal

According to Article 164 of the Constitution, “a judge cannot be removed, whether temporarily or permanently, from the post he occupies except by trial and proof of his guilt, or in consequence of a violation entailing his dismissal. A judge cannot be transferred or redesignated without his consent, except in cases when the interest of society necessitates it, and only by decision of the head of the judiciary branch after consultation with the chief of the Supreme Court and the Prosecutor General.” The Article insures that “the periodic transfer and rotation of judges will be in accordance with general regulations to be laid down by law.” However, the authority to determine the “interest of society” in “exceptional” cases of judges' transfer remains with the head of the judiciary, thus conferring upon him far-reaching power over the judicial profession.

The 1991 Disciplinary Court of Judges Law (DCJL) grants the head of the judiciary further authority to disqualify and dismiss judges. This law contains several deficiencies that severely undermine the independence of judges:

- The vague criteria for disqualification of judges: According to Article 1 of the DCJL, the head of the judiciary may determine disqualification of a judge according to religious criteria, which could be interpreted in a broad and ambiguous way.
- The dependence and partial structure of the Disciplinary Court of Judges (DCJ): Once the head of the judiciary reaches the conclusion that a certain judge is disqualified, he may refer the case to a Commission of Experts composed of the Prosecutor of the DCJ, the Deputy Ministry of Justice in Legal and Parliamentary Affairs and the Deputy of the Prosecutor-General. After reviewing the case, the Commission transmits the matter for final decision regarding qualification of the judge to the DCJ, which consists of the head of the judiciary, the head of the Supreme Court, the head of the first branch of the DCJ, the Prosecutor of the DCJ and the Prosecutor-General.

The membership structure of the DCJ undermines its independence, as two members of the DCJ are also members of the Commission of Experts, which would have been responsible for the earlier decision regarding the case. In addition, most members of the DCJ are not elected, but appointed by the head of the judiciary. Thus, the presence of the head of

the judiciary in the DCJ renders the court's decisions effectively dependent on the decision of the head of the judiciary, who is in charge of filing complaints against the judges in the first place.

- Restrictions on the independent decision-making of the DCJ: According to Article 2 of the DCJL, the decisions of the DCJ are only valid if the majority opinion includes the opinion of the head of the judiciary. Secondly, the decision of the DCJ is restricted only to the announcement of the qualification or disqualification of the judges. The determination as the type of the applicable disciplinary punishment in a case (e.g., dismissal, retirement or transfer of the judge) remains under the authority of the head of the judiciary.

LAWYERS

According to Article 35 of the Constitution "both parties to a lawsuit have the right in all courts of law to select an attorney, and if they are unable to do so, arrangements must be made to provide them with legal counsel." The assigned lawyers, however, typically assume a passive role, and in some cases, have been openly denounced in the courts by the defendant for not telling the truth. The disciplinary court for lawyers within the Bar Association has not been active for a considerable time.

The Independent Bar Association (IBA) of Iranian lawyers, despite the turmoil concerning the freedom of press and the courts, was silent on the rights of the defendants to fair trial and the detention of the lawyers. The Union of Iranian Journalists met with the Speaker of the Parliament to complain about the passive role of the IBA over the detention of three of its members, Mehrangiz Kar, Shirin Ebadi and Mohsen Rohami.

According to a 1998 law, the judiciary is empowered to confirm the competency of all law graduates to receive a license as a lawyer. In his interim report on the situation of human rights in Iran, the Special Representative of the Commission on Human Rights asserted that "as the bar cannot be beholden to the judiciary, that provision clearly offends international standards of the independence of the bar, as well as the reputation of the 90-year-old Iranian institution." Several cases of disrespectful behaviour on the part of judges toward lawyers were reported to the Islamic Human Rights Commission.

Despite the Law on the Independence of the Bar Association, which declares that the Bar Association is the only competent authority to issue

licenses to lawyers, the SCC accepts clergy members as lawyers. Moreover, the lawyers who are not clergy are banned from practicing their profession in the SCC, which requires the defendants to choose clerics as their lawyers. The non-cleric lawyers of Hojatoleslam Mohsen Kadivar, a reformist religious scholar, and Hojatoleslam Abdollah Nouri, a former Minister of Interior, were refused by the SCC and the accused were forced to receive the services of clergy for their defense.

CASES

Mehrangiz Kar [lawyer and women's rights activist]: After her participation in the international Berlin conference, where she made a speech advocating women's rights, Ms. Kar was arrested on 29 April 2000 and detained without charge. She was freed on \$60,000 bail on 21 June 2000. Her family had not been informed of her place of detention and she was denied access to legal council and a fair trial. Shirin Ebadi, her lawyer, had to resign, stating in an interview on 5 June that she was not permitted to meet with her client when she was questioned. On 10 October 2000 she was tried, along with sixteen other reformist intellectuals, who attended the conference, and on 13 January 2001, she was sentenced to four-year imprisonment by Tehran Revolutionary Court on charges of "propaganda against the state" and "insulting Islam." Mrs. Kar has recently been diagnosed with breast cancer and was prevented for a while from leaving the country for medical treatment.

Mohsen Rahami [lawyer, human rights defender, a former member of Parliament, and professor of law at Tehran University], and Shirin Ebadi [lawyer, women's and children's rights defender]: Mr. Rahami, a lawyer for students injured during the raid by security forces on student dormitories in July 1999, and Ms. Ebadi, an advocate of women's rights and a lawyer for writers and intellectuals murdered in 1998 and 1999, were arrested on 27 June 2000. Having represented the family members of the victims in "Serial Murders" cases, Mr. Rahami and Ms. Ebadi were accused of "disturbing public opinion" by producing and distributing a video cassette, in which Amir Farshad Ibrahimy, a former member of Ansar-i Hezbollah, stated that Ansar-i Hezbollah vigilantes had received payments from senior clerics and conservative government officials to carry out attacks against reformists and dissidents, including a failed attempt to murder Hojatoleslam Abdollah Nouri, former Vice President and Interior Minister. The lawyers were held for weeks in pre-trial detention without access to legal counsel. After a closed

trial in 27 September 2000, both lawyers received suspended prison sentences of fifteen months and were banned from practicing law for five years.

Nazar Zarafshan [lawyer]: Mr. Zarafshan, attorney for the families of the serial murder victims, was arrested on 10 December 2000 for "revealing state secrets" and "engaging in propaganda against the Islamic system." Mr. Zarafshan had criticized the lack of investigation before the trial of those convicted for these murders and suggested that a series of killings at the end of 1998 was part of a wider plot and that, therefore, other unsolved murders should be investigated and tried simultaneously. Mr. Zarafshan was freed on 13 December 2000, then rearrested shortly thereafter and held in solitary confinement until his release on 13 January 2001 on \$60,000 bail.

Hojatoleslam Sayyid Mohsen Saidzadeh [reformist legal scholar, lawyer and a former judge]: He was arrested without a warrant on 28 June 1998, and convicted by the SCC for his criticism of the legal situation of women under Iranian law and his advocacy of the equality of men and women before the law. After being held in incommunicado detention in Tehran for a prolonged period, he was released from prison in early 1999. He has been banned from performing any clerical duties and publishing for five years. As a result, he discontinued writing his monthly column, in which he had discussed various legal issues, focusing on women's rights.

ISRAEL AND THE OCCUPIED TERRITORIES *

The basic laws of Israel guarantee the independence of the judiciary, which is generally respected by the legislative and executive powers. The September 1999 landmark judgment of the High Court barring the use of torture and the April 2000 ruling prohibiting the holding of detainees for use as “bargaining chips” demonstrated that the judiciary would maintain independence even in certain sensitive cases relating to national security. The overall human rights situation vis-à-vis the Palestinian population under the jurisdiction or control of Israel deteriorated markedly. Following the outbreak of violence in late September 2000, Israeli security forces made repeated and sustained incursions into Palestinian territory, engaging in widespread and gross violations of human rights and humanitarian law.

Israel has no written constitution, but rather a series of basic laws which provide for fundamental rights. The legislative power is vested in a unicameral parliament, the Knesset, consisting of 120 members serving four-year terms pursuant to public election. The Knesset has the power to dissolve the government and to limit the executive branch. The executive authority is vested in the Presidency and the Government. The President, elected by the Knesset for a five-year term, serves as head of state and retains largely ceremonial functions. Moshe Katzav of the Likud Party currently holds the position. The principal executive powers are exercised by the Prime Minister, who is directly elected by popular vote, and his cabinet. The Prime Minister appoints the other ministers, subject to approval by the Knesset. The Prime Minister and at least half of all other ministers must be members of the Knesset. Presently, Israel is governed by a “national unity” government, which includes the Likud and Labour parties.

The continuing Palestinian *intifada* (uprising), following the visit by Ariel Sharon to the Temple Mount in October 2000 and the collapse of peace negotiations prompted the resignation of the former Prime Minister Edhud Barak (Labour Party). In February 2001, Ariel Sharon, of the conservative Likud Party, was elected Prime Minister of Israel. His Government adopted a

* See also chapter on Palestinian Autonomous Area.

hard-line approach in the occupied territories, which included repeated and sustained incursions into territory administered by the Palestinian Authorities. In October 2001, Israel sent troops and tanks into Palestinian cities following the murder of Rehavam Zeevi, a far-right Israeli politician and member of the cabinet. In December, bombs in Jerusalem and Haifa caused substantial civilian casualties. Israel responded by bombing the infrastructure of the Palestinian Authority and declaring it a "terror-supporting entity". With Mr Sharon seemingly bent on destroying the Palestinian Authority, and more Palestinians abandoning the peace process, a political settlement seemed far off.

HUMAN RIGHTS AND HUMANITARIAN LAW ISSUES

By October 2001, a year after the onset of the latest *intifada*, more than 570 Palestinians had been killed by Israeli security forces, in most instances unlawfully and when no lives were in danger. Palestinian armed groups (*Fatah* – and its military arm, *Tanzim* – *Hamas*, *Islamic Jihad*, the Popular Front for the Liberation of Palestine, and the Democratic Front for the Liberation of Palestine) and individuals had killed more than 150 Israelis, including 115 civilians both in Israel and the Occupied Territories. Thousands of additional Palestinians and Israelis have been wounded. Israeli forces killed Palestinians at demonstrations, checkpoints and borders, and bombarded Palestinian police stations and residential areas, leaving thousands of people without homes. At least 1,500 Palestinians have been arrested and many have been held in prolonged incommunicado detention and tortured. Almost every Palestinian town and village has been sealed from the outside world due to Israeli army checkpoints or physical barriers of earth, concrete blocks or metal walls. On security grounds, hundreds of Palestinian homes have been demolished and Palestinians have been prohibited from travelling along certain roads. Many Palestinians have become economically impoverished by the closures and traumatised by the killings and destruction.

Torture

In September 1999, the Supreme Court of Israel issued a landmark judgement declaring certain interrogation methods employed by the Israeli General Security Service (GSS) to be illegal (See *Attacks on Justice 2000*). The methods examined included violent shaking, painful shackling in contorted positions, sleep deprivation for extended periods of time and prolonged exposure to extreme temperatures. However, the Court's judgement did not rule out the possibility of prospective legislation by the Knesset that would sanction the

use of some physical force in interrogations by members of the GSS, provided that such legislation meets the requirements of article 8 of the Basic Law: Human Dignity and Liberty. This article requires the proposed legislation to befit the values of the state of Israel, to be enacted for a proper purpose, and to be of an extent no greater than is required. Enacting of any kind of legislation sanctioning the use of physical force would likely constitute a breach of Israel's obligations under the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment and general international law.

In November 2001, the Committee against Torture (CAT) considered the third periodic report of Israel. The CAT welcome the 1999 Supreme Court ruling as well as the Government's decision not to initiate legislation to authorise the use of physical means in interrogations conducted by the police or GSS. However, it regretted that the ruling did not reflect a categorical prohibition of torture. Although the Court prohibited the use of sleep deprivation for the purpose of breaking the detainee, it stated that if such deprivation were merely incidental to interrogation, it was not unlawful. In practice in cases of prolonged interrogation, it would be impossible to distinguish between the two conditions. Furthermore, the Court indicated that GSS interrogators who use physical pressure in extreme circumstances ("ticking bomb" cases) might not be criminally liable, as they may be able to rely on the "defence of necessity". The CAT also expressed concern at the continuing allegations received concerning the use of interrogation methods by the GSS against Palestinian detainees that had in fact been prohibited by the September 1999 ruling of the Supreme Court. Finally, the CAT concluded that Israeli policies on closure and on house demolitions, might, in certain instances, amount to cruel, inhuman or degrading treatment or punishment.

OCCUPIED TERRITORIES

Israel occupied the West Bank, Gaza Strip and East Jerusalem in 1967 and exercises control over these areas through a military government. As a result of signing the Israeli-Palestinian Declaration of Principles in 1993, areas containing much of the population came under Palestinian control. However, since the outbreak of violence in September 2000, Israeli forces have made periodic excursions into Palestinian-controlled territory. On 19 October 2000, the UN Commission on Human Rights adopted a resolution establishing an independent inquiry commission to investigate Israeli human rights violations and grave breaches of international humanitarian law. It also requested the UN High Commissioner for Human Rights to

undertake an urgent visit to the Occupied Palestinian territories to take stock of the violations of human rights and to facilitate the activities of the mechanisms of the Commission in implementation of the resolution. The Commission further requested that several Special Rapporteurs conduct immediate investigation into the situation and report the findings to the Commission.

The various UN reports have emphasised that as the occupying power in the West Bank, the Gaza Strip and Jerusalem, Israel bears *de jure* responsibility for implementing the applicable humanitarian law norms. Therefore, international humanitarian law obligations, including those contained in the 1949 Geneva Conventions, apply to Israel's role in the occupied Palestinian territories. The treaty bodies have subsequently reaffirmed that Israeli obligations remain applicable to the Occupied Territories. The various UN reports have identified massive and gross human rights violations committed by the Israeli Defence Forces (IDF), including *inter alia* excessive use of force, and extra-judicial executions/ political assassinations. The reports have noted a marked escalation in the use of lethal force against the civilian population, purportedly in response to demonstrations beginning in Jerusalem and spreading throughout the West Bank and Gaza Strip. The fundamental human rights and humanitarian norms of necessity and proportionality have been breached in most reported cases of confrontation between Palestinian civilians and Israeli forces.

In August 2001, the Committee on Economic Social and Cultural Rights considered the additional information submitted by Israel. The Committee deplored the State party's refusal to report on the Occupied Territories owing to the Government's position that the Covenant does not apply to "areas that are not subject to its sovereign territory and jurisdiction". The Committee expressed its deep concern at extensive violations of economic, social and cultural rights in the Occupied Territories. Such violations include severe measures to restrict the movement of civilians between points within and outside the Occupied Territories, severing their access to food, water, health care, education and work. The Committee noted that on frequent occasions, Israel's closure policy had prevented civilians from reaching medical services and that emergency situations have ended at times in death at checkpoints. The Committee was also alarmed over reports that the Israeli security forces had turned back supply missions of the International Committee of the Red Cross and the United Nations Relief and Works Agency for Palestine Refugees in the Near East attempting to deliver food, water and medical relief to affected areas.

Extrajudicial executions or targeted political assassinations have been carried out by the IDF. The practice of political assassination is a fundamental violation of international human rights standards, as well as a grave breach of the Fourth Geneva Convention. Several human rights instruments, including the Universal Declaration and ICCPR, affirm the right to life and specifically prohibit executions of civilians without trial and fair judicial process.

JUDICIARY

Israeli basic law guarantees the independence of the judiciary. The independence of the judiciary is generally respected by the legislative and executive powers. Article 22 of the basic law of the judiciary provides that it cannot be varied, suspended, or made subject to conditions by emergency regulations. Article 2 of the basic law of the judiciary states that “a person vested with judicial power shall not, in judicial matters, be subject to any authority but that of the Law”. However, members of the judiciary have tended to acquiesce to Government arguments of national security in sensitive cases. The September 1999 landmark judgement of the High Court barring the use of torture marked a change in this practice, as did the April 2000 ruling prohibiting the holding of detainees for use as “bargaining chips”. Judicial power is vested in the Supreme Court, District Courts, Magistrate Courts, Religious Courts and any other court designated by law.

STRUCTURE

Article 1 of the Basic Law of the Judiciary establishes that judicial power is vested in the following courts: the Supreme Court; District Courts; Magistrate's Courts; and other courts designated by Law as courts. It also vested judicial power in religious courts. No court may be established for a particular case.

Magistrate Courts are courts of first instance. They have jurisdiction over both criminal cases, where the penalty does not exceed seven years, and civil suits, for immovable property or where the value of the claim does not exceed one million shekels. Cases in Magistrate Courts are usually heard by a single judge, but in certain instances a matter may be heard by a panel of three judges. Judgements of Magistrate Courts may be appealed to the District Courts.

District Courts function both as courts of first instance and appellate courts. As a court of first instance, District Courts have jurisdiction over criminal cases with a penalty exceeding seven years imprisonment, and over civil suits where the claim exceeds one million shekels. As an appellate court, District Courts hear appeals from Magistrate Courts and Administrative Tribunals. Certain District Courts act in special capacity as Maritime Courts or Appeal Courts for elections.

The Supreme Court, which carries the ultimate judicial authority, is both a court of first instance, in cases involving government action, and an appellate court, when hearing cases from District Courts. Cases before the Supreme Court are heard by a panel of three judges or, if a party requests a rehearing of a case already decided by the Court, by a panel of five judges. However, questions of fundamental importance or those regarding constitutional issues can be heard by a larger number of judges. The Supreme Court sits in Jerusalem.

Various additional courts have been established to have jurisdiction over specific subjects, including religious courts, which are vested with jurisdiction to hear cases involving personal status, and labour courts, which have jurisdiction over cases involving labour relations.

The Israeli judicial system suffers from long delays and excessive case-loads. The administration of justice has been criticised as discriminatory. According to some human rights organisations, the legal system often imposes far stiffer punishments on Christian, Muslim and Druze citizens than on Jewish citizens. For instance, Israeli Arabs are more likely to be convicted of murder (which carries a mandatory life sentence) than Jewish Israelis. The courts are also more likely to detain Arab Israelis until the conclusion of proceedings.

JUDGES

A non-political selection of judges and the guarantee of life tenure secure the independence of the judiciary. Article 4 of the Basic Law of the Judiciary provides that judges be appointed by the President of the State upon election by a Judges' Election Committee. This Committee consists of nine members, including the President of the Supreme Court, two other judges of the Supreme Court elected by the body of judges thereof, the Minister of Justice and another Minister designated by the Government, two members of the Knesset elected by the Knesset and two representatives of the Chamber of Advocates, elected by the National Council of the Chamber. The Minister of

Justice serves as chairman of the Committee. Only an Israeli national may be appointed judge.

According to article 7 of the Basic Law of the Judiciary, the tenure of a judge shall end only: upon his retirement on pension; his resignation; his being elected or appointed to one of the positions the holders of which are debarred from being candidates for the Knesset; a decision of the Judges' Election Committee prepared by the chairman of the Committee or the President of the Supreme Court and passed by a majority of at least seven members; or upon a decision of the Court of Discipline (See below). Article 9 establishes restrictions on re-postings; a judge may not be transferred permanently from the locality he is serving to a court in another locality, save with the consent of the President of the Supreme Court or pursuant to a decision of the Court of Discipline. A judge shall not without his consent be appointed to an acting position at a lower court.

Regarding disciplinary proceedings, article 13 establishes that a judge shall be subject to the jurisdiction of a Court of Discipline, which consists of active and retired judges and judges appointed by the President of the Supreme Court. The rules of procedure shall be in accordance with law. Where a complaint or information is filed against a judge, the President of the Supreme Court may suspend the judge from office for such period as he may prescribe. Article 12 establishes that criminal proceedings against judges may only be opened with the consent of the Attorney-General. Furthermore, a criminal charge against a judge may only be taken to a District Court consisting of three judges, unless the judge has consented that the charge be tried in the ordinary manner. However, article 12(c) provides that these provisions shall not apply to categories of offences designated by law.

Article 23 provides that the manner of electing and duration of the tenure of the members of the Judges' Election Committee; qualifications for the posts of judges of the various grades; the conditions and procedures for terminating the tenure of a judge; and the proceedings for the suspension of a judge from office and review of the suspension shall all be prescribed by law. Article 10 establishes that salaries of judges and other payments to be made to them during or after their period of tenure shall be prescribed by law or by a decision of the Knesset or of a Knesset committee so empowered by the Knesset. No decision may be taken reducing the salaries of judges only.

MILITARY COURTS

Military Courts in Israel are established by the Military Justice Law. These courts have jurisdiction to hear cases involving military personnel for military and civilian offences. The military court system comprises both military courts of first instance and appellate military courts. Decisions from military courts of appeal may be reviewed procedurally by the Israeli Supreme Court. Judges of these courts are military personnel, with the President of the Court required to have legal training.

Israeli Military Courts have full jurisdiction in areas of the Occupied Territories that have not been handed over to Palestinian control (See chapter on Palestinian Autonomy). The Court of First Instance may try all cases connected to security, including criminal offences that may become security offences. Further, in article 2 of the jurisdiction in Criminal Offences Order of 1967, Military Courts were given jurisdiction over all criminal offences, by deeming them to be security offences. Palestinian detainees are judged in Israeli Military Courts. Although the jurisdiction of military courts in the Occupied Territories formally extends to Israeli residents in the Occupied Territories, in practice Israelis are never tried before one of these courts for offences committed in the Occupied Territories, but are rather tried before ordinary criminal courts. Military courts, following the establishment of the Palestinian Autonomy, are situated in military camps or attached to settlements, rendering it difficult for Palestinian lawyers to gain access to them. Authorisation is required to enter these areas and lawyers are frequently held up at checkpoints.

Military court trials do not meet international standards for fair trial. Judges and prosecutors are officers serving in the Israeli Defence Forces (IDF) or in its reserves. Judges are appointed by the IDF Regional Commander, following the recommendation of the Military Advocate General, who is advised by a special committee. Judges lack security of tenure and may be dismissed by the Regional Commander. This condition and the close links between military judges and military prosecutors rise to concerns as to the independence and impartiality of these tribunals. Trials are usually based on confessions and plea bargains. Detainees are prone to "confess" owing to pressures, such as incommunicado detention and interrogation methods amounting to torture or inhuman or degrading treatment. Many detainees plea guilty rather than risk trial because they lack confidence in the fairness of trial procedures or because the time expended for a trial might be equal to that a person convicted of this offence would spend in prison under the sentence.

ADMINISTRATIVE DETENTION

In Israel and the Occupied Territories, administrative detention is a procedure under which detainees are held without charge or trial. Neither criminal charges are filed nor is there intention to judge the detainee. In Israel and East Jerusalem, the Minister of Defence issues administrative detention orders, specifying the term of detention. In the Occupied Territories, except for East Jerusalem, military commanders issue such orders. Before the term expires, the detention order may be renewed and renewal is frequent in practice. The process may continue indefinitely. In the Occupied Territories, a judicial hearing is not afforded unless the detention order is longer than six months, in which case there is a judicial review at the culmination of six months. Shorter detention orders are renewed without judicial order. The law allows for the right to review every administrative detention, first by a military court and ultimately by the Supreme Court sitting as the High Court of Justice. However, this procedure does not comply with international standards, as in the vast majority of cases neither the lawyer nor the detainee are informed of the details of the evidence against the detainee. The court may determine which information to disclose based on security considerations. A defence lawyer may not be allowed to cross-examine witnesses.

The number of administrative detainees had been decreasing until the onset of violence in September 2000, after which the Government detained without charge hundreds of persons in Israel, the West Bank and Gaza. In November 2001, the Committee against Torture welcomed the Supreme Court's decision of April 2000 that the detention of a number of Lebanese, held as "bargaining chips", was unlawful and must be released.

LAWYERS

The legal profession is regulated by the Chamber of Advocates Law, which established the Israeli Bar. The Bar, headed by a president elected by the Bar membership for a four-year term, consists of two principal organs, the National Council and the Central Committee. The National Council has competency to adopt rules concerning the organisation of the Bar and its activities and is responsible for proposals for amending the Chamber Advocates Law. It is composed of the President of the Bar, the President's predecessor, the Director General of the Ministry of Justice, the State Attorney, the military Advocate General, 25 member elected by the other members of the profession and three members from each district elected by district committees. The Central Committee is the Bar's executive organ and is responsible for the

management of its affairs. It is headed by the President of the bar and its members are elected by the National Council.

The Bar's structure and administration ensures that the legal profession maintains a sufficient degree of independence from the executive and properly represents the interests of its clients. However, both Israeli and Palestinian lawyers have faced serious restrictions that hamper them from carrying out their professional tasks and responsibilities. The ability of Israeli or Palestinian lawyers to visit their Palestinian clients is often unduly limited. Palestinian lawyers are frequently unable to visit their clients in Israeli jails because of the difficulty of obtaining travel permits. The internal and external closure and the restriction on freedom of movement imposed by the Israeli authorities since 29 September 2000 have had far-reaching implications on the ability of lawyers to carry out their professional tasks and have led to serious breaches of the detainee's right and the state obligation to ensure legal representation upon arrest or detention within 48 hours. In fact, Israeli law, which also applies in East Jerusalem, establishes that although detainees must be brought to a court within 24 hours of their arrest, access to a lawyer may be withheld for up to 21 days. Military order 378 allows detentions of Palestinians in the Occupied Territories for up to 90 days without access to a lawyer.

CASES

Fares Riyad Abu Hassan [lawyer]: Beginning in October 1999, administrative restrictions were imposed upon this Palestinian lawyer by the Israeli authorities to prevent him from representing any individual in the military courts without the permission of Major General Ya'alon, Military Commander of the Central Division, West Bank, or any individual duly authorised by him. Virtually all the work of Advocate Abu Hassan has involved representing Palestinians in Israeli military courts. Detailed reasons for the restrictions on his professional activities were not provided in the court order, beyond a statement in the preamble that the order is necessary for "security reasons". The issuance of an order under article 85 (A) (4) of Military Order No. 378 of 1970 restricting the activities of a lawyer appear to have been unprecedented. An appeal against the order was rejected.

Adnan al-Hajjar [lawyer]: A Palestinian lawyer working for the Palestinian al-Mezan Human Rights Centre, Mr. al-Hajjar was arrested by the Israeli security forces on 23 April 2001 on his return from Egypt, where he had been with a Palestinian delegation attending a legal training seminar

sponsored by the US Agency for International Development. He was held for a month at Shikma prison, in Ashkelon, Israel, but never charged with any offence. It was reported that during his detention he was kept chained to a chair and interrogated daily for 20-hour periods over 14 to 15 days, except during weekends. He was also deprived of sleep for four days during this interrogation. He was released on 23 May 2001.

Daoud Darawi [lawyer]: Mr Darawi is a Palestinian lawyer and a human rights activist. On 10 September 2001, he was arrested by Israeli officials at King Hussein/Allenby Bridge as he was crossing into the West Bank from Jordan. He had been accused of membership in both the Popular Front for the Liberation of Palestine and the Islamic Jihad organisation. Mr. Darawi was allegedly tortured, including by “shabeh”, which involves forcing a person to remain in an uncomfortable or unnatural position for long periods of time. On 13 September 2001, an Israeli court extended Mr. Darawi's detention allowing the GSS 25 additional days for investigation. Mr Darawi's wife, also a lawyer, reportedly attempted to visit him in jail, but was not permitted to see her husband. Interrogators allegedly used her presence to further frighten Mr. Draw by telling him that she had been arrested. By the end of September, Mr. Darawi had neither been released nor charged with an offence.

ITALY

The Italian justice system continued to be hampered by excessively long periods of trial. Silvio Berlusconi, Italy's wealthiest business figure, and his centre-right coalition won the Italian general election held in 2001. For the first time in Italian judicial history, the serving Prime Minister is a defendant in criminal trials. Mr. Berlusconi has faced criminal prosecution in nine cases, but only three out of these have reached the final appeal court. The tangled relationship between justice and politics carries troubling implications.

Italy is a democratic parliamentary republic composed of regions, provinces and municipalities.

Following World War Two, the population voted to replace the monarchy, which had governed the country since unification in 1870, with a democratic republic. Italy adopted a written constitution in 1948, which strongly protected fundamental rights. The guardian of the Constitution is the Constitutional Court, which may judge the activities of Parliament by striking down unconstitutional legislation.

On 13 May 1999, the Parliament, consisting of the Chamber of Deputies and Senate acting in joint session, elected for a seven-year term Mr. Carlo Azelio Ciampi as President of the Italian Republic. He exercises mostly supervisory and guarantor functions. His most important political function is to mandate, after consultation with all political parties, the formation of a government by the political leader who has a majority in both houses of Parliament. Recently adopted legislation defines the tasks of the President of the Council of Ministers, and also distinguishes the competence of each ministry. In recent decades, Italy's head of government has been increasingly hampered by the need to form a coalition among the many political parties, some of which are very small.

The multiplicity of parties had been widely considered to result from the structure of Italy's electoral system, which until recently was one of almost pure proportional representation. In 1993 the law was amended to provide that 75 per cent of the members of the Chamber of Deputies be elected in "first past the post" single member constituencies, and 25 per cent by the

parties, and that Senators be elected through a hybrid system. However, the number of parties has since actually increased and there is no majority support for increasing the threshold (four percent of the national vote) required for parliamentary representation.

The “Clean Hands” anti-corruption investigations of the 1990's decimated two of Italy's major post-war parties, the Christian Democrats, who had ruled for decades, and the Socialist Party. The other major party of the post-war period, the Italian Communist Party, has changed its name and avowed its commitment to social democracy. Mr. Berlusconi's movement assumed its place in the vacuum that had been left on the right. In 1993, Mr. Berlusconi founded his political party Forza Italia and portrayed himself as a self-made man who had constructed a powerful television empire by breaking the monopoly of Italy's state-owned broadcasters. Mr. Berlusconi set up private networks with the benefit of specially tailored legislation pushed through by the later disgraced Socialist leader Bettino Craxi. Shortly before becoming Italy's Prime Minister in May 1994, magistrates had investigated numerous allegations against Mr. Berlusconi, including money-laundering, association with the Mafia, tax evasion, complicity in murder and bribery of politicians, judges and the finance ministry's police, the *Guardia di Finanza*. Mr. Berlusconi, who strongly denied all of these allegations, has maintained that left-wing magistrates dominate the judiciary and that the “Clean Hands” investigations were politically motivated.

During the recent general election campaign, owing to his myriad legal problems and apparent conflict of interest between his own business and affairs of states, Mr. Berlusconi attracted critical attention in the international media. The Economist magazine carried a cover story concluding that Mr. Berlusconi was “unfit to lead Italy”, and “the election of Mr. Berlusconi as Prime Minister would mark a dark day for Italian democracy and the rule of law”. *Le Monde* ran an editorial suggesting that a vote for Mr. Berlusconi “would be in contradiction to the values of the European community of which the Italians are a key part”. *El Mundo* made further allegations about Mr. Berlusconi's business connections in Spain.

On 22 April 1998, the Chamber of Deputies unanimously passed a draft bill which provided the Government with three different options regarding means to resolve conflicts of interest involving ownership by a person holding public office of significant economic holdings or possession of instruments of mass communication: resignation from office, sale of the holdings, or their assignment to a blind trust. When it reached the Senate, the bill was judged inadequate by the Ulivo. For three years the Constitutional Affairs

Commission sought to come up with an alternative, but the solution proposed by the centre-left (ineligibility for office) was considered by the opposition to be authoritarian and designed to damage Berlusconi. On 28 February 2001, the Senate passed a bill which would require a person holding public office to entrust his or her holding to a "separate management" and introduced harsh sanctions for violations. Instead of a blind trust, the law provides for a "fiduciary manager" who, after consultation with the interested parties, would be chosen by the Antitrust Authority together with the stock market regulator, Consob. Mr. Berlusconi and his allies objected, arguing that the interested parties should have the right to select the fiduciary.

On 13 May 2001, Mr. Berlusconi and his centre-right coalition (House of Freedom) was elected by a comfortable majority in both Houses of Parliament. After the first 100 days in office, Mr. Berlusconi was still seeking to resolve his conflict of interest problems. His government has proposed to set up an "authority of three wise men" appointed by the speakers of the two Chambers of Parliament, both of them members of Mr. Berlusconi's own coalition. This body would monitor all senior public figures, from the Prime Minister down to big-city mayors, and make representations to the Parliament or to courts if a conflict of interest arises. But they would not have the power to block suspect decisions or legislation.

On 7 October 2001, Italian citizens voted in favour of the federalist constitutional reform pushed through by the Ulivo centre-left government shortly before last May's general election, giving the central government exclusive competence on a series of matters and leaving such matters as health, education and local security to be shared by the Regions.

HUMAN RIGHTS BACKGROUND

In March 1999 the UN Committee on the Elimination of Racial Discrimination included in its principal subjects of concern "reports of acts of violence and ill-treatment by police and prison guards against foreigners and members of minorities in detention, concern was also expressed about the apparent lack of appropriate training for law enforcement officials and other public officials regarding the provisions of the Convention". It recommended that Italy "strengthen its efforts towards preventing and prosecuting incidents of racial intolerance and discrimination against foreigners and Roma people", as well as "ill-treatment of foreigners and Roma in detention".

In May 1999 the UN Committee against Torture urged that “legislative authorities ... proceed to incorporate into domestic law the crime of torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and make provision for an adequate system of compensation for torture victims”. The Committee highlighted its concern that “the prison system remains overcrowded and lacking in facilities which make the overall conditions of detention not conducive to the efforts of preventing inhuman or degrading treatment, that reports of ill-treatment continued and that many of them involved foreigners”.

In April 2000, the European Court of Human Rights determined that Italy was responsible for failing to carry out a “thorough and effective investigation into the credible allegations of ill treatment by Pianosa prison officers” made by Benedetto Labita in October 1993. Labita alleged that he and other prisoners had suffered systematic physical and mental ill treatment, mainly between July and September 1992.

Recent reports by non-governmental organisation continue to include allegations of ill treatment by law enforcement officials and prison officers. Although the allegations related to both Italian and foreign nationals, large proportion of the victims were of African origin or Roma.

G8: GENOA INVESTIGATIONS

On 20 July 2001, representatives from the G8 nations met in Genoa, Italy, for a three-day summit. Outside the meeting, over 200,000 persons, many of whom had travelled from abroad, took to the streets to demonstrate on issues such as world debt and globalisation. After two days marked by violence, one protester was shot dead by a young officer carrying out his military service in the *carabinieri* military force, 200 people were injured and over 280 protesters, many foreigners, were arrested.

The Italian policing operation appears to have breached a number of internationally recognised human rights standards. There are concerns that detainees were denied their rights to prompt access to lawyers and, in case of foreigners, consular officials, and prompt and adequate medical care. In addition, many were not allowed to have their relatives promptly notified of their whereabouts and were not informed of their rights.

On 1 August 2001 the Constitutional Affairs Committees of the Chamber of Deputies and Senate, decided to establish a fact-finding committee to examine events occurring in the context of the G8 Summit in Genoa, including alleged human rights violations by law enforcement officials and prison

officers. They rejected the option of an ad-hoc parliamentary commission of inquiry with full judicial powers.

In addition to the work of the parliamentary fact-finding committee, eleven criminal investigations into the conduct of law enforcement officials and prison officers have been opened by the Genoa Public Prosecutor's Office. The full account of the events surrounding the G8/Genoa policing operation is still emerging

THE JUDICIARY

Pursuant to Article 104 of the Constitution, "the judiciary constitutes an autonomous and independent organ and is not subject to any other power of the State." This institutional independence is guaranteed by the Superior Council of the Magistrature, which is an autonomous organ presided by the President of the Republic and is composed of two members *ex officio* (President of the Supreme Court of Cassation and the Prosecutor General attached to it) and 30 elective members (two thirds are elected by the judges and are judges themselves and one third is elected by the Parliament and are lawyers or professors of law). The Superior Council of the Magistrature also attends to the judges' recruitment, assignments, transfer, promotions and discipline (Article 105 of the Constitution).

The lengthy process of justice, especially in civil actions, has resulted in rendering Italy the most frequent Strasbourg "offender" in the jurisprudence of the European Court of Human Rights in recent years. Nevertheless, in October 2000 the Council of Europe Committee of Ministers acknowledged that various measures to modernise the judicial system have in fact been introduced.

STRUCTURE

The Italian system of courts maintains two distinct categories, those of ordinary jurisdiction and special jurisdiction. The organs which form the ordinary administration in civil and criminal cases are the Juvenile Court (*Tribunale per i minorenni*); the Tribunal on Freedom (*Tribunale delle libertà*); the Court responsible for the enforcement of the sentences (*Tribunale di Sorveglianza*); the Justice of Peace (*Giudice di Pace*); the Court of First Instance (*Tribunale ordinario*); the Single-Judge Court of First Instance (*Giudice Unico di primo grado*); and the Court of Appeal (*Corte*

d'Appello). The Supreme Court of Cassation (*Corte di Cassazione*) is the highest tribunal in the country and has national jurisdiction to review sentences passed by lower courts, but only on questions of law.

The special jurisdictions of the Italian legal system consist of Regional Administrative Courts (*Tribunale Amministrativo Regionale*) and the Council of State (*Consiglio di Stato*), regarding the administrative jurisdiction; State Auditors' Department (*Corte dei Conti*), for matters concerning public accountancy; Military Courts (*Tribunali Militari*); Military Appeal Courts (*Corti militari d'appello*); Military Surveillance Courts (*Tribunali Militari di Sorveglianza*) for military offences committed by members of the Armed Forces; Provincial Fiscal Commissions (*Commissioni Tributarie Provinciali*) and District Fiscal Commissions (*Commissioni Tributarie Distrettuali*) for matters concerning taxes.

Special organs have also been established. The Court of Assizes, composed of two career judges and six lay judges, is competent to hear cases involving very serious crimes. The Regional Court of Waters (*Tribunale regionale delle acque pubbliche*) and the High Court of Waters (*Tribunale Superiore delle Acque Pubbliche*) have competency for matters related to water.

Career judges who exercise their functions under the supervision of the Minister of Justice hold the office of Public Prosecutor. Their task is to ensure that justice is administered promptly and regularly, promoting the repression of crime. They are entitled to start criminal proceedings. In addition, the District Anti-Mafia Division is present in each office of the State Prosecutor, attached to the courts located in district capitals. These Divisions are made up of prosecutors specialized in investigating organized crime. Within the Office of the Prosecutor General attached to the Court of Cassation is the State Anti-Mafia Division, which co-ordinates the investigations carried out by the District Divisions. A legislative initiative is pending presently to separate the careers of public prosecutors and magistrates within the judiciary.

JUDICIAL REFORMS

The Former Minister of Justice, Piero Fassino, commented on the Government's record on justice over the past five years at the opening of the 2001 Judicial Year. The ceremony coincided with the end of the Parliamentary session, which in 1996 had opened with the unveiling of the then-Justice Minister Giovanni Maria Flick's reform package, aimed primari-

ly at improving efficiency within the judicial system. The announcement of that reform package was followed closely by a program to provide certain legal guarantees, which resulted in lengthening the legal processes, increasing cases of prescription, and leading to the early release of dangerous prisoners whose term of protective custody had expired. The trend therefore ran counter to improved efficiency.

THE "SINGLE JUDGE" REFORM

The single-judge reform was instituted for criminal courts on 2 January 2000 and for civil courts on 2 June 1999. Certain courts, particularly those within smaller jurisdictions, have achieved positive results from this reform. For example, Rimini courts went from processing 1,809 civil cases in 1999 to 1,906 in 2000 and from 2,754 to 3,892 criminal cases during the same period. However other courts have not fared as well, either because of the lag effect necessary during transition or the assimilation necessary for the complicated new legal code (especially regarding criminal law). There also remains a massive backlog of cases in a number of jurisdictions. Yet almost all court presidents agree that a lack of staff both on the benches and in the administrative offices is mostly to blame, and the presidents maintain that they cannot expect to implement such a complex reform without the necessary resources.

The Palermo Court president Carlo Rotolo has pointed out that in Palermo, "the ratio of judges to prosecutors is 1.7, whereas in Milan there are 3.5 judges per prosecutor despite the fact that the size of the jurisdiction is the same". The consequences of the reform, which places the first instance of judgment in the hands of a single judge, are clear. At the first level (*preture e tribunali*), each civil judge has seen his caseload rise from 450 to 670 in a year. However this caseload is nothing as compared to the 12,000 cases per year now faced by labour dispute judges.

Giovanni Salvi, vice-president of the national association of judges, has viewed the reforms as encouraging.

THE "FAIR TRIAL" REFORM

In common with other internationally recognised human rights principles, the European Convention on Human Rights (ECHR) does not yet enjoy constitutional rank. Therefore, article 111 of the Constitution was amended on 23 December 1999 by adding a paragraph that guarantees the right to due

process of law in all judicial proceedings, thus giving effect to Article 6 of the ECHR.

The amendment provides that due process of law should be guaranteed in every proceeding before the courts, and, more specifically, in criminal proceedings where the accused shall have the right to be promptly informed of the charges against him/her and be allowed time and conditions to prepare his/her own defence. The accused shall also have the right to examine or have examined witnesses against him/her and to present witnesses in his/her favour under the same conditions. The amendment also establishes the principle whereby all evidence being produced during trial should be subject to questioning by the other party. Finally, it establishes the legal right to be tried within a reasonable time.

This constitutional amendment has yet to be fully implemented, because the inquisitorial and accusatorial models are in a transitional phase, whereby old institutions continue to exist and overlap with the new. A major step towards the equality of arms between prosecution and defence was taken by the adoption of law 397/2000 on defence investigations, allowing defence attorneys to conduct their own investigation. They can move "parallel" to public prosecutors and the judiciary police to interrogate suspects, inspect the crime scene, and sift through papers in public offices to procure evidence. Private investigators and technical consultants may now aid the defence.

Administration and resources

The Minister of Justice governs the administrative services connected with the exercise of the judicial functions. In the offices attached to the Courts, the administrative personnel, under the direction of the Head of Office and of a director, carry out tasks which support the judicial activity. These tasks include maintaining the documents of the proceedings, publication of the judges' decisions, enforcement of sentences, as well as largely administrative tasks involving personnel and budget.

ANTI-MAFIA OPERATIONS AND ORGANISED CRIME

The Parliament adopted controversial legislation on 3 October in open voting, while in the previous secret ballot, 27 members of Berlusconi's coalition had voted to delay passage of the bill. The legislation ratifies a 1998 accord between Italy and Switzerland aimed at enhancing judicial co-operation in the fight against the Mafia, terrorism and financial fraud. It supplements and updates the 1959 European Convention on Mutual Assistance in

Criminal Matters, to which both countries are party. However, amendments introduced by the Government will make it more difficult for Italian courts to accept evidence procured from Switzerland and other states unless it has been subject to rigid bureaucratic procedures, such as certification by the government in the country of origin. Italy's opposition has called for a referendum on a new law, arguing that the bill weakens the fight against terrorism at a time when co-operation among governments should be made easier.

At a summit of European Justice Ministers in Moscow on 2 October 2001, Ruth Metzler Arnold, the Swiss justice minister, warned her Italian counterpart Roberto Castelli that the new amendments "do not correspond to the spirit of the accord" and "in the fight against terrorism, it was barely conceivable that Italy was slowing down cross-border cooperation over justice, given the current climate of concern about international terrorism, and the Italian-Swiss accord was meant to speed up anti-criminal co-operation". A leading United States judge threw his weight behind expression of concern about the newly amended law, warning that Italy was going down "the opposite road to the US and the entire international community" in the fight against terrorism.

The National Association of Magistrates also criticised the new law saying it could render many cases impossible to prosecute. In addition, the measure is retroactive and likely to affect over 5,400 requests made since 1996 by Public Prosecutors throughout Italy.

The Government has explained the retroactive measure as a tool to protect defendants from possibly false information. Many critics of the Bill in the political opposition also noted that it would protect Mr. Berlusconi and his closest friends in pending corruption cases in which information about secret foreign bank accounts might be useful.

MR. BERLUSCONI ON TRIAL FOR ALLEGED BRIBERY OF JUDGES

Before the election in May 2001, defense counsel in the cases of alleged bribery of judges in which Mr. Berlusconi and his closest friends were allegedly involved challenged the admissibility of evidence obtained by Italian prosecutors from their Swiss counterparts.

The complaint asserted that the letter of the 1959 European Convention on Mutual assistance in Criminal Matters had not been observed. For instance, the Convention provides that the country of request should certify copies of documents as authentic. As a matter of practice, the Swiss authorities do not certify documentation used to transmit the evidence. The Italian courts rejected all these complaints and ruled that no breach of Italian law had taken

place. But the Bill's two controversial articles would almost certainly exempt Mr. Berlusconi and his friends from judge-bribery charges. At present, responses by the Swiss authorities to requests for judicial assistance do not usually comply with the letter of the 1959 Convention. Unless the authorities in Switzerland are willing to change the way they respond to such requests, the Italians may be unable to obtain admissible evidence from, for instance, Swiss banks.

CLEAN HANDS ANTI-CORRUPTION OPERATIONS

Reform of Italy's false accounting law has been under discussion for a considerable period of time. The magistrates who launched the "Clean Hands" investigations in 1992 have used the current legislation to prosecute a string of businessmen, including Mr. Berlusconi. The previous government had introduced a modest bill to reform the false-accounting law, but the Parliament was unable to enact it before the election. Mr. Berlusconi's government passed this bill in August in the Lower House, but with crucial amendments.

One amendment decriminalises most offences of false accounting in private companies. Prosecutors therefore will not be able to bring charges except in response to a complaint from a party (a shareholder or a creditor) who is able to show damage as a result of the alleged fraud. Secondly, prison sentences, currently up to five years, are greatly reduced. Thirdly, as a direct result of this reduction, the statute of limitation will expire much earlier. At present, a defendant can be convicted of an offence of false accounting for up to 15 years after the offence was committed. Under the bill, this period is cut to a maximum of seven years and six months. Thus, in many instances, the Magistrates' work will not come to fruition.

If approved in autumn without amendment by the upper house and signed by the President, the bill will become law. In that event, the verdict in two of the three criminal trials in which Mr. Berlusconi is currently a defendant would be irrelevant.

MR. BERLUSCONI ON TRIAL FOR FALSE ACCOUNTING

The two criminal trials in which Italy's Prime Minister is currently a defendant on charges of false accounting involve private companies in which he has an ownership stake. The first relates to alleged irregularities in the purchase of a footballer by a. c. Milan football club. The case concerns

alleged falsification of the accounts of Fininvest, his main holding company. He also faces further possible charges of falsification of the accounts of Fininvest. All of these alleged offences of false accounting took place in 1993 or earlier. Thus, under the new bill, the offences would be covered by the refined statute of limitations. Under the Italian penal code, this extinguishes the crime.

CASES

Jorge Olivera case

In August 2000, a former Argentinean Military officer, Jorge Olivera, was arrested in Rome on an international warrant issued by France for the abduction, subsequent torture and disappearance of a French citizen, Marie Anne Erize Tisseau, in Argentina in 1976. The French Statute of Limitations did not apply because the unresolved "disappearance" was seen as a continuous crime. While full examination of the relevant French extradition request was still pending, the Roma Appeal Court considered an application by Jorge Olivera for provisional release or house arrest. The Court, noting that Jorge Olivera's defence lawyers had presented a death certificate for the victim recording her death in 1976, said that the crime could not, therefore, still be continuing. He also stated that the crime of which Olivera was accused was covered by a statute of limitations, indicating that under Italian law, the statute of limitations normally applies to the crime of abduction after 15 years or, under certain circumstances, up to a possible maximum of 22 years and six months). On this basis, the court ruled that there were no grounds to detain Jorge Olivera who was released and who immediately returned to Argentina.

The Procurator General appealed against the court's decision. The Minister of Justice announced an internal disciplinary investigation into the conduct of the appeal judges and the Public Prosecutor opened an investigation into the apparently false death certificate presented to the court.

In February 2001 the Supreme Court of Cassation annulled a Rome Appeal Court sentence. It ruled not only that the appeal court had released Jorge Olivera on the basis of a false death certificate, but given the Argentine context, it should have considered the alleged abduction as one aimed at subverting the democratic order, a crime to which the statute of limitations does not apply. It returned the dossier to Rome appeal court for examination of the extradition request.

Sofri, Pietrostefani and Bompressi case

(See *Attacks 2000*)

After nine years of judicial proceedings and seven trials, in January 2000 the Venice Appeal Court confirmed a 1995 verdict by the Milan Appeal Court which had sentenced Sofri, Pietrostefani and Bompressi, three leading members of the former extraparliamentary left-wing group "Continuous Struggle", to 22 years of imprisonment for participating in the killing of police commissioner Luigi Calabresi in Milan in 1972.

In October, when the Supreme Court examined an appeal lodged against the January judgment, the Procurator General's Office asked it to annul the Venice judgment and order new review proceedings. However, the Court rejected the appeal.

After all domestic remedies had been exhausted, at the end of the year the three men lodged a complaint against Italy before the European Court of Human Rights, claiming violations of fair trial guarantees.

JAMAICA

The judiciary has been hampered by inefficient practices, a severe backlog of cases due to limited resources and a lack of political resolve to institute reform. These barriers to the dispensation of justice are situated within a context of high national poverty, politically motivated violence and a security force that routinely ignores the rule of law in the exercise of its duties.

Jamaica is a constitutional parliamentary democracy that achieved full independence from the United Kingdom in 1962. During the 1970s, this Caribbean island state suffered depressed economic conditions which contributed to recurrent societal and politically motivated violence.

The Jamaican Constitution declares itself the supreme law of the land and provides that all laws inconsistent with it are void to the extent of such inconsistencies. It is rooted in the separation of powers between the three branches of government, namely the executive, the legislature and the judiciary. Executive authority is vested in the Prime Minister and, subject to constitutional restrictions, may be exercised either directly or through subordinate officers. The legislative power resides in a bicameral Parliament, which is composed of the Prime Minister, an upper house called the Senate and a lower house called the House of Representatives.

Politically, the Jamaican populace has shifted allegiances between two legislative parties, the People's National Party, (hereinafter PNP), and the Jamaica Labour Party (hereinafter JLP). The PNP, under Prime Minister P.J. Patterson, has held power since 1992, with the 1997 national elections granting this party 50 of 60 available parliamentary seats. Significantly, in the weeks preceding the 1997 election, it was reported that while there was a degree of voter intimidation, such infringements were significantly less violent than during previous general election campaigns.

In April 2001, violence with political undertones was triggered by the drive-by shooting of a man in an area affiliated with the ruling PNP. The murder triggered gang violence in surrounding areas, which by July 2001 had claimed the lives of an additional 40 persons. On June 12, 2001 alone,

19 Jamaicans perished in clashes between supporters of the two opposing political parties. Compounding this societal chaos, in the capital city of Kingston violent riots broke out between the Jamaican security forces and inner city residents.

HUMAN RIGHTS BACKGROUND

With notable exceptions, the Jamaican Government generally respected the human rights of its citizenry. However, serious problems continue to exist with members of the security forces, who arbitrarily and unlawfully detain, beat and, in some cases, murder citizens during the course of their duties. In this connection, although the Government has moved to punish some law enforcement officials engaging in such illegal activities, continued impunity for the security forces remains a serious problem.

Numerous legal safeguards, found in the Constitution and subsidiary rules have been erected to protect the Jamaican citizenry from arbitrary and illegal actions committed against them by security officials. However, Jamaica has a poor record of protecting its citizenry from the extrajudicial and illegal actions perpetrated by its security forces. Indeed, the incidence of fatal shootings of Jamaican civilians by police, 140 in the year 2000, was the highest per capita rate in the world. This figure is compounded by official statistics evidencing that during the preceding 10 years, some 1,400 civilians had been mortally wounded by the police, for an average of 140 victims per year. Given the country's relatively small population, 2.65 million, these figures are alarming. It is not simply the rank and file population that suffers at the hands of the Jamaican security establishment. As alleged by an October 2000 public media report, the police unlawfully wiretapped the telephones of the Prime Minister, two Cabinet members and other senior officials. It must be recognised also that the police themselves suffer among of the highest rates of death in the world.

Under the PPCA, the police must investigate and discipline themselves, and this process has not inspired the confidence of the Jamaican citizenry. The independence of this body has been hampered by understaffing, underfunding, a lack of effective enforcement mechanisms and a dependence on questionable PPCA police investigations. These questionable investigations stem from the fact that investigators are generally disinclined to investigate crimes allegedly committed by members of their own profession in an impartial or thorough manner. The aforesaid factors result in a high degree of impunity for illegal actions committed by the security establishment against

the Jamaican citizenry, further contributing to a trend towards vigilantism and socio-political violence.

In recent years Jamaican human rights organisations have endured an increase in the level of threats and harassment, sometimes with the explicit or tacit support of the Jamaican security forces and Government. For example, in May and June of 2000, two members of the organisation, Jamaicans for Justice, received death threats in a series of anonymous phone calls. A spokesperson for the Jamaican Police Federation lent its implicit support for the harassment by labelling this organisation as "suspicious", stating that the Federation would monitor the group "closely." Attacks against human rights defenders continued during the 2001 funeral of a police officer, when the Minister for National Justice and Security, K D Knight, stated that the members of human rights organisations were "wimps" who sympathised with criminals.

THE JUDICIAL SYSTEM

Structure

The Jamaican judiciary and legal system are based on English common law and practice. Three courts handle criminal matters at the trial level. Resident magistrates try lesser misdemeanour offences, while a Supreme Court judge tries felonies other those involving firearms, which are tried before a judge of the Gun Court. Defendants have the right to appeal a conviction of any of the three trial courts to the Court of Appeal, which is the highest Jamaican court. The Constitution allows the Court of Appeal and the Parliament to refer cases to the Judicial Committee of the Privy Council in the United Kingdom as a final court of appeal.

Guarantees of judicial independence are found in the Constitution, Chapter VII, sections 97(3) and 103(4). These include a prohibition on the abolition of the office of a Judge of the Supreme Court (the Court of first instance) or Court of Appeal while there is a substantive holder of that office. The grounds upon which a judge of the Supreme Court or the Court of Appeal may be removed from office are: (a) an inability to discharge the functions of the office (whether due to a physical or mental disorder or another cause); or (b) inability to understand the English language.

Certain provisions of the Constitution further guarantee judicial independence:

20(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. (2) Any court or other authority prescribed by law for the determination of the existence of the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time. (3) All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or other authority, shall be held in public.

While an independent judiciary largely functions in practice, it is situated within an overburdened system operating with inadequate resources, human and material. Trials in many cases are delayed for years, for example in the case against brothers Kenneth and Floyd Myrie who have spent more than five years in custody awaiting trial for murder. Further, numerous cases have been dismissed because files cannot be located. This predicament owes itself to a Court administration system that employs archaic practices that hinder the efficient rendering of justice. As an example of such inefficiency, the spoken words of witnesses continue to be recorded by the sitting justice in his or her own handwriting. When a witness is finished testifying, the justice reads back his or her statement, amendments are duly made and the piece of paper on which the testimony has been recorded is handed around for those in authority to sign and to initial any and all changes. The lack of judicial resources combined with administrative inefficiencies creates such situations.

Assistance for the Jamaican Legal System

In 1995, the Jamaican Government initiated a night court system, which has had limited success in reducing the backlog of cases. In addition, in February of 2000, the salaries of state appointed defence counsel were increased, while, recently, the donation of computers for judicial use has assisted the courts in dispensing more efficient justice.

The Social Conflict and Legal Reform Project (hereinafter SCLRP), which runs from 1999 through 2004, is a five million dollar Canadian initiative intended to enhance the capacity of both the civil legal system and the general Jamaican public to manage societal conflict. The major components of assistance for the state legal system include the establishment of a court-annexed system for alternative dispute resolution; improved access to up-to-date legal information; better court record-keeping; judicial sensitivity training to enhance the benches' understanding of social context, especially gender issues; and increased awareness of the rights of children and youth. At the community level, the project focuses on improving collaboration between groups such as police, educators and social service professionals. The SCLRP also supports communities in their efforts to articulate their own solutions to local problems using conflict management. At the end of the five-year period, the project should result in 200 community members trained in conflict resolution and as mediators. Furthermore, two peace and justice centres will be established in two pilot communities, which persons in dispute will attend for mediation. Taken together, the SCLRP should contribute to the improvement of the Jamaican legal system's capacity to resolve civil disputes.

Prospectively, there are increasing calls for a Caribbean court of final appeal to be based in the region, which would replace the British Privy Council, which presently acts as the final court of appeal. The Caribbean Court of Justice is the proposed regional judicial tribunal to be established by the Agreement Establishing the Caribbean Court of Justice. It has had a long gestation period commencing in 1970, when the Jamaican delegation at the Sixth Heads of Government Conference proposed its establishment. Whether this initiative will come to fruition is uncertain.

CASES

Dahlia Allen [Lawyer]: During 2000, Ms Allen represented some twenty inmates of the St. Catherine Adult Correctional Centre who had been the alleged victims of ill-treatment by correctional officers. She also represented homeless people allegedly abducted and or ill-treated by the police in the Montego Bay area. Taking up these causes during hearings of a Commission of Inquiry called to investigate said claims, Mrs. Allen reported that she received telephone death threats and was the subject of surveillance and illegal wiretapping by agents of the Jamaican security authorities. Ms. Allen was said to have been intimidated and harassed solely as a result of her human rights work in representing clients who, under domestic and

international legislation, possess the right both to legal representation and to having their allegations of abuse investigated by a competent authority. The pattern of continuous intimidation and harassment prompted Ms. Allen to leave Jamaica in August 2001.

Hilarie Sobers [Lawyer]: A lawyer, human rights activist and journalist, Mr. Sobers received a death threat in August of 2001 that appeared to emanate from a current Jamaican Government supporter. Mr. Sobers is an outspoken critic of the Government's human rights record and these views are reflected in a weekly column that he pens for the *Jamaica Observer* newspaper. He has particularly attacked the failure of the authorities to prevent extrajudicial executions by the Jamaican security forces. The August death threat, received through the post and delivered to the Jamaica Observer's office addressed to Mr. Sobers contained a picture of a gunman raping and shooting the lawyer with an M16 rifle. Referring to his work and the letter read, "When we ready wi a go shoot all a oonu like Perkins, Wignal and all oonu lawyer in a oonu rass hole... Fire in a yu batty." (When we are ready we are going to shoot all of you like Perkins, [a renowned radio journalist], Wignal, [another journalist working for the Jamaica Observer], and all of you lawyers in the arsehole... Fire in your arse). The day before the death threat was delivered, Mr. Sobers and representatives from a human rights organisation had gone to a police station in the Jamaican capital city of Kingston to provide legal assistance to several young men who had been arrested. When questioned, the police refused to say why the detainees had been arrested. Questioned further, an officer grabbed one of the representatives, put her under arrest and charged her with using abusive language and obstructing an officer. At this time, another of Mr. Sobers' party was threatened and the group was evicted from the premises of the police station.

KENYA

A Constitutional Review process has been under way and a significant portion of civil society has now been allowed to participate. The Government has attempted to intimidate the opposition media with arrests and prosecutions. The administration of justice is riddled with political influence and inadequate funding, and lawyers are frequently denied access to clients. The continuing economic crisis and political instability has further undermined the judiciary and led to a deteriorating human rights situation. These factors contribute to a climate of impunity.

Kenya achieved independence from the United Kingdom in 1963. Jomo Kenyatta served as president until his death in 1978, when he was succeeded by Daniel Arap Moi. The National Assembly has been dominated by the ruling Kenya Africa National Union (KANU).

The present Constitution came into force in December 1964, when the Republic was established. It requires a two-thirds majority of the unicameral National Assembly for any amendment. There have been numerous constitutional amendments under Moi's presidency. In 1986, control of the civil service was transferred to the President's office, and the President was given power to dismiss High Court judges. Also in 1986, the secret ballot for preliminary elections was replaced by public queue-voting. The secret ballot was reinstated in 1990 and the tenure of office of judges was restored in 1992. In 1991, the single-party rule ended, and the first multi-party elections were held in 1992, mainly as a result of domestic unrest and pressure from international aid donors. President Moi was last re-elected during the general elections of 29 December 1997. These elections, which took place at the presidential, parliamentary, and local levels, were marred by allegations of widespread fraud. The KANU adopted a number of strategies that undermined free and fair elections, such as a lopsided voter registration which excluded opposition voters and the appointment of the Electoral Commission's members by the President. President Moi's term ends in 2002 and he is not eligible for re-election.

The Constitution of Kenya provides for the separation of powers. The President is the head of state and appoints a Cabinet of ministers from among the members of the National Assembly to aid and advise the government of

Kenya. The Cabinet is collectively responsible to the National Assembly in the execution of its office. The Cabinet initiates and directs national policies. It also implements laws passed by the legislature and performs tasks involving the appointment, tenure and dismissal of government officers. The President has extensive powers including the ability to declare a state of emergency.

The legislative power of Kenya is vested in the parliament which consists of the President and the National Assembly. The National Assembly consists of 210 popularly elected members, 12 members nominated by the President from nominees of political parties in proportion to party strength, and two *ex officio* members, the Attorney-General and the Speaker. The President is responsible for the summoning of parliament at least once a year and can at any time dissolve it.

The country is divided into eight administrative regions which are further subdivided into districts. The central government appoints a commissioner for each district and region.

The worsening financial situation and continuous reshuffling of government ministers by President Moi has led to a growing lack of confidence in the Government and the development of political instability. All government bodies have been subject to persistent allegations of corruption. In May 2000, a parliamentary committee-made up of opposition politicians and ruling party members- published a "list of shame" of corrupt leading politicians and civil servants. The report states that "corruption exists at every level of Kenyan society, but is strongest in the civil service, the provincial administration, the local authorities and the judiciary". Nevertheless, in July 2001, the Attorney General Amos Wako published a new anti-corruption bill that would grant amnesty to officials for economic crimes committed before December 1997. In August 2001, the bill was defeated by the Parliament, and it is not clear whether it will be introduced again to Parliament in for adoption.

THE CONSTITUTIONAL REVIEW PROCESS

Following the December 1997 elections, a forum comprised of political and civil society members was appointed to redraft the Constitution, and on 8 December 1998, the Constitution of Kenya Review Commission Act came into law, setting down the basis for constitutional review and establishing organs to facilitate public involvement in the review of the Constitution. However, in June 1999, the President announced that the review was to be

carried out solely by the National Assembly and not by an independent body consisting of the National Assembly and other interested civil society groups. This decision provoked controversy within Parliament and led to public demonstrations in Nairobi. The Ufungamano Initiative was established by religious leaders and other civil society activists as an alternative process to reform the Constitution.

In July 2000, the Constitution of Kenya Amendment Bill was passed, providing for the appointment of 15 commissioners to review the Constitution. In November 2000, the leader of the review team, Professor Yash Ghai, promoted the idea of a joint commission formed by the parliamentary-led commission and the Ufungamano Initiative. After lengthy negotiations preparations for the merger of the two constitutional review teams began in January 2001, and amendments were introduced to the Constitution of the Kenya Review Commission Act 2000 to accommodate the merger. However, President Moi questioned the credibility of the 12 experts proposed by the Ufungamano Initiative to join the unified commission. On 18 April 2001, the Law Society of Kenya declared the Constitutional Review Commission of Kenya to be holding office illegally, as according to the Constitution of Kenya Review Commission Act, in force since January 25 1999, the Commission should have finished its work by 25 January 2001. In June 2001, President Moi appointed the 12 members nominated by the Ufungamano initiative, with the result that civil society was now included in the constitutional review process. However, there have been allegations, mainly in the Kenyan press, of corruption among the commissioners in connection with luxurious expenditures.

There is continuing debate over the Constitution of Kenya Review Bill 2001 and the Constitution of Kenya Bill 2001, both documents being the result of the merger agreement between the parallel review groups. Members of the Parliament appear to disagree on the constitutional reform process. The holding of a referendum is compulsory under the Kenya Constitution Review Bill before the draft Constitution is taken to the parliament. However, the KANU has presented proposals, under which the referendum would take place only after the new constitution has been passed by the parliament.

HUMAN RIGHTS ISSUES

The human rights situation in Kenya continued to deteriorate, with the Government taking steps to silence political opposition. The absence of

adequate enforcement mechanisms and a lack of political will has led to a general culture of impunity for those who commit human rights abuses.

The Bill of Rights (Constitution of Kenya, Chapter V, Articles 70-83) provides for basic rights but then restricts these with qualifying limitations, known as clawback clauses. Colonial era laws have been re-enacted, such as the Preservation of Public Security Act (PPSA), which among other constitutional violations restricts freedom of expression and assembly. Although the derogation of the constitutional guarantees is clear, the Act has never been amended to remove these restrictions. Magistrates' courts are accused of suppressing fundamental freedoms, since most political detainees are prosecuted before them. Magistrates' courts also base their rulings on colonial-era legislation, such as Articles 56 and 57 of the Penal Code, which create the offence of sedition, and the PPSA, allowing for detention without trial.

While the Government has continued to criticise human rights NGOs publicly and to intimidate them, there has nevertheless been an increase in the number of civil society organisations.

INTERNATIONAL HUMAN RIGHTS MECHANISMS

Kenya is a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child. On 8 September 2000, Kenya signed the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, as well as the Optional Protocol on the sale of children, child prostitution and child pornography. Kenya is also a member of the African Union (formerly Organisation of African Unity) and a party to the African Charter on the Rights and Welfare of the Child. In 1999, the Kenyan Government signed the Rome Statute for the creation of an International Criminal Court.

At its 56th session, the Commission on Human Rights considered the situation in Kenya under the confidential 1503 procedure. The Commission has since decided to discontinue consideration under that procedure.

The Special Rapporteur on Torture, Sir Nigel Rodley, visited Kenya in September 1999. In his report to the 56th session of the Commission, the Special Rapporteur stated that "a number of his official interlocutors acknowledged that there was a tradition in Kenya of physical rough treatment

of suspects by the police". It was apparent to him that "such treatment routinely includes sustained beatings on all parts of the body with sticks, metal bars and lengths of rubber, leaving unmistakable signs of their use". These beatings were administered generally to obtain confessions or other information. The Special Rapporteur stated that "there is a general sense of impunity among those, notably members of the Criminal Intelligence Department, charged with investigating suspected criminal activities". The Special Rapporteur also reported that the police detained individuals for extended periods without bringing them before a magistrate. The Kenyan Government announced that the Special Rapporteur's recommendations would be implemented. In October 2000, the Criminal Law Amendment Bill on the treatment of detainees and police custody was published. This Bill incorporated the above recommendations and included a provision to establish the Standing Committee on Human Rights as an independent Human Rights Commission.

In October 2000, the Attorney General published the Bill establishing the Kenya Human Rights Commission to create a commission to promote and protect human rights in the country. The Commission will monitor the Government's compliance with its obligations under international treaties and conventions on human rights and will investigate, *inter alia*, extrajudicial killings by the police and deaths caused by politically instigated ethnic clashes. The Bill reportedly has been submitted to the parliament for approval.

The excessive use of force by the police is evidenced by the shooting of six unarmed, naked prisoners by prison wards in September 2000. The six were part of a group of eight prisoners on death row who attempted to escape from a Nyeri prison and were shot indiscriminately, according to the initial police report. However, human rights groups alleged that the prisoners had been beaten to death and that the authorities were trying to cover up the incident. According to Amnesty International, by the end of 2000, the report by the Commissioner of Prisons had not been made public, and no prison officers were suspended from duty pending investigations. The eight men had been sentenced to death for robbery with violence after trials which were not conducted in accordance with international standards at Magistrates' Courts, where the defendants do not have the right to legal aid.

Convicted persons continued to be sentenced to the death penalty. However, even though no one has been executed for more than 10 years in Kenya, there are currently approximately 1,000 people on death row. Prison conditions remain harsh with severe overcrowding and lack of adequate clothing, food and medication. No local or international human rights organisation has been allowed access to prisons. Family members and attorneys

may visit prisoners at the discretion of the government, although the law provides for this right.

In Kuria, a self-styled vigilante group, known as the *Sungu-Sungu*, was formed by the village court, the *Iritoongo*, to police the district. Suspects are arrested, put in cells at camps belonging to the chiefs and are tried by the *Iritoongo*, often having to pay heavy fines. The *Sungu-Sungu* team illegally exercised police and judicial powers throughout 1999, and there have been allegations that it has tortured suspects and detainees.

FREEDOM OF ASSEMBLY AND EXPRESSION AND FREEDOM OF THE MEDIA

The initial exclusion of civil society groups from the constitutional reform process led to increased political protest and calls for a more democratic society. Police have sometimes responded to these protests with mass arrests and physical violence, including the use of tear gas and, on occasion, live ammunition. There were also increased reports of state supported gangs assaulting members of the political opposition and dispersing protests.

On 26 November 2000, at the Tumsifu Centre in Kisumu, Western Kenya, a group of 50 youths violently disturbed a public hearing on the Kenyan Constitution, organised by the Ufungamano initiative, attacking the panellists and members of the audience.

There have been additional incidents where the police have broken up similar meetings. On 31 March 2000, the police arrested eleven human rights activists while they were performing a play before a group of children as part of a civic education program in the Ogiek community. In all these cases, the police have defended their actions by claiming that the organisers of the rallies failed to obtain the relevant permit. However, the organisers claim that they gave advance notification in conformity with the 1997 amendments to the Public Order Act.

On 25 November 2000, President Moi speaking at a fund-raising rally, ordered the police not to interfere with political meetings, including those organised by the opposition. However, a month earlier, he had banned all rallies by *Muugano wa Magenzi* (Movement for Change), a party group formed in September 2000 that was calling for political change. On 27 November 2000, President Moi called *Muugano wa Magenzi* "a revolutionary movement bent on unleashing chaos in the country", and said its activities were legally questionable.

Two journalists from *The People*, a newspaper owned by a leading opposition politician, were charged with publishing on 17 January 2000 secret military information issued by the army following rumours of a mutiny. Nobody was charged from the *East African Standard*, a newspaper associated with the ruling party, for publishing a similar story on the military code.

On 22 October 2000, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Abid Hussain, sent an urgent appeal to the Kenyan Government concerning the arrest and detention of Johann Wandetto, sentenced on 15 February 2000 to 18 months in prison in connection with an article published on 6 March 1999 in *The People*. In the article, Wandetto had reported on the alleged disarmament of the elite presidential guards by a militia in the West Pokot region. No reply had been received by the time the Special Rapporteur presented his report to the 57th session of the United Nations Commission on Human Rights.

The Special Rapporteur on the Independence of Judges and Lawyers, Param Cumaraswami, as well as the Special Rapporteur on the freedom of opinion and expression, intervened in the case of the publisher of the *Post on Sunday*. Tony Gachoka was convicted of contempt of court on 20 August 1999 after he published articles alleging corruption in the judiciary. In addition to concerns related to the status of three judges hearing the case, who specifically had been mentioned in the article as being involved in the corruption scandal, it was noted that the defendant was denied the right to give oral evidence and to call witnesses in his defence. He was also denied the right to appeal (see *Attacks on Justice, 1999-2000*). The Special Rapporteur has since requested an invitation to visit the country.

WOMEN'S RIGHTS

Women in Kenya continued to face serious obstacles to the exercise of their freedoms. Domestic violence against women remains widespread, and the spread of HIV/AIDS has created a large orphan population. Women are seriously underrepresented in Kenya's politics and government.

Female genital mutilation continues to be practised. Following a landmark Rift Valley court decision on 12 December 2000, two young girls successfully obtained a court order restraining their father from having them forcibly circumcised. President Moi has issued two presidential decrees banning female genital mutilation, and the Government prohibits state-controlled hospitals from engaging in the practice. However, legislation which would give the presidential decree legal effect has not been adopted.

THE JUDICIARY

The Kenyan legal system is primarily based upon English common law with customary law, Hindu law and Islamic law being applicable in certain disputes. There is no jury system. The legal system suffers greatly from inefficiency, corruption and a lack of adequate funding. The Kenyan Government announced on 5 April 2000 at the 56th Session of the Commission on Human Rights that the court registries were in the process of being computerised and that an increase in the number of judicial officers was being considered in order to address the inadequacies of the judicial system. On 22 June 2001, the Law Society of Kenya (LSK) said the overload threatened justice and called upon the Government to appoint more judges and magistrates in order to clear a backlog of court cases.

COURT STRUCTURE

The Court of Appeal and the High Court are superior courts of record and are established by Chapter IV, Part 1 of the Constitution of Kenya. The Court of Appeal sits at the head of the court system and has jurisdiction to hear such appeals from the High Court as may be conferred upon it by law. The High Court has unlimited original jurisdiction in civil and criminal matters and such other jurisdiction as may be conferred on it by law. There are approximately 60 High Court judges and 11 Court of Appeal judges. The Chief Justice is a member of both the Court of Appeals and the High Court, an arrangement that violates the principle of judicial review. As a result of the Kwach Committee report (see *Attacks on Justice 1998*) a criminal division of the High Court was established in March 2000. The High Court has sole jurisdiction to hear election petitions and constitutional references. The fact that the High Court serves as a constitutional Court on an *ad hoc* basis has been criticised by the ICJ Kenya section in its 1999 Rule of Law report.

Section 65 of the Constitution provides that parliament may establish subordinate courts which have such jurisdiction as may be conferred by law. Magistrate Courts are the main subordinate courts and include the Resident Magistrate Courts and District Magistrate Courts. Both the Resident and District Magistrate Courts are divided into three classes, which determines the severity of the punishment they are allowed to impose, and both are appointed by the Judicial Service Commission. Appeals are brought to the more senior categories of the courts; appeals from the Resident Courts are sent to the High Court, while those from the District Magistrate Courts must first appeal to the Residents Courts. A wide range of tribunals have also been created to deal with specialised issues. In December 2000, Kenya launched a

family Court specifically to deal with, among other issues, will adoption, custody of children and burial disputes. The launch of the family Court Division of the nation's High Court was performed by the Chief Justice, Bernard Chunga. This brings to three the number of judicial divisions under the Government's ongoing reform program. The other divisions deal with commercial and criminal law. Experts claim that there are approximately 6,627 family-related cases pending before Kenyan courts.

Although legislative power is vested in the legislature by Section 30, and executive power is vested in the President by Section 23 of the Constitution of Kenya, the Constitution does not explicitly vest the judicial power in the judiciary. The structural separations in the Constitution imply the vesting of judicial power in the judiciary, but the lack of a direct provision to that effect theoretically enables the legislature or executive to usurp the exercise of such power. This makes it possible for the executive to establish special courts which exercise judicial power.

Section 77 of the Constitution provides that those charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. This section also provides for the presumption of innocence, the allocation of adequate facilities and time for the preparation of a defence and the right to legal representation of one's own choice.

The lack of full independence of the judiciary allows the government to violate these rights with impunity. People are detained for long periods without being charged or brought to trial and are subject to police brutality, and a detainee's right to have access to legal counsel is frequently denied. Defendants have the right to government-provided legal counsel only in murder and treason cases, and defence lawyers are frequently denied access to government-held evidence, as the government can plead the State Security Clause as a basis for withholding evidence. These cases violate the provisions protecting the fundamental rights and freedoms of the individual as enshrined in the Constitution and do not come within the public interest exception. These actions also violate the Kenyan Penal Code.

THE ATTORNEY GENERAL

By virtue of Section 26(3) of the Constitution, the Attorney General has absolute discretion to institute and undertake, take over and continue, or discontinue at any stage before judgement, any criminal proceeding. Subsection (8) of that section provides that in exercising his functions the Attorney

General shall not be subject to the direction or control of any other person or authority. Section 109 of the Constitution vests the power of appointing the Attorney General in the President.

The Attorney General is also an *ex officio* member of parliament, and is the Government's principal legal adviser. The placing of such wide discretionary power to institute criminal proceedings in a member of the Government clearly creates a conflict of interests. The Attorney General has used his power to discontinue private prosecutions against government officials, often stifling criticism and limiting the accountability of the Government. He has argued in a number of cases that citizens must notify his office before initiating private prosecution.

JUDGES

The Constitution does not explicitly guarantee the independence of the judiciary or provide adequate safeguards to ensure judicial independence. The judiciary is subject to executive interference and is widely perceived by the public to be corrupt. This has resulted from improper selection procedures and the provision of insufficient funds to ensure the adequate and impartial operation of the judicial system.

JUDICIAL SELECTION

The procedures for selection and removal and the conditions of service for superior court judges are guaranteed by the Constitution. Constitutional security of tenure was removed by the Moi government in 1988 but was restored in 1990 after the suspension of military assistance by the United States. The Chief Justice of Kenya is appointed directly by the President, and all other judges in the superior courts are appointed by the President acting in accordance with the advice of the Judicial Service Commission (JSC). The Judicial Service Commission consists of the Chief Justice as chairman, the Attorney General, two other judges of a superior court designated by the President and the chairman of the Public Service Commission. The Attorney General and the chairman of the Public Service Commission are appointed by the President. The criteria for appointment is experience in advocacy for seven years.

This selection process clearly demonstrates that the judiciary is not free from executive influence, as members of the Judicial Service Commission are appointed by the President. The legal structure creates a selection process in which the main role is played by the President. The President is solely

responsible for the selection of all participants in the appointment process and can exercise considerable influence over their decision making. Furthermore, the consolidation of power in the President in Kenya clearly exacerbates the deficiencies in the selection process. There is not sufficient guarantee against appointment for improper motives and therefore judicial impartiality is undermined.

In 2000, the Chief Justice announced the establishment of an administrative Judiciary Inspection Unit, aimed at evaluating the performance of magistrates. This unit may recommend disciplinary measures in respect of errant and under-performing magistrates, but it lacks hiring and dismissal powers, which belong to the Judicial Service Commission. The importance of this Unit resides in its enhancement of administrative efficiency and its supervision of magistrates nationally.

According to a recently published survey by the International Bar Association, women account for some 49 per cent of judicial officers in Kenya .

CONDITIONS OF SERVICE AND REMOVAL

Judges serve until seventy four years of age and can only be removed from office for inability to perform the functions of their office, whether arising from infirmity of body or mind or any other cause, or for misbehaviour. The Chief Justice is responsible for determining the remuneration of members of the judiciary. The President is responsible for the ultimate removal of judges and acts upon a recommendation provided by a tribunal specially constituted for the matter.

Section 62(5) of the Constitution of Kenya provides that the President shall appoint such a tribunal, consisting of a chairman and four other members that have held judicial office, who are qualified to hold judicial office or upon whom the President has conferred the rank of senior counsel. The members of the tribunal are selected by the President. The President can suspend a judge upon the recommendation of the Chief Justice, where a question of removal has been referred to the tribunal. It should be noted that the Constitution is not clear on the legal character of the recommendations made by the tribunal to the President. Since 1963, in some cases judges who acted independently of the executive branch have been allegedly punished with transfers from their court to outlying areas in the country.¹

According to Professor Makau Mutua "such tenuous tenure protections are heightened in Kenya where judges, once they are removed from the

bench, are prohibited from practising law before its courts. This increases the pressure on judges to do the state's bidding, because employment as a practising lawyer is forbidden upon removal or retirement from the judiciary”.

The status of magistrates is governed by the Judicial Service Commission regulations and the Magistrates' Courts Act, which are neither guided by nor based on the principle of judicial independence. According to Kenyan scholars, magistrates are treated by the JSC as civil service employees in need of strict supervision and do not enjoy security of tenure.

The inadequacies of the selection process demonstrated clearly by the process of appointing the Chief Justices of Kenya. As stated previously, the appointment of the Chief Justice is solely a presidential responsibility. The Chief Justice is responsible for the administration of the judiciary and has the power to transfer cases and judges within the judicial system.

Since 1963, the President has frequently appointed judges of foreign origin on a contract basis, thereby bypassing life tenure and clearly making the position of Chief Justice subject to executive influence. There is widespread agreement among observers of the Kenyan judiciary that the institution of the contract judge, not provided in the Constitution, is corrosive and undermines judicial independence.

Furthermore, the absence of criteria governing appointment, or any review process, allows the President to appoint a Chief Justice purely on a discretionary basis. The previous Chief Justice, although having experience as an advocate, was not a practising lawyer or sitting judge at the time of appointment and had been previously dismissed twice from judicial office on disciplinary grounds.

The current Chief Justice, Bernard Chunga, was previously Deputy Public Prosecutor, and was active in that role in prosecuting critics of the government. The presidential control over the selection process clearly undermines the independence of the judiciary and allows the President to directly assert control over the judiciary. It also creates a climate in which the judiciary exercises its powers in accordance with the President's wishes, or otherwise faces administrative retribution from the President or his direct appointee, the Chief Justice. It has been alleged that the Chief Justice issues “circulars” to judges instructing them on how to rule in particularly sensitive matters.

In February 2000, the Chief Justice issued an internal circular calling upon judicial officers to make full disclosure of their individual wealth as well as that of their spouses and unmarried children. Judicial officers were said to have largely ignored this instruction.

COURT INVASIONS

In June 2000, more than 100 Maasai “supporters” of Cabinet Minister Julius Sunkuli, dressed in traditional regalia and armed with knives and sticks, stormed the High Court building to protest his arraignment on vandalism charges.

Similarly, on 17 July 2000, more than 200 Kipsigis “supporters”, chanting and brandishing traditional weapons, stormed the High Court building to protest the arraignment of Cabinet Minister Kipngeny arap Ngeny on theft of more than 100 Kshs. million from the Kenya Posts and Telecommunications Company. The “supporters” had been transported from Kericho, about 100 km from Nairobi, in buses belonging to a public university.

University students also stormed courthouses twice in 2000. On 2 April, approximately 80 students mobbed Kibera Magistrates Court, calling for the release of a Nairobi university student. On 2 November 2000, some 100 students stormed Kibera courts again, protesting charges against three students for stoning cars during a riot.

On 22 September 2000, a huge public mob invaded Kibera law courts and fought with prison guards. The mob wanted to beat a theft suspect whom they alleged was a well-known thug in the neighbourhood.

The ICJ Kenya section wrote to the Chief Justice protesting these invasions, as they interfere with the independence of the judiciary and increase the risk of physical violence in the courts. The Chief Justice replied that the matter “was receiving necessary consultation, and action will be taken as deemed appropriate”.

THE EMBATTLED KENYAN JUDICIARY: A DIVIDED COURT OF APPEAL

On 29 June 2001, Judge Kwach of the Court of Appeal accused his two colleagues, Judge P.K. Tunoi and Judge A.B. Shah of “putting the integrity of the Kenyan highest court into question”. Judge Kwach was apparently unhappy with Justices Tunoi and Shah after they changed their position in a case pitting Express Kenya Ltd against a local businesswoman. Kwach alleged his colleagues had attempted to persuade their fellow Justices not to go ahead with their decision to grant an award of 4.8 million Kenyan shillings. Kwach took the unusual step of prefacing his judgement with a critical commentary on the purpose of the judicial oath. He said that the integrity and independence which the Court of Appeal had enjoyed up to that point “was now water under the bridge” because of the conflicting judgements which were

issued in the same case, and because of the reasons for these conflicting judgements. Judge Tunoi retorted that Justice Kwach's conduct was "unbecoming". On 4 July 2001, Chief Justice Bernard Chunga addressed a news conference attended by all appellate judges. In this highly unusual public statement, the Court of Appeal offered an apology to all Kenyan citizens for the public confrontation which had occurred between the Justices.

The former Law Society of Kenya Chairman, Gibson Kamau Kuria said that "the Court of Appeal has lost integrity and a commitment to the rule of law" and backed Kwach's attack on his two colleagues as "right and courageous" adding that "his view was shared among a silent majority of senior advocates".

In his paper of 14 September 2000, Ahmednasir Abdullahi, a law professor at the University of Nairobi discusses the practice of the courts in completely disregarding legal precedents. He also cites several cases in which a Kenyan court may "set forth the applicable law, find exactly how that law applies to the case and then rule to the contrary for no apparent reason. Often such decisions are tailor-made for specific parties in a case rather than sound decisions based on established law".

LAWYERS

LEGAL EDUCATION

Legal education in Kenya begins at the Faculty of Law of the University of Nairobi or at the newly established Faculty of Law of the Moi University. Following the university education, those pursuing a career as an advocate have to attend a 12-month course at the Kenya School of Law and then to do an internship at a law firm. Upon completion of the traineeship stage, students receive a Certificate of Compliance from the law firm, along with a Certificate of Good Conduct from two other advocates, which they submit for admission to the Roll of Advocates.

Kenyan scholars stress the need to reform the legal education system in the country, as it is based on foreign models, is controlled and influenced by the elite, focuses on private practice and commercial legal interests and favours a teaching style that is highly theoretical and of limited practical value. Students often choose to obtain their university degree abroad, leading to admission to the Law Society of Kenya of many advocates who may have a strong theoretical legal education but know little of the reality of law in the

Kenyan environment. Kenyan commentators also note that the substantial rise in the number of advocates in Kenya, as well as the weakness in the Kenyan judiciary, has led to major delays in the courts. The increasing competitiveness among advocates has led them to "create" cases and bring inappropriate cases to courts.

THE LAW SOCIETY OF KENYA

Lawyers in Kenya are represented by the Law Society of Kenya. The Law Society is established by an act of parliament and governed by a ruling council elected annually by the members of the Law Society. All practising lawyers within Kenya are required to become members of the society. The number of lawyers currently exceeds 3,000.

The Law Society of Kenya is mandated to maintain and improve the standards of conduct of the legal profession, to conduct continuing legal education of its members and to assist the Government and the judicial system in all matters regarding legislation and the administration of law in Kenya. In the latter role the Law Society has been active in the promotion of human rights and in participating in the constitutional reform process.

In June 2001, a draft Bill to introduce changes into the Law Society of Kenya Act was circulated to lawyers for scrutiny. Proposed changes would streamline the Law Society's election provisions and empower the Council for Legal Education to be more closely involved in formal legal training.

THE LEGAL PROFESSION IN PRACTICE

The Special Rapporteur on Torture, following his mission to Kenya, reported that lawyers are frequently denied access to clients even when they are in possession of a court order. During the mission, the Attorney General of Kenya acknowledged that, based on Chapter V of the Constitution of Kenya, lawyers have a legal right to free and immediate access to their clients at any time. This right was routinely ignored by police or prison officials and detainees were not informed of their right to have access to legal counsel. This constitutes a violation of Articles 7 and 8 of the UN Basic Principles on the Role of Lawyers. Article 7 states that "governments shall 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". Similarly, Article 8 stipulates that "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”.

The unavailability of legal aid, with approximately only ten per cent of those accused of a crime being represented by counsel, was also of concern. This problem was particularly serious in the north of the country. All persons are entitled to have the assistance of a lawyer in defending themselves in criminal proceedings. Governments have a positive duty to ensure effective and equal access to lawyers and to allocate sufficient funding to legal services for poor or other disadvantaged persons.

CASES

Aggrey Muchelule [Chief Magistrate]: In April 2000, the Chief Magistrate was transferred from Mombasa to Meru after freeing key suspects on bail in a case involving 6,2 tons of hashish. Chief Justice Chesoni (deceased) had ordered the suspects to be held. The Chairman of the Law Society of Kenya (Mombasa Branch) characterised the move as a “retribution” for the bail ruling and threatened to seek judicial review of the transfer order.

Ahmed Nassir [lawyer and law lecturer]: In October 2000, Mr. Nassir accused the judiciary of mediocrity during a Law Society planning workshop. His criticism was carried in the print media. Mr. Nassir had indicated that his worst students invariably became magistrates and that judges were unskilled in legal philosophy with the result that their judgements were “mediocre, lacked legal argument and were shorter than train tickets ‘good for this train only’.” During the subsequent week, Justice Tom Mbaluto of the High Court Commercial Division in Nairobi, refused to hear Mr Nassir and had him thrown out of his court when Mr. Nassir appeared before him to argue a private matter.

In May 2001, a group of lawyers led by Richard Stein, from a British law firm representing Kenyans killed or injured by live bombs left behind by British soldiers based in Kenya, was barred from entering the British Army training Field at Archer's Post by British and Kenyan soldiers. The British army has used this area for military exercises since the Second World War, and after Kenyan independence signed an agreement with the government to continue using the camp for military activities. The British army stopped

using live ammunition some years ago. However, they have failed to clean up the area properly. The lawyers were seeking information for their case regarding exploding military devices, and were thus denied access to evidence. The Kenyan community has sought compensation from the Kenyan Government, but has failed due to a one-year statute of limitation which has expired. The Kenyan plaintiffs subsequently sued the British Government seeking damages.

The Kenyan branch of the International Federation of Women Lawyers (FIDA) which has been helping an alleged rape victim bring charges against a Minister of the State in the Office of the President, experienced an attempted break-in by police. On 29 August 2000, five armed police officers allegedly tried to force their way into the FIDA office in Nairobi, but security guards at the gate were able to fend them off. A few weeks before the attempted break-in, three FIDA staff members had received anonymous death threats as a result of their work. A Catholic priest and human rights defender, Father John Kaiser, who brought the rape case to public attention, was murdered five days before the attempted break-in. Since Father Kaiser's death, the girl allegedly raped by the Minister of State has dropped the charges against him.

On 21 September 2000, the Special Rapporteur on the Independence of judges and lawyers, Param Cumaraswami, sent a communication to the Kenyan Government regarding the threats made against the FIDA. On 26 October 2000, the Government denied any involvement and stated that the police was already investigating the matter. The Government also stated that if any police officers were found to be involved, they would be prosecuted in their individual capacity. The attempt at forced entry and harassment and intimidation of FIDA staff constitutes a violation of Article 16a of the UN Basic Principles on the Role of Lawyers, which states that "Governments shall ensure that lawyers are able to perform all of their judicial functions without intimidation, hindrance, harassment or improper interference".

MALAYSIA

The Government of Malaysia continued its repression of political opponents and further restricted freedom of expression, assembly and association. Detentions under the Internal Security Act (ISA) continue. However, a number of developments indicate that there has been a positive change towards a more independent judiciary. The Federal Court quashed the sentence of Anwar Ibrahim's defence lawyer Zainur Encik Zakaria; a judge criticised the ISA and released two detainees; the High Court struck down one of the suits against the UN Special Rapporteur on the Independence of Judges and Lawyers, Param Cumaraswamy, and the plaintiffs withdrew the remaining suits. The Government-appointed National Human Rights Commission called for a wide review of Malaysia's strict laws on freedom of assembly and expression; and Justice Muhammad Kamil Awang defied a "telephoned directive" from his superior and annulled a victory for the Prime Minister's ruling coalition in a state assembly election.

The former territory of Malaya gained independence from the United Kingdom in 1957. In 1963 the areas of Malaya, Sabah, Sarawak and Singapore joined to form the Federation of Malaysia. Singapore left the Federation in 1965. The Federation of Malaysia currently consists of thirteen states and three Federal Territories. These are the eleven states of peninsular Malaysia, the two states of Sabah and Sarawak on the island of Borneo, and the Federal Territories of Kuala Lumpur, Labuan and Putraya.

Malaysia is a constitutional monarchy, headed by the *Yang di-Pertuan Agong*, who is elected by the Conference of Rulers for a term of five years. The Conference of Rulers consists of the hereditary rulers of the states of peninsular Malaysia and, for certain matters, the *Yang di-Pertua-Yang di-Pertua Negeri* of States not having a ruler. The current *Yang di-Pertuan Agong* is Salahuddin Abdul Aziz Shah, who was elected in April 1999.

The Constitution embodies the principle of the separation of powers. The legislative power of the Federation is vested in the Parliament. The Parliament consists of the *Yang di-Pertuan Agong* and two *Majilis* (Houses of Parliament), which are the Senate (*Dewan Negara*) and the House of

Representatives (*Dewan Rakyat*). The Senate consists of 26 members elected by the legislative assemblies of the states and 43 appointed by the *Yang di-Pertuan Agong*. The members of the House of Representatives are directly elected by the public for a period of five years. The National Front (*Barisan Nasional*), a coalition of twelve parties dominated by the United Malays National Organisation (UMNO), has held power since independence.

The executive authority is vested in the *Yang di-Pertuan Agong* and is exercisable by him or by the Cabinet or any other minister authorised by the Cabinet. Article 40 of the Constitution requires that the *Yang di-Pertuan Agong* act in accordance with the advice of the Cabinet or of a Minister authorised by the Cabinet. The Cabinet is appointed by the *Yang di-Pertuan Agong* and is collectively responsible to the parliament.

Each of the thirteen states of Malaysia has its own constitution and legislative assembly. The federal Constitution delineates the respective legislative competence of the federal and state parliaments.

The tenth general elections were held on 29 November 1999. The Barisan Nasional coalition retained the two-thirds majority needed to amend the constitution. However, the UMNO lost twenty seats, including those of five cabinet ministers. In simultaneous assembly elections held in 11 states, the UNMO lost two states to the Pan-Malaysian Islamic Party (PAS). Dr. Mahathir bin Mohamed Iskandar continued as Prime Minister for his fifth consecutive term.

The International Bar Association, the Centre for the Independence of Judges and Lawyers, the Commonwealth Lawyers Association and the Union Internationale des Advocats conducted a joint mission to Malaysia from 17-27 April 1999. The report, entitled *Justice in Jeopardy*, was published in April 2000. It concluded that the powerful Executive in Malaysia had not acted with due regard for the essential elements of a free and democratic society based on the rule of law. The report examined the relationship between the executive, the Bar Council and the judiciary and found that in politically and economically sensitive cases the judiciary was not independent. It found that the autonomy of the Bar had been threatened by the government and that the relationship between the Bar and judiciary was strained. It noted that in politically sensitive defamation cases, awards of damages were so great that they stifled free speech and expression. It also noted that the use of contempt proceedings against practising lawyers constituted a serious threat to their ability to render services freely. The four organisations urged Malaysia, *inter alia*, to recognise the independence of the judiciary, not to threaten or diminish the autonomy of the Bar Council, to ensure that the choice of judges in

sensitive cases be carefully considered and to establish a Judicial Services Commission that would recommend appointments to the judiciary.

HUMAN RIGHTS BACKGROUND

The human rights situation in Malaysia has not improved over the course of the period covered by this report. Malaysia's government has continued its repression of political opponents by further restricting freedom of expression, assembly and association. The use of the Internal Security Act (ISA), which allows for indefinite detention without trial, resulting in arbitrary detentions, continued. There were reports of police brutality in several cases.

The police repeatedly broke up peaceful demonstrations by the opposition and on 25 March 2000 banned public rallies in the capital for an indefinite period. A demonstration held in Kuala Lumpur on 15 April 2000 by supporters of the Parti Keadilan Nasional (PKN) to mark the anniversary of Anwar Ibrahim's conviction on corruption charges in April 1999 was broken up with tear gas and water cannons by the police. At least 48 PKN activists, among them Tian Chua, the vice-president of the party, were arrested on 15 - 16 April 2000 and charged with illegal assembly. On 1 March 2000 the government restricted publication of the largest opposition newspaper, *Harakh*, to only two times per month instead of two times per week and banned the publication from news-stands. The pro-opposition publications and critical magazines *Detik*, *Al Wasilah*, *Tamadun* and *Ekklusif* were also banned throughout the year.

In April 2001 ten political activists were arrested under the ISA. Six were given two-year detention orders in June 2001. The other four were either released through *habeas corpus* petition or by the police. In late July 2001 two students were also arrested under the ISA. On 16 July 2001 one student was released unconditionally, while the other remained under ISA detention at the time of writing. The six people that were ordered to be detained for two years without charge or trial under the ISA by the Minister of Home Affairs are Tian Chua, Vice-President of the PKN, Mohd Ezam Mohd Noor, the National Youth Chief of the PKN, Haji Saari Sungip, PKN activist, Hishamuddin Rais, media columnist and social activist, Dr. Badrul Amin Baharom, PKN Youth Leader and Lokman Nor Adam, Executive Secretary of the PKN Youth Wing.

In a positive development, judge Datuk Mohamed Hishamudin ordered the release of two of the 12 activists held under the ISA in late June 2001 on

the grounds that the police had acted in bad faith in detaining them. Reportedly, he also questioned whether the ISA was relevant in the present situation and suggested that in order to prevent or minimise abuse the provisions of the ISA needed to be thoroughly reviewed.

The apparently politically motivated six-year prison term imposed on former Deputy Prime Minister Anwar Ibrahim for corruption charges on 14 April 1999 was upheld by the Court of Appeal in April 2000. Anwar Ibrahim appealed to the Federal Court. His lawyers requested a postponement of the trial because Anwar Ibrahim is currently treated in the hospital for a slipped disk in his back. His spinal injury has not responded to treatment and independent medical experts recommended that Anwar Ibrahim should undergo endoscopic microsurgery. The best prognosis for recovery would be for the operation to be conducted at a specialised spinal surgery available outside Malaysia. Although his condition continues to deteriorate, the Malaysian authorities so far have not permitted him to seek medical treatment abroad.

On 8 August 2000 the High Court in Kuala Lumpur convicted Anwar Ibrahim and his adopted brother Sukma Darmawan of sodomy and sentenced them to nine and six year's imprisonment which, for Anwar Ibrahim would commence after the completion of his six-year sentence for corruption. The fairness of this second trial has been widely questioned by observers. In a Presidency statement on behalf of the European Union on 10 August 2000 the EU "notes with deep concern the verdict announced on 8 August 2000 (...) and regrets that several aspects of the proceedings in the second trial, as was the case with the first, raise serious doubts about its fairness." The ICJ issued a Press Release on 8 August 2000 condemning the sentencing as wholly disproportionate to the alleged offences committed and voicing its concern about the prosecution's amendment of the date of the alleged offences, the (in)admissibility of certain evidence, the failure to permit the calling of some defence witnesses and the (im)partiality of the presiding judge. Moreover the ICJ criticised comments made by Prime Minister Mahathir during the trial as prejudicial and entirely inconsistent with a free and independent judiciary. In both cases Anwar Ibrahim was refused bail, pending the appeal.

On 23 February 2001 the Federal Court upheld the rulings of two lower courts in August 1999 and December 2000 and dismissed Anwar Ibrahim's attempt to sue Mahathir for 100 million ringgit for slandering him in a speech in September 1998 in which Mahathir had given descriptions of alleged acts of sodomy.

Anwar Ibrahim was beaten by the former police chief Abdulh Rahim Noor while in police custody after his arrest in September 1998 and a doctor

had testified to an earlier inquiry that Anwar had been fortunate to survive the assault. Abduhl Rahim Noor was sentenced to two months' imprisonment and a fine of 2,000 ringgit on 15 March 2000 after the charge was reduced from "attempting to cause grievous hurt", which carried a maximum sentence of three-and-a-half years, to "causing hurt". After his appeal against the sentence Noor was released on 5,000 ringgit bail. The outcome of the appeal is still pending.

The term of the Chief Justice of the Federal Court, Eusoff Chin, was extended for another six months from 20 June 2000, the date on which he was to have retired, despite a public controversy over his conduct. Allegedly he had travelled to New Zealand with a lawyer in 1995 and subsequently sat on appeals where that lawyer appeared and had ruled in favour of the lawyer.

In December 2000 the former Vice-President of the Malaysian Bar and judge of the Federal Court, Tan Sri Mohamad Dzaiddin Abdullah was sworn into office as the new Chief Justice. He stated that his first and main agenda would be to restore the public's confidence in the judiciary by making changes in respect of seeing justice done, reducing the numerous citations for contempt and fostering a better relationship with the Bar. His appointment was welcomed inside and outside of Malaysia. The Malaysian Bar in a Press Statement on 20 December 2000 called his appointment "most welcome" and found him "eminently suited to this task." The UN Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, in his 2001 report to the 57th Commission on Human Rights, called his appointment "a positive development, which was enthusiastically welcomed by all."

On 1 January 2001 Dato' Ainum Mohd Saaid became the first woman in Malaysia to be appointed (new) Attorney-General. Her appointment was also widely welcomed. She will act as principal legal adviser to the Government and public prosecutor empowered to institute, conduct or discontinue any criminal proceedings, oversee the drafting of legislation for the Federal Government and act as advocate on behalf of the Government in any court matter.

NATIONAL HUMAN RIGHTS COMMISSION OF MALAYSIA (SUHAKAM)

In April 2000 the National Human Rights Commission (Suhakam) was established, pursuant to the Human Rights Commission of Malaysia Act 1999, adopted by the Parliament in July 1999. The 13-member Commission is chaired by former Deputy Prime Minister Tan Sri Musa Hitam (1981 - 86)

of the ruling party. The twelve other members include retired judges, academics and consumer activists. The functions and powers of the Commission are, *inter alia*, to promote awareness of human rights, to assist the Government in drafting legislation and administrative directives concerning human rights, to advise the Government with regard to the accession to international treaties and instruments in the field of human rights, to inquire into complaints regarding infringements of human rights, to visit places of detention and make the necessary recommendations, to issue public statements and hear witnesses and to receive evidence on human rights matters. In May 2000 the Commission established the Working Group on Education, the Working Group on Laws Reform, the Working Group on Accession to Treaties and International Instruments and the Working Group on Complaints Inquiry. As of 27 July 2000 the Working Group on Complaints Inquiry had already received a total of 175 complaints.

Commission Chair Musa Hitam publicly supported the right of citizens to assemble peacefully outside the courthouse at which the verdict in the sodomy trial of Anwar Ibrahim was announced. Throughout the year 2000 the Commission met with human rights NGOs, government ministries, representatives from the ruling, and opposition parties. In December 2000 the Commission opened an inquiry about police misconduct during a rally organised by the opposition on 5 November 2000.

In April 2001 the Commission published its first annual report. The report called for a wide-ranging review of Malaysia's strict laws on freedom of assembly and expression. It made several recommendations, *inter alia*, that Malaysia's police force, which has been accused of brutality at political demonstrations, should maintain a discreet presence at rallies and stay away from the assembly site; that the judiciary should consider human rights to be an integral part of the common law of Malaysia and enforce them accordingly; and that Malaysia should immediately ratify several international agreements on human rights.

Unfortunately, the scope of the Commission is rather limited, as the Act defines human rights as "the fundamental liberties provided for" in the federal Constitution and restricts the application of the Universal Declaration of Human Rights to those provisions consistent with the Constitution. Section 12 of the Act furthermore limits the powers of the Commission by stipulating that it shall not inquire into any allegations that are the subject matter of any proceedings in any court or which are finally determined by any court, and that it shall immediately cease the inquiry if the allegations of an inquiry become the subject of proceedings in any court.

INTERNATIONAL OBLIGATIONS

Malaysia is party to the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, both with reservations, and the Convention on the Prevention and Punishment of the Crime of Genocide. It is not a party to other principle human rights treaties including the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as these treaties are seen to not properly reflect "Asian values".

Domestic obligations

Part II of the Federal Constitution of Malaysia protects certain fundamental liberties. These include the right to life, freedom from slavery, equality before the law, freedom of religion and freedom of movement, speech, peaceful assembly and association. However, the Constitution allows for the derogation from some of these rights as is deemed necessary or expedient in the interest of the security of the Federation or public order and morality.

Articles 149 and 150 allow for the derogation from the provisions of Part II of the Constitution. Article 149 provides that the parliament may promulgate legislation in response to actions taken or threatened by a substantial body of persons that, *inter alia*, excite disaffection against the government. Such legislation may be inconsistent with the provisions regarding the freedoms of speech, assembly and association and the due process of law, including the right to be represented by a lawyer. Article 150 allows the declaration of a state of emergency by the *Yang di-Pertuan Agong* where the security or economic life of the Federation is threatened.

During a state of emergency, the power of the *Yang di-Pertuan Agong* is broadened considerably. He can promulgate any ordinance he deems necessary in relation to any matter, regardless of the required procedures in Parliament. These ordinances have the same effect as an Act of Parliament. The proclamation of a state of emergency extends the executive authority of the Federation over matters within the legislative authority of the States. Furthermore, during the state of emergency no provision of any ordinance, nor of any Act of Parliament, which is required by reason of the emergency can be challenged on grounds of inconsistency with the federal constitution.

No court has jurisdiction to determine the validity of the Proclamation of Emergency.

A declaration of a state of emergency was made in 1969 and has not been revoked by the *Yang di-Pertuan Agong* or by a resolution of both houses of parliament as required by the Constitution.

RESTRICTIVE LEGISLATION

The Malaysian Constitution guarantees a number of important rights. However, these rights are often deprived of their meaning and force by the enactment of various pieces of restrictive legislation under the exceptions provided by the Constitution. The Internal Security Act 1960, enacted pursuant to Article 149, allows the executive to detain persons for two years without trial, detention renewable indefinitely and not subject to judicial review, except on procedural matters. The Act also provides the police with the power to detain a person suspected of "acting in a way prejudicial to Malaysia" for up to 60 days without trial. The Dangerous Drugs Act (Special Preventive Measures) 1985 also based upon Article 149 of the Constitution, and the Emergency (Public Order and Prevention of Crime) Ordinance 1969, which depends for its validity on the continued existence of a proclamation of emergency also allow for administrative detention for a period of two years without trial.

The Sedition Act 1948 (revised 1969) defines a "seditious tendency" as a tendency to bring hatred or contempt, to excite disaffection against any ruler or any government, or to excite disaffection against the administration of justice. Officials sometimes invoke this act in response to criticism of the government, in particular criticism related to the Attorney General's perceived political and selective prosecutions. The Printing Presses and Publications Act 1984 also severely limits the freedom of the press and of free speech. It grants the Minister absolute discretion to grant, refuse or revoke a licence for a printing press or for publishing a newspaper. This Act also provides that issuing a publication that, *inter alia*, is likely to promote feelings of ill-will, hostility, enmity, hatred, disharmony or disunity is a punishable offence. The use of these Acts contributes to a large degree of self censorship by publishers, further institutionalising limits on freedom of expression. These two Acts were enacted without relying on Article 149 because they are presumably considered not to be in contravention of Article 10 of the Constitution, on the freedom of speech, assembly and association.

In the report "Justice in Jeopardy" published in April 2000 the IBA, CIJL, CLA and UIA conclude that all of the above Acts constitute a body of restrictive legislation that requires major revision if Malaysia is to be governed in accordance with a just rule of law.

THE JUDICIARY

The Malaysian legal system is based on English common law and is enforced through a unified court system. Article 121 vests the judicial power of the Federation in the two High Courts of co-ordinate jurisdiction. Separate *Syariah* Courts exist to deal with disputes involving Islamic religious law, and indigenous people in Sabah and Sarawak have a system of customary law to resolve matters such as land disputes between tribes. The Constitution is the supreme law of the land, and any law which is inconsistent with it shall be void to the extent of the inconsistency. Article 145(3) of the Constitution grants the Attorney General complete discretion to institute, conduct or discontinue any proceedings for an offence.

THE COURT SYSTEM

The court system is divided into superior and subordinate courts. The Federal Court, Court of Appeal and High Courts are superior courts and are established by the federal Constitution. The Session and Magistrate Courts are subordinate courts and are established by federal law.

At the head of the court system is the Federal Court (*Mahkamah Persekutuan*), situated in Kuala Lumpur. Article 121(2) of the Malaysian federal Constitution grants the court jurisdiction to determine appeals from the Court of Appeal, the High Court or a judge thereof, as provided by federal law. The court also has original and consultative jurisdiction to determine the validity of actions of the states; disputes between the states or between the states and the Federation; and any question regarding the interpretation of the federal Constitution that arises in proceedings or is referred to it by the *Yang di-Pertuan* for its opinion. The Federal Court also has such other jurisdiction as federal law may confer. The Court consists of the President of the Court (the Chief Justice), the President of the Court of Appeal, the two Chief Judges of the High Courts of Malaya and Sabah and Sarawak, and, at present, three Federal Court judges.

The Court of Appeal (*Mahkamah Rayuan*) has jurisdiction to determine appeals in any matter from decisions of the High Court or a judge thereof, and can also hear appeals in criminal matters directly from the Session Courts. In addition, the Court of Appeal may, with leave, hear an appeal against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrate Court, but only on questions of law. The federal Constitution in Article 122A(1) states that the court shall consist of a President of the Court and ten other judges, until the *Yang di-Pertuan Agong* otherwise provides.

Article 121(1) creates two High Courts of co-ordinate jurisdiction and status situated in the state of Malaya and in the states of Sabah and Sarawak. These courts have such jurisdiction and powers as may be conferred by federal law. The High Courts have civil and criminal jurisdiction. They also have appellate or revisionary jurisdiction in respect of criminal matters decided by a Magistrate Court or a Session Court, and hear appeals in civil cases from Magistrate Courts and Session Courts. There are currently 49 judges on the High Court of Malaya and six judges on the High Court in Sabah and Sarawak.

Under Article 121(1) of the federal Constitution two inferior courts have been created. Both the Magistrate Courts and the Session Courts have wide criminal and civil jurisdiction. The Session Courts have jurisdiction to hear all criminal matters involving offences other than those punishable with death, and civil cases where the claim does not exceed 250,000 ringgit. Magistrate Courts have the jurisdiction to hear criminal cases where the maximum sentence does not exceed 10 years imprisonment, and civil cases where the value of the claim does not exceed 25,000 ringgit. Currently there are 52 Session Court judges and 122 Magistrate Court posts in Malaya, and eight Session Court judges and 29 Magistrate Court posts in Sabah and Sarawak.

A special court was established in 1993 with jurisdiction over cases involving the rulers of the states of Malaysia and the *Yang di-Pertuan Agong*. The court hears all criminal cases involving alleged offences committed by the rulers or the *Yang di-Pertuan Agong* and all civil cases involving them. The court is constituted by the Chief Justice of the Federal Court, the two Chief Judges of the High Courts and two other persons appointed by the Conference of Rulers who hold or have held office as a judge.

The formulation of Article 121 of the Constitution makes the High Court's, jurisdiction and powers dependent upon federal law, i.e., the court

has no constitutionally entrenched original jurisdiction. This arrangement undermines the separation of powers and presents a subtle form of influence over the exercise of judicial power. This makes the operation of the High Court dependent upon the legislature and so constitutes a fundamental threat to the structural independence of the judiciary.

JUDGES

APPOINTMENT

The appointment of judges to the Federal Court, the Court of Appeal and the High Court is governed by the Constitution. Article 122B (1) vests the power of appointment in the *Yang di-Pertuan Agong*, acting on the advice of the Prime Minister, after consultation with the Conference of Rulers. The Prime Minister, before giving advice regarding the appointment of any judge apart from the Chief Justice, is required to consult the Chief Justice. For appointments to particular courts the Prime Minister also must consult the respective heads of the court, i.e. the Chief Justice, the President or the Chief Judge, as applicable.

For appointment as a judge to any of the superior courts a person must be a citizen and have acted as an advocate in any of those courts or have been a member of the judicial and legal service of the Federation or of a state for the ten years preceding his appointment. In practice most appointments are made from the judicial and legal service.

Appointments to subordinate courts come almost entirely from the judicial and legal service. Members of this service spend time in the various departments, such as public works, prosecution, revision of legislation and magistracy. Therefore it is possible that an official may be both a prosecutor and a magistrate in a court at various times during his or her career. Repeated interchangeability of functions may threaten the independence of persons appearing as magistrates by creating an inherent conflict of interest.

Further, promotion through the judicial and legal service is entirely dependent upon the executive and allows the executive to exert direct or indirect influence over a magistrate's rulings. Promotion to the superior courts is also dependent upon a person's performance in the judicial and legal service.

CONDITIONS OF SERVICE

The conditions of service of judges of the superior courts is guaranteed by Article 125 of the federal Constitution. Judges hold office until the age of sixty-five and their remuneration and other terms of office cannot be altered to their detriment during service.

Magistrates' conditions of service, as members of the judicial and legal service, are governed by the rules that apply generally to the public service. These rules are specified by federal law and can be altered by an act of parliament. A Judicial and Legal Commission, created pursuant to Article 138 of the federal Constitution, is responsible for appointment, placement, promotion, transfer and the exercising of disciplinary control. The Commission consists of the chairman of the Public Service Commission, the Attorney General or Solicitor General, and one or more other members appointed by the *Yang di-Pertuan Agong* after consultation with the Chief Justice of the Federal Court.

DISCIPLINE AND REMOVAL

Superior court judges can only be removed from office in accordance with the provisions of Article 125 of the federal Constitution. If the Prime Minister or the Chief Justice, after consulting the Prime Minister, believes that a judge ought to be removed from office, such officials may represent this opinion to the *Yang di-Pertuan Agong* who will constitute a tribunal to consider the matter. If the tribunal recommends that the judge be removed, the *Yang di-Pertuan Agong* may remove the judge. The tribunal consists of not less than five persons who have held office as a judge in a superior court, and if the *Yang di-Pertuan Agong* considers it expedient, other persons who hold or have held equivalent office in any other part of the Commonwealth. The grounds for removal are:

- any breach of any provision of a code of ethics promulgated by the *Yang di-Pertuan Agong* on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts, after consultation with the Prime Minister;
- inability, resulting from infirmity of body or mind or any other cause, to properly discharge the functions of his office.

Article 125(5) provides that pending a recommendation of the tribunal a judge may be suspended by the *Yang di-Pertuan Agong* on the recommendation of the Prime Minister after consultation with the Chief Justice.

LAWYERS

The Malaysian Bar has approximately 11,000 lawyers, including advocates and solicitors. Some 8,500 of these are located in West Malaysia. West Malaysian lawyers are professionally organised by the Legal Profession Act 1976 (LPA 1976). In addition, practice standards are governed by the Legal Profession (Practice and Etiquette) Rules 1978, the Bar Council Rulings 1997, and the Conveyancing Practice Rulings. Lawyers in Sabah and Sarawak are professionally organised by the Advocate Ordinance of Sabah and the Advocate Ordinance of Sarawak.

The LPA 1976 establishes the Bar, of which all advocates and solicitors of the High Court are members, and the Bar Council. The Malaysian Bar Council is an autonomous body created by statute, whose primary purpose is to "uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour." The Bar Council consists of 36 members elected by members of the Malaysian Bar Association or nominated by state bar committees.

There has been continuous tension between lawyers, the government and the judiciary. The Malaysian Bar Council has been in conflict with the Government on many occasions; *inter alia*, the LPA 1976 and the amendments to it over the years have been the source of some controversy. Tension between the Bar and judges also remains prevalent, stemming from the Bar Association's vote of no confidence during the events of 1988, despite the restoration of normal relations in 1994.

In June 2000 the High Court granted an injunction to restrain the Malaysian Bar Council from convening an Extraordinary Meeting to discuss improprieties in the Malaysian judiciary. It held that the conduct of judges and lawyers cannot be discussed save in parliament. The Court of Appeal dismissed the appeal against this judgement in July 2000 and leave to appeal against that decision was refused by the Federal Court on 29 November 2000. "Therefore, in Malaysia today," as the Special Rapporteur on the Independence of Judges and Lawyers states in his 2001 report to the 57th Commission on Human Rights, "the conduct of judges cannot be discussed by anyone, not even the legal profession, in a closed-door meeting, except in parliament."

The Malaysian Bar Council has noted that there has been a dramatic improvement in the relationship between the Bench and the Bar with the appointment of the new Chief Justice, Tan Sri Dato' Paduka Mohamed Dzaiddin Abdullah on 20 December 2000. They stressed that he has taken

positive steps to improve the administration of justice and to strengthen ties with the Malaysian Bar.

The Bar Council has called for an independent law commission to undertake law reform towards a more just legal system. It was proposed that such a commission should make the legal system more efficient, economical and accessible by reviewing laws to bring them in line with current conditions, remove obsolete laws and simplify existing legislation. At present Malaysia's law revision is handled by the Attorney General's Chambers, but the relevant department does not focus on law reform or development of laws which involve considerations of other issues, such as the socio-economic and technological environment, policy issues and the evolving needs of the country. The proposal is for a permanent commission to continually assess how laws should be modernised. The Council has prepared a draft Law Commission of Malaysia Act which will be forwarded to the Government. This draft law is based on laws from other jurisdictions. It is envisioned that the Commission would comprise judges, senior lawyers and legal academics as well as individuals with specialised knowledge.

In January 2000, the independence of lawyers was seriously threatened by the government with the charging of **Karpal Singh** with sedition due to statements he made in court whilst representing Anwar Ibrahim (*see cases*). The prosecution of a lawyer in respect of statements made in court breaches Principle 20 of the 1990 Basic Principles on the Role of Lawyers. This principle guarantees lawyers civil and penal immunity for statements made in good faith in oral or written proceedings before a court. It is a basic duty of a lawyer to properly represent the interests of a client and provide a full and adequate defence. The charging of a lawyer for statements made in court improperly associates a lawyer with his client's cause and represents an unjustified interference in the performance of a lawyer's professional duties.

CONTEMPT OF COURT

The increased use, or threat of use, of the contempt law has led to further tension between the Government and the Bar Council. There have been several cases of excessive use of the contempt of court power against lawyers who have questioned a judge's impartiality. In its judgement on 5 September 2000, the Court of Appeal dismissed lawyer **Zainur Zakaria's** (*see cases*) appeal against a three-month jail sentence for "contempt of court" and drew attention to "an increase in contempt offences being committed by advocates and solicitors." The Court remarked "(a)s such we feel that the time is now ripe for imposition of custodial sentences in contempt offences."

Although the power of contempt is an essential part of the justice system, if this power is used too broadly there are well-founded grounds for concern that in certain circumstances, the ability of lawyers to render their services freely is adversely affected. Andrew Nicol QC examined the use of the contempt power in Malaysia and stated that: "There can be no fair hearing and legal presentation cannot be effective unless a party's advocate is free to advance all arguments and lead admissible evidence which can reasonably be said to support the client's case. It is the recognition that lawyer's must have this freedom which lies behind the absolute privilege which they enjoy (in the common law system at least) against actions for defamation for anything said or done in court."

CASES

Dato' Param Cumaraswamy [lawyer, member of the Executive Committee of the International Commission of Jurists and the CIJL Advisory Board and United Nations Special Rapporteur on the Independence of Judges and Lawyers]: Several businessmen filed four lawsuits in Malaysian courts against Mr. Param Cumaraswamy, alleging that he used defamatory language during an interview published in the November 1995 issue of *International Commercial Litigation* and seeking damages in a total amount of US \$ 112 million. The UN Secretary-General asserted that Mr. Cumaraswamy had spoken in his official capacity of Special Rapporteur and was thus immune from legal process on account of the 1946 Convention on the Privileges and Immunities of the UN. Nevertheless, the Malaysian courts failed to uphold the immunity granted to the UN Special Rapporteur under international law. Thereafter the ECOSOC requested a binding advisory opinion from the International Court of Justice (ICJ). On 29 April the ICJ ruled in favour of the Special Rapporteur. It held that the Malaysian government should have informed its domestic courts of the UN Secretary-General's findings that Dato' Param Cumaraswamy was immune from legal process.

The Malaysian government conveyed the decision of the International Court of Justice, but the Registrar of the High Court, on 18 October 1999, dismissed the Special Rapporteur's application to strike out the fourth suit, ruling that his court was not bound by the opinion of the ICJ. The Special Rapporteur appealed that decision and made applications to strike out the second and third suits and submit the first suit for case management. The appeal was partly heard by a judge of the High Court on 19 January 2000. The Court there observed that there were two conflicting points in the opinion of the ICJ

and queried whether it had to be bound by a decision that is conflicting in itself. Delivering the final judgement on 7 July 2000 the judge held that the Court was bound by the advisory opinion of the ICJ and accordingly struck down the suit. Furthermore, he ruled that "each party ought to bear its own costs." In a press release the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists welcomed the decision to uphold the immunity of the Special Rapporteur but also noted that it is "disturbed by the failure of the Court to award costs to Mr. Kumaraswamy." The statement noted "(t)hat decision is based on the judge's assertion, amongst others, that this would best serve the interest of justice." That assessment appears partisan rather than judicial.

In a positive development in May and June 2001 the plaintiffs withdrew the remaining three defamation suits some five years after the commencement of the four suits and more than two years after the delivery of the advisory opinion by the ICJ.

During the meeting of the Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights in February 2000, the Malaysian Government used technical arguments in an attempt to limit the tenure of the Special Rapporteur to the completion of his current term in April 2000. This and a further effort at the 56th Session of the Commission on Human Rights failed and the Special Rapporteur's mandate was extended for a further three year term in resolution 2000/42 of 20 April 2000.

Karpal Singh [lawyer, lead defence counsel for Anwar Ibrahim]: Mr Singh was charged with sedition in January 2000 with respect to statements made in court on 10 September 1999 in the defence of Anwar Ibrahim. The statements were "It could be well that someone out there wants to get rid of him....even to the extent of murder" and "I suspect that people in high places are responsible for the situation." Mr Singh was charged under Section 4(1)(b) of the Sedition Act 1948 which carries a 5,000 ringgit fine or a maximum of three years imprisonment. The case was transferred to the High Court on 27 February 2000. His trial is now fixed for hearing on 16 - 31 October 2001.

Tommy Thomas [lawyer, former Secretary of the Malaysian Bar Council]: Tommy Thomas had been the subject of several defamation actions by Malaysian businessmen resulting from comments he made in an article entitled "Malaysian Justice on Trial." The cases were settled out of court in November 1998, but Mr Thomas made a statement that the cases had been settled despite his express objections. He publicly retracted that statement the

day after it was published. Irrespective of this, the court issued a notice of contempt and Tommy Thomas was sentenced to six months imprisonment in December 1998. He appealed the decision and was released on bail. On 23 April 2001 the Court of Appeal dismissed the appeal against his conviction. The appeal against the sentence was allowed. The sentence of imprisonment was set aside and substituted with a fine of RM 10,000 in default of three months imprisonment and Mr. Thomas was allowed stay of execution.

Zainur Encik Zakaria [lawyer, member of Anwar Ibrahim's defence team and former President of the Bar Council of Malaysia]: Mr Zakaria was sentenced to three months imprisonment for contempt on 30 November 1998. He had made an application for the exclusion of two prosecutors on the basis that they had attempted to fabricate evidence. The court ruled that this application was an abuse of process and interfered with the due administration of justice. (see *Attacks on Justice 1998*). After the Court of Appeal dismissed Zainur Zakaria's appeal on 5 September 2000 he appealed to the Federal Court. On 27 June 2001 the Federal Court ruled in favour of Mr. Zakaria and quashed the contempt of court conviction and the prison sentence.

Justice Muhammad Kamil Awang [judge in the eastern state of Sabah]: In early June 2001 Justice Muhammed Kamil Awang reported that one of his superiors had instructed him by telephone to drop a case involving electoral irregularities. The judge ignored this instruction and annulled a victory for Prime Minister Mahatir's ruling coalition in a constituency in state assembly elections in Sabah, on Borneo island in 1999. He ruled that the electoral roll included names of non-existent, or phantom voters, and foreigners. Justice Muhammad reported the matter to Chief Justice Mohamed Dzaiddin Abdullah. He also reportedly said that other judges in Sabah and neighbouring Sarawak had told him they had come under similar pressure. However, the Government accepted the judge's verdict and as a result, a by-election will be held.

MEXICO

Breaches in the constitutional structure for the separation of the judiciary from the executive, disparity of quality in the justice provided by federal and states courts, the overly wide powers of the Office of the Public Ministry, the lack of independence of labour and military tribunals and the obstacles that indigenous people face in accessing justice were among the problems of the judiciary during the period under review. The failure on the part of the judicial authorities to account for large-scale impunity, corruption and human rights violations has caused public distrust in the judiciary. The murder of a prominent human rights lawyer in November 2001 posed doubts about the safety of human rights defenders and the possibility of a smooth transition to democracy.

BACKGROUND

The United Mexican States' (Mexico) Constitution, adopted in 1917, establishes that the country is a democratic, representative and federal republic. The hierarchy of sources of law in the civil tradition, to which Mexico's legal system belongs, is the Constitution, legislation, regulations and custom.

Mexico is politically divided into 31 states and one Federal District. The Constitution provides for the separation of powers, which are exercised through the legislative, executive and judicial branches. In addition to the federal Constitution, each Mexican State has its own Constitution and executive, legislative and judicial systems. The President of the Republic is both chief of State and head of the Government and is elected by direct popular vote for a non-renewable period of six years. The President has broad powers of appointment and removal, fiscal powers, control of the military, and the power to initiate and veto legislation. Although the Constitution provides for separation of powers, in reality the presidency is by far the most important political State office in Mexico, due to constitutional provisions and a well-institutionalised tradition of near absolute power.

Congress exercises legislative power. It is composed of two chambers, a 500-seat Chamber of Deputies and a 128-seat Senate. The deputies are elected for a non-renewable three-year term. In the Senate, each one of the

32 political entities of the federation is represented by three members, two of whom are elected by a relative majority, with the third seat being given to the second most voted party. The 32 remaining seats are elected from national lists according to the principle of proportional representation. The senatorial term is six years. Senators and deputies may not serve two consecutive terms.

The Judiciary is reserved to a court system headed by the Federal Supreme Court. The President and the Congress are involved in the procedure for appointment of the General Prosecutor and the members of the Federal Supreme Court.

General elections were held in July 2000. Recently instituted legal reforms that increased the independence of the federal elections monitoring agency introduced quick counts and allowed observers to monitor elections, playing a key role in making possible the fairest elections in Mexico's history. For the first time in 71 years the Revolutionary Institutional Party (PRI) lost the presidential elections. The Alliance for Change (*Alianza por el Cambio*) candidate, Vicente Fox Quesada, was elected President and assumed office in December 2000. During his campaign, the new President had promised to distribute Mexico's wealth more evenly, implement jobs programmes, almost double resources for education, create a "transparency commission" to investigate previous governmental abuses and fight corruption. President Fox led a coalition which includes his own party, the conservative National Active Party (PAN), and the Green Party (PVEM). The coalition did not secure a working majority in Congress, which means that the Fox administration must deal during his term with other political parties, including the PRI and the leftist Party of Democratic Revolution.

HUMAN RIGHTS ISSUES

In the period covered by this report, the overall human rights situation remained problematic. In February 2000, the Chairperson-Rapporteur of the Working Group on Indigenous Populations of the Sub-Commission for the Protection and Promotion of Human Rights undertook a visit to Mexico. The UN High Commissioner for Human Rights, Mary Robinson, visited Mexico in December 2000 and signed a Technical Cooperation Programme with the new Government. In May 2001, the Special Rapporteur on the Independence of Judges and Lawyers also went to Mexico.

The National Human Rights Commission (*Comisión Nacional de Derechos Humanos*), Mexico's Ombudsman Office, continued to carry out its

mandate on human rights. Following the 1999 Constitutional amendment, the procedures for appointment of the Commission's members were amended. Its Advisory Council is constituted of ten members elected by a vote of two thirds the Senate for a five-year term. Every year the two members that have served the longest periods are replaced, unless they are ratified in their positions. The Commission's chairperson serves a five-year term, which may be renewed only once. The chairperson is elected in the same way as the members of the Council. According to the Constitution, the Commission enjoys economic and administrative autonomy. The Commission presents a periodic report to parliament, however its findings and recommendations are non-binding. Some Mexican NGOs have pointed out that as in the past, the executive continues to control the Commission's budget

President Fox announced the beginning of negotiations with the UN Office of the High Commissioner for Human Rights (UNOHCHR) for the establishment an office in Mexico. The signing of a Technical Cooperation Programme with the UNOHCHR was a positive development. The Programme, which commenced in January 2001, focuses on national human rights initiatives; indigenous rights; administration of justice; economic, social and cultural rights; and vulnerable groups, especially women, children and migrants.

The *amparo* proceeding (*juicio de amparo* – a petition seeking protection for fundamental rights), first developed in the nineteenth century, is regulated in articles 103 and 107 of the Federal Constitution. The *amparo's* purpose is to protect individual rights from state's actions or to remedy violations that have already been committed. Although *amparo* does not question the general constitutionality of a law, it may stop application of a law in a particular situation affecting an individual. The Federal Supreme Court of Justice has elaborated a bill in order to reform the *amparo*. This amendment would be welcome as, according to some Mexican NGOs, *amparo* has become neither effective nor accessible. The bill would widen the cases that may come under *amparo*, such as protection of individual and collective human rights recognised in international instruments. It would also broaden the concept of authority when dealing with violations of individual guarantees by State agents. Finally, it would allow for a review of the constitutionality of any law.

PEACE TALKS WITH THE EZLN

Armed opposition groups, which included the Zapatista National Liberation Army (EZLN), the Revolutionary Popular Army and the Insurgent People's Revolutionary Army, continued to be active in Chiapas, Guerrero and Oaxaca states respectively. On 1 January 1994, the Zapatista National

liberation Army (EZLN) took up arms and waged a 12-day rebellion to secure greater indigenous rights. After military intervention by the Mexican Army, a cease-fire was agreed and negotiations started. Although, formally, the cease-fire continues, peace talks have not taken place since 1996. EZLN's permanent presence in the jungles of Chiapas in Southern Mexico has led to the militarisation of the region and frequent encounters with pro-government forces.

Human rights abuses, including summary execution, torture and ill-treatment of detainees and forced displacement, have been attributed to the security forces and "armed civilians" functioning in Chiapas. In August 2000, paramilitary forces calling themselves "the Peace and Justice Group" caused the forced displacement of sixty families when they attacked a community in Yajalón municipality. In the same month, EZLN supporters allegedly launched an attack against PRI supporters living in a community of the Ocosingo municipality. (EZLN denied the accusations.)

In December 2000, the Government released 16 EZLN prisoners and dismantled the military checkpoints. The EZLN asked that three conditions be met before it would return to the negotiating table; a) the demilitarisation of Chiapas; b) the release of all Zapatistas in Mexican prisons; and c) the fulfilment of the 1996 San Andrés Accords, particularly, approval by the Congress of the bill on indigenous rights, drafted with the participation of EZLN and governmental authorities.

In April 2001, the Government allowed the members of the EZLN to carry out a peaceful demonstration across the country and, simultaneously, sent a bill on indigenous issues to the Congress, based on that demanded by the EZLN. The bill was amended during debate in Congress and was approved unanimously in the Senate and by a majority in the Chamber of Deputies. On 29 April 2001, the leader of the EZLN declared that the recently issued Constitutional amendment on Indigenous Rights and Culture was unacceptable and that the amendments betrayed the San Andrés Accords in main areas such as, autonomy, self-determination, legal status of the indigenous populations, and indigenous lands and territories. The EZLN decided to stop any communication with the Government until the Constitutional reform complied with their demands.

IMPUNITY

The new Government has yet to fulfil its promise to establish a truth commission to investigate past human rights abuses. Some members of the

Government have supported the formation of such commission, but others have opposed it on the basis that it might undermine the current institutions that administer justice in Mexico. In June 2001, an amendment of the Federal Penal Code established forced disappearance as a crime. The new law provides for penalties from five to forty years in prison for those who commit this crime.

The Mexican Government sent to the Senate for ratification the UN Convention on the *Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* and the Inter-American Convention on Forced Disappearances. However, the treaties contain two reservations: "The statute of limitations will be applied to crimes committed before the entry into force of the treaty in Mexico" and "the Constitution of Mexico recognises the jurisdiction of military courts".

The courts have arrested 44 public officials in connection with the 1995 Aguas Blancas massacre of 17 indigenous farmers. Thirteen of these officials have been sentenced to 18 years in prison, another nine have been convicted and sentenced to lesser terms, and three are fugitives. However, then-governor Rubén Figueroa Alcocer has not been prosecuted for his alleged involvement in the massacre, despite suggestions of culpability by the Inter-American Commission on Human Rights, the U.N. Special Rapporteur on Extrajudicial Executions and the Federal Supreme Court.

Human rights defenders came under political pressure during 2000 and 2001. Certain politicians, especially from the PRI, sought to ascribe blame to them for some of the country's crime problems. The office of the All Rights for All Mexican Human Rights network (Red de Organismos Civiles de Derechos Humanos Todos Derechos para Todos, known as the Red) in Mexico city was subjected to surveillance by the National Security System (SISEN). Harassment and death threats against human rights activists were numerous. Human rights defenders from abroad continued to face restrictions on carrying out their work in Mexico. The threats and the use of expulsion from the country continued to be exercised by the Mexican authorities. During his campaign, President Fox had announced that he would ease the visa requirements once he became President, but this pledge has remained unfulfilled. In October 2001, in one of the worst attacks against human rights defenders during the past decade, human rights lawyer Digna Ochoa was murdered in her office. (See Cases.)

On 24 August 2000, Ricardo Miguel "Serpico" Cavallo, alleged to have been responsible for torture in Argentina during the military regime (1976-1983), was arrested in Mexico as he was leaving for Argentina. The arrest

was carried out on the basis of an international arrest warrant issued by Spanish judge Balthazar Garzón from the Audiencia Nacional (Spanish National Court). He remains in custody in Mexico pending a judicial rule on a petition of *amparo* filed by his lawyers against the Mexican Minister of Foreign Affairs' decision to authorise his extradition. The legal process to determine whether Cavallo may be extradited under Mexican Law may take some time and any decision will undoubtedly be appealed. If Cavallo were to return to Argentina, he might benefit from amnesty laws that Argentina has adopted for crimes committed during the rule of the military Government (These amnesty laws are presently being challenged, see chapter on Argentina). Mexican Federal courts have universal jurisdiction in cases of torture, as provided under the Convention against Torture, to which Mexico is a party.

THE JUDICIARY

The main legal sources for the functioning of the Mexican Judiciary are the Federal Constitution (Title 3, Chapter IV), the 1996 Law of the Judiciary (*Ley Orgánica del Poder Judicial de la Federación*), and the 1996 Law of the General Prosecutor (*Ley Orgánica de la Procuraduría General de la República*).

STRUCTURE

The Federal judiciary is composed of the Federal Supreme Court (*Suprema Corte de Justicia de la Nación*), the Electoral Tribunal, the District Tribunals (*Tribunales Colegiados del Distrito*), One-judge Circuit Tribunals (*Tribunales Unitarios del Circuito*), the District Courts (*Juzgados del Circuito*), and the Federal Council of the Judiciary (*El Consejo Superior de la Judicatura Federal*) (Article 94). Among the offences that come under federal jurisdiction are those relating to organised crime, drug-trafficking and violations of human rights. The State judiciary has jurisdiction over murders, robberies, kidnappings and other common criminal offences.

The Federal Supreme Court is composed of eleven justices and functions either as a plenary assembly or in two chambers. As a plenary, it has jurisdiction over constitutional disputes between the political entities of the United Mexican States, petitions of unconstitutionality, and review of decisions taken by lower courts on constitutional matters and on petitions of *amparo* (as noted above, a petition seeking protection of constitutional rights). The

Federal Supreme Court in plenary sessions also elects a president from among its members for a non-renewable period of four years.

For any law or treaty to be declared unconstitutional, the Federal Supreme Court must agree by the assent of eight of its eleven members. Actions that challenge the compliance of legislation with the Constitution may only be brought before the Federal Supreme Court by qualified parties, i.e. the Federal Attorney or members of federal or state legislative bodies, but not by regular citizens. The requirement of a qualified majority for favourable decisions and existing constraints on exercising the petition render this procedure a limited system of constitutional review.

The Federal Council of the Judiciary is composed of seven members, including the President of the Federal Supreme Court, two Circuit Court Judges, one District Court judge, two members designated by the Senate and one by the President. It is mandated to administer, monitor, discipline and implement the judicial career system of the federal judiciary, except for judges of the Federal Supreme Court and the Electoral Tribunal.

Several judicial bodies exist that are not part of the regular federal court structure. The most important of these are the Tax Court, Labour Courts, Agrarian Courts and Military Courts. In these courts the executive acts simultaneously as judge and interested party. As a result, impartiality may be impaired, as the executive itself resolves conflicts regarding its own decisions and omissions. The Labour Courts (*Juntas Federales y Locales de Conciliación y Arbitraje*) have jurisdiction over claims of violations of the Labour Law, disputes over collective bargaining and issues related to strikes. Although Mexican Law recognises most labour rights for workers, the labour courts have not been fully independent or impartial. The system previously functioned as a political instrument of the PRI. The fact that Mexico restricted the right to association and empowered non-representative workers organisations is another problem that has affected the impartiality of the judiciary, as labour union members take part in the labour courts. Labour tribunals have generally lacked impartiality when dealing with unlawful dismissals.

Failures in the Mexican labour law system have become more evident when dealing with the increasing number of maquiladoras functioning in the country (companies established in Mexico looking for cheaper labour and access to American markets in the context of NAFTA –The North-American Free Trade Agreement). Such companies have tended to disrespect international minimal labour standards. The new Government expressed its intention to include the labour courts in the regular federal court structure. Although this pledge has not yet been fulfilled, some improvement has been noted in

the impartiality of the Labour Tribunals and the increased number of unions not controlled by the PRI.

With respect to the state judiciaries, article 116 of the Constitution, section III, establishes that they will be composed of tribunals established by state constitutions, which must guarantee their independence.

PROSECUTION

The Mexican prosecution system is based upon Mexico's federated system. At the Federal level, the Office of the Federal Public Ministry, commonly known as Procuraduría General de la República (PGR), exercises prosecution functions. It is headed by the General Prosecutor (Procurador General de la República), whom the President appoints and whose term is ratified by Congress. It forms part of and depends on the federal executive for financial and personnel resources. This office is mandated to prosecute before the tribunals all criminal offences (Article 102A Constitution).

Former Military Prosecutor, General Rafael Macedo de la Concha, was appointed to the position of General Prosecutor. A number of Mexican NGOs have criticised this appointment, as General Prosecutor Macedo has a poor record of prosecuting members of the military involved in human rights violations. The new General Prosecutor has appointed ten military officers to positions of influence, which has confirmed fears of militarisation of the Federal Public Ministry.

The prosecution functions in the 31 states, and the Federal District consists of 31 Offices of the Public Prosecutor of the States (Procuradurías Generales de los Estados PGE) and the Office of the Public Prosecutor of the Federal District (Procuraduría General de Justicia del Distrito Federal PGDF). They are under the direction of the respective prosecutors. All these offices are assisted by sectional judicial police.

Mexican prosecutors conduct pre-trial investigation proceedings (*averiguación previa*), in which crimes are investigated and suspects identified by collecting evidence and interviewing suspects, witnesses and victims. Once this proceeding is finished, the case passes to a judge, who is able to issue a warrant of arrest only by confirming that the crime has "probably" been committed and that it can probably be attributed to the person. If the defendant was caught in "flagrance", the judge only has to certify that the arrest has complied with the law. In any case, the suspect must make a declaration to a judge, which is known as a preparatory declaration (*declaración preparatoria*). The judge bases the decision as to whether to proceed with the

process based on this declaration. If the case goes forward, the Public Ministry will continue to gather information. Judicial Police officers may also carry out investigations, subject to orders of the Public Ministry. Only declarations submitted before a judge or a prosecutor may be considered in a trial. Prosecutors enjoy exclusive power to conduct investigations and prosecutions, meaning that neither victims nor judges may open investigations.

Reforms introduced since 1993 to the Constitution as well as to the Code of Criminal Procedure, which contains most of the Public Ministry's functions (see Attacks on Justice 2000), have given wide powers to prosecutors in order to fight the high levels of criminality in Mexico. Prosecutors are able to arrest persons suspected of having committed an offence during pre-trial investigations. They may order the arrest of a person without judicial order in "urgent" and "serious" cases and to "prevent the suspect from escaping from justice". The flagrante situation, in which a person may also be arrested without judicial order, has been widened. The suspect of a crime can be detained within 72 hours after the crime has been committed. Moreover, in flagrant and urgent cases, the prosecutors can hold the suspect for 48 hours (96 hours in cases of organised crime) before taking him or her to a judge. Suspects may not see their lawyer during this period.

The Constitution provides that a decision not to prosecute an offence may be judicially challenged as determined by law. However, the legislation needed to implement this constitutional provision has not been enacted. Attempts have been made to execute the constitutional provision through the procedure of *amparo* before the ordinary courts, resulting in conflicting jurisprudence on the matter. While certain courts have endorsed the use of *amparo* procedures to protect victims' rights and have willingly granted the petition ordering the prosecutor to reopen investigations, others have decided differently. This conflicting jurisprudence was resolved by a Federal Supreme Court decision, adopting the view that *amparo* petitions were appropriate. However, it has been reported that prosecutors now tend to avoid making any formal decision concerning prosecution, causing the investigations to slow down.

The system that regulates the Public Ministry has been the subject of criticism. Prosecutors have the power not only to search for evidence, but to decide the judicial weight to be accorded such evidence. According to some experts, prosecutors act as *de facto* judges in the Mexican system, since their findings are considered as evidence without further evaluation. The fact that the main objective of the prosecutors is to accuse and not to judge impartially

renders judicial control necessary. Prosecutors obtain and analyse evidence, bring accusations and additionally have the power to incarcerate persons in a wide range of cases. The wide-ranging powers of prosecutors to arrest and detain suspects before presenting them to a judge leaves suspects prone to human rights violations committed to obtain evidence. Detainees are subject to torture or other ill treatment during prolonged arbitrary detention. Studies have shown that the length of arbitrary detention was determined by the time the suspect's wounds needed to heal. Legislation and some jurisprudence provide that evidence obtained through human rights violations, although potentially implicating criminal responsibility on the part of the State agent, may be considered in trials, although evidence obtained through torture is invalid. Certain judges attach great credibility to the first declaration of the suspect and in many cases do not pay attention to allegations that the declaration was achieved through torture, giving greater judicial weight to declarations made before prosecutors or police officers and without the presence of the accused's advocate than to statements made directly by the accused in their presence.

Article 20 of the Constitution was recently amended to expand the rights of victims, including the right to name a lawyer to serve as co-counsel with the prosecutor. This reform was directed toward assuring adequate investigation and prosecution of crimes, contributing to fulfilment of right of victims to have the offender punished and to receive reparation.

MILITARY JUSTICE

Military justice is administered by the Military Supreme Court, the Ordinary Courts Martial and Special Courts Martial. The prosecution is carried out by the Military Public Ministry and assisted by the Judicial Military Police. These latter two bodies operate under the authority of the General Prosecutor of Military Justice. The Ministry of Defence appoints all members of the military judiciary.

The Military Code of Justice provides that military courts have jurisdiction over common crimes committed by military officers "while on duty or for reasons related to their own duty". This imprecise formulation has allowed the military tribunals to try not only offences related to legitimate military functions, but also any other common crime committed by a military officer. If a member of the military commits a crime and is arrested by civil authorities, the agent has the right to ask for immediate transfer of the case to the military justice system.

The use of military courts constitutes a principal cause of impunity with regard to human rights violations and common crimes committed by members of the military. Civilians are not permitted to participate in military trials and the military judiciary is dependent on the Federal Executive, meaning that the military justice systems contravenes international standards regarding impartiality and independence of the judiciary.

In 2000, the Inter-American Commission on Human Rights (IACHR) reiterated its previous recommendations to the Mexican State regarding the military courts. The IACHR concluded that the State had not fulfilled its obligation to investigate the arbitrary detention, rape and torture of four women. According to the IACHR, to allow the potentially implicated organs to conduct the investigations clearly affects the independence and impartiality of the judiciary. The IACHR disregarded Mexico's argument according to which the case had to be considered by military courts because the alleged abuses were committed by members of the armed forces during duty. The IACHR reasoned that the alleged abuses had not been committed during the exercise of the legitimate functions of the army.

Military justice has also been used as a means of political reprisal. Brigadier José Francisco Gallardo continued to be deprived of his liberty in retaliation for his criticism of the army and his proposal for the establishment of an Ombudsman's Office to investigate human rights violations. In 1993, General Gallardo was sentenced to more than 20 years in prison, ostensibly for crimes against military discipline. The IACHR considers General Gallardo to be a prisoner of conscience and has asked the Government to release him. The case is currently under review by the Inter-American Court of Human Rights following the November 2001 submission of the case to the Court due to the reluctance of Mexican authorities to release the General.

ADMINISTRATION

Since 1984, the Government has been investing in improvements to the Federal Judiciary. It has raised salaries, restored locations and increased the number of tribunals. At the state level the situation is less positive, with states commonly providing poor remuneration, lacking basic equipment and maintaining large workloads, with the result that penal processes may last up to five years before being resolved. It is necessary to increase the budget for both the federal and state judiciary in order to retain judges at better pay and reduce the incentive for corruption.

Appointments and tenure

The President enjoys wide-ranging power concerning the appointment of justices of the Federal Supreme Court. The President may send to the Senate a list of three candidates for every vacant seat at the Federal Supreme Court. The Senate, having previously conducted hearings with the proposed nominees, selects the justices. Two thirds of the Senate must agree on the names within 30 days. If there is no agreement in the Senate, the President designates the justice from among the list he has sent. The justices of the Federal Supreme Court serve a non-renewable 15-year term.

The Federal Council of the Judiciary appoints the judges of lower tribunals. Article 97 of the Constitution provides that these judges shall hold their posts for a period of six years. If the judges are elected or promoted to higher posts, they will no longer be subject to removal. Therefore they only enjoy effective security of tenure if promoted to a higher tribunal or if ratified.

The appointments carried out by the Federal Council of the Judiciary should be based in objective criteria and in accordance with the law. Admission and promotion of judges of Circuit Tribunals and District judges are carried out through an internal exam. The organisation of these exams is undertaken by the Federal Judicial Institute (Instituto de la Judicatura Federal) based on terms it establishes and with preference for those candidates that are in the immediately inferior category.

In Mexico City, the City's Chief of Government submits a proposal to the Mexico City Legislative Assembly for appointment of the judges of the supreme Tribunal. Once approved, magistrates also remain in their post for six years. The Mexico City Judicial Council appoints the first instance judges.

At the state level it is generally the case that judges of state supreme courts are appointed for six-year terms by the state Governor with the approval of the state supreme court. Although the Constitution provides for the Federal Council of the Judiciary and the Mexico City Judicial Council, no similar provision was established with regards to the state's judiciary. Not all of the states carry a judicial council within their judiciaries, which has allowed the state supreme courts to maintain administrative and monitoring powers.

Only the justices of the Federal Supreme Court enjoy security of tenure. The IACHR has pointed out that the constitutional structure, which provides for a six-year term subject to ratification for other judges, undermines the

independence of the judiciary in relation to the executive. The requirement of ratification for judges of lower tribunals compromises their independence and makes them vulnerable to political pressure. As a result, the membership of the judiciary typically changes as new governments come to power, resulting in the absence of continuity in the administration of justice and pressure on judges during the first six years to issue rulings not offensive to the ratifying authorities.

Disciplinary Control

The Federal Council of the Judiciary carries out disciplinary control of the Federal judiciary, except with respect to the Federal Supreme Court and the Electoral Tribunals. However, it lacks the requisite independence to monitor the actions of judges, as four of its seven members, including the President, are themselves members of the judiciary to be reviewed.

In a report published in May 2001, the Federal Council of the Judiciary Council outlined its recent actions. It designated 206 Circuit Court Justices and 248 District Judges. It strengthened administrative control and investigated 2,155 complaints against judicial personnel, 287 of which resulted in sanctions, some of them dismissals. The Council created 62 new courts, including two new Circuit Courts. It completed 1,935 visits to District and Circuit Courts, where the performance of judges and lawyers was evaluated. Finally, 5,511 judges and judicial staff were trained in several courses.

Removal

The Federal Supreme Court justices, Circuit judges, and District judges, as well as the Justices of the Mexico City Supreme Court (Tribunal Superior de Justicia del Distrito Federal), may be removed only pursuant to the terms established by the Constitution regarding the obligations of civil servants. Article 109 establishes that a political trial (*juicio político*) be carried out in cases in which civil servants have committed acts or omissions that affect the law, honour, loyalty, impartiality and efficiency in the discharge of their functions. Crimes are to be sanctioned according to criminal law.

For a political trial to proceed, the Chamber of Deputies must act as the accusing party, and the Senate as a court of judgement, designating any appropriate penalty by resolution of two thirds of the senators present at the session. The declarations and resolutions of the Congress are incontrovertible. Criminal proceedings against Federal Supreme Court Ministers for crimes

committed during their serving period may be initiated after the Chamber of Deputies has declared by a majority of its members that there is a basis to proceed against the accused, in which case the accused is removed from the post.

Public Defence System

The Public Defence system suffers serious deficiencies due to lack of resources. Few defence attorneys are employed and many lack training. Public defenders are poorly paid, receiving some US\$ 12,000 per year.

The Public Defence system has also attracted criticism over allegations of corruption. It has been reported that in some cases, the defendant's lawyer was more interested in helping the prosecutors than his or her client. Those who need court-appointed defence attorneys are situated at the bottom of the socio-economic spectrum and usually receive harsher punishment. The Human Rights Commission of the Federal District (HRCFD) acknowledged the deficiencies of this system and confirmed (recommendation 3/96) that on many occasions the public defender only formally acts as counsel, solely completing procedural requisites such as signing declarations, without even being present during the trial. Thus, even if the judicial record contains defenders' signatures as witnessing what happened during the trial, an adequate defence may still have been lacking.

INDIGENOUS COMMUNITIES

The Chairperson of the Working Group on Indigenous Populations, Irene Erica Daes, suggested that the judiciary was viewed with mistrust by indigenous groups and echoed the concerns of other United Nations organs concerning impunity, the language difficulties faced by non-Spanish speakers, detention procedures, the widespread lack of transparency of the judiciary and the ignorance of indigenous peoples as to what constitutes a crime in Mexican law. For many indigenous defendants, some of whom do not speak Spanish, the right to a fair trial is denied. Although the law calls for translation services to be available at all stages of the criminal process, the courts do not generally enforce this rule. Therefore indigenous peoples may be convicted without understanding the reasons for their conviction.

According to the Mexican Commission for the Promotion and Protection of Human Rights, there are 7,431 indigenous prisoners in various prisons across Mexico. The State of Oaxaca has almost a quarter of such indigenous

prisoners. In Oaxaca, the largest number of violations of the right to a fair trial are committed against indigenous persons. A study carried out by the Centre for Indigenous Rights and Culture in the prisons of Oaxaca found that the defence provided by court-appointed attorneys was deficient. In many cases the prisoners did not even know that they had a defence attorney. Furthermore, the study pointed out that many indigenous persons sentenced did not exhaust their potential appeals, because they lacked the necessary economic resources.

Judges and prosecutors often discriminate against indigenous populations, for instance by failing to consider in their decisions testimony and documentation presented by indigenous authorities in favour of indigenous prisoners. Among the gravest problems confronting indigenous people in the administration of justice are lack of translators of indigenous languages; offensive treatment of existing interpreters by judges and their staff; threats against the interpreters by the judicial police; ignorance of the legitimate presence of indigenous interpreters in the court system; interpreters not receiving salaries; indigenous persons unaware as to what actions constitute a crime under Mexican law; and inhumane treatment of the prisoners by prison personnel.

VISIT OF THE SPECIAL RAPPORTEUR TO MEXICO

In May 2001, the Special Rapporteur on the Independence of Judges and Lawyers, Dato' Param Kumaraswamy, visited Mexico for 10 days. He met with many persons involved with the administration of justice, including judges, lawyers, prosecutors, academics and NGOs. The Special Rapporteur also had meetings with the President of the Federal Supreme Court, the General Prosecutor, the Secretary of State for the Interior, officials of the Human Rights Commissions and the Ombudsman. He also visited the states of Chihuahua and Nayarit. In Chihuahua he went to Ciudad Juárez to inquire into the murders of a large number of approximately 200 women since 1994.

According to the Mexican Commission for the Defence and Promotion of Human Rights (*Comisión Mexicana de Defensa y Promoción de los Derechos Humanos*, CMDPDH), the visit was difficult but useful. During the Special Rapporteur's visit, the President of the Supreme Court criticised Kumaraswamy for not being sufficiently familiar with the Mexican judiciary system to issue criticism of it.

At a press conference, the Special Rapporteur expressed his preliminary impressions. He stated that while the judiciary had once been seen as an

extension of the executive, since 1994 it had become more independent. However, this transition had been slow. The failure on the part of the authorities to account for large scale impunity, corruption and human rights violations had led to public distrust of the judiciary. Gaps in the constitutional structures regarding the separation of the judiciary from the executive contributed to this perception.

The Special Rapporteur welcomed the increasing independence of the Federal Supreme Court and took note of planned reforms. He pointed out that there was disparity in the quality of justice provided by Federal and states courts owing to the relative disparity in resources. This situation is especially problematic because access to justice for the vast majority of the people of Mexico is found in the state Courts.

The Special Rapporteur expressed concern over the disorganisation of the legal profession in Mexico; the lack of independence of labour, tax, juvenal offenders and administrative tribunals (which form part of the executive); the absence of separate juvenile courts; the problems that indigenous people face to access justice; and the parallel trials that some sectors of the press seemed to be carrying out in Mexico.

CASES

Juan López Villanueva [lawyer]: Mr. López works for the Fray Bartólome de las Casas Human Rights Centre. He received death threats by electronic mail in the following form: "If you continue to play the fool, I'll kill you. I hope that you think carefully before showing this message, if not you will come to a bad end". In January 2000, a complaint concerning the death threats was filed and is currently under review by the National Human Rights Commission.

Arturo Solis [lawyer]: Mr. Solis is Director of the Centre for Border Studies and Promotion of Human Rights (CEPRODHAC), in Reynosa, Tamaupilas State, bordering the United States. In February 2000, he was accused of defamation by a Government body after publicising charges of extortion and illegal traffic and ill-treatment of immigrants by officials of the National Immigration Institute (INM). Two witnesses who testified in favour of Mr. Solis were allegedly threatened and retracted their statements. Mr. Solis also was threatened. He and his family were followed by unidentified persons in vehicles without licence plates. The Government began an investigation and, on 11 July 2000, the Office of the General Prosecutor in

the State of Tamaulipas instituted protective measures to guarantee the safety of Mr. Solis.

Pilar Noriega García [lawyer]: From 1996, Ms. Noriega's work as defender of Manuel Manríquez San Agustín, an indigenous man convicted of murder, has come under repeated attack. Mr. Manríquez's case is before the IACHR for human rights violations related to his conviction. In 2000 and 2001 the harassment continued when she visited her client in the La Palma maximum security prison in the State of Mexico. On 31 March 2000, prison officials required her to remove her pantyhose, lift her skirt to the panty line, and lift her shirt over her bra. On 23 May 2000, she went to the same prison with a colleague to visit several clients, but they were informed that their clients were in a "notification procedure" and therefore could not see them. Finally, this prison requires lawyers to meet with their clients in a locked room, obliging lawyers to pound on the door and yell to be let out. This practice is allegedly unnecessary for security, because the prisoners are confined on the other side of a glass wall.

Leonel Guadalupe Rivero Rodríguez, Maurilio Santiago Reyes and María del Pilar Marroquín [lawyers]: On 29 March 2000, Mr. Rodríguez's house was burgled in an apparent attempt to steal files relating to his defence of students of the National Autonomous University of Mexico. On 12 May, stones were thrown through the windows of Mr. Rodríguez's house. On 9 May 2000, Mr. Santiago Reyes and Ms. Marroquín experienced acts of intimidation. A van without number plates passed by Mr. Santiago Reyes' house, and during the same night he received death threats. The Office of the State Procurator General initiated a preliminary investigation. The Oaxaca Procurator General reported that the lawyer concerned declined to be seen by the psychology expert from the Procurator's Office, which is apparently a requirement for the completion of the preliminary investigation.

Juan de Dios Hernández Monge [lawyer]: Mr. Hernández represents a group of students from the National Autonomous University of Mexico, who were being held in detention. On 3 May 2000, Mr. Hernández was attacked by a man while in his car. The attacker asked him if he was the lawyer of the students, then insulted him and cut his forehead. On January 2000, Mr. Hernández was beaten by unknown men in the parking lot of the National Autonomous University. Government officials stated that the office of the General Prosecutor for the federal district had initiated an inquiry jointly with the branch of the public prosecutor's office in Coyocán. In March 2000, a proposal was made to refrain from initiating criminal proceedings because the complainant had not appeared, despite having

been summoned. The National Human Rights Commission decided not to intervene in the case.

Mario Alberto Gallardo [lawyer]: Mr. Gallardo is a political activist and former president of the non-governmental Comisión de Derechos Humanos en Comalcalco (CODEHUCO, Human Rights Commission in Comalcalco). In September 2000, he was accused of having robbed the keys of a car. Mr. Gallardo had complained against the use of public funds for political advertising in election campaigns and defended political activists detained for protesting electoral anomalies. Although Mr. Gallardo was never called before any judicial authority, an arrest warrant was issued. However, when the political opposition party, the PRD, won the local municipal election in Comalcalco in October 2000, the witnesses to the theft, allegedly members of the outgoing PRI, retracted and the case was concluded.

Digna Ochoa y Placido [lawyer]: While Ms. Ochoa was the head of the legal division of the Miguel Agustín Pro Juárez Centre for Human Rights (PRODH), she was the subject of a series of threats and attacks throughout 1999 by individuals reportedly linked with governmental agencies (See *Attacks on Justice 2000*). The harassment was closely related to her work in PRODH, a non-governmental organisation that litigates domestically and internationally cases of torture, execution and arbitrary detention. In the year 2000, the death threats continued, and 24-hour police personal protection was provided by the State. After staying several months in the United States, Ms. Ochoa came back to Mexico to work as an independent lawyer, but police protection was not resumed. On 19 October 2001, Ms. Ochoa was found dead in her office. Unidentified individuals had shot her twice. The killers left a letter with death threats against members of PRODH. The lack of investigation into the death threats may have contributed to the death of Ms. Ochoa. Several human rights NGOs, the Inter-American Court of Human Rights and UN human rights mechanisms had made appeals to the Mexican Government to secure her protection. However as late as February 2000 the SISEN had kept her on a list of guerilla collaborators.

MONGOLIA

The Constitution of Mongolia provides for an independent judiciary. The General Council of Courts, established to promote the independence of the judiciary, has far-reaching powers with regard to the selection and removal of judges. The General Council is headed by the executive, an arrangement with adverse implications for the independence of the judiciary. There have been incidents reported concerning attempts by members of the executive to influence the judiciary.

Mongolia gained independence from China in 1921. From 1924 until 1990 the country was ruled by the Communist Party. A largely peaceful and democratic revolution changed the country's political system. In May 1990 the Constitution was amended to provide for a multi-party system. The new Constitution entered into force on 12 February 1992.

Mongolia is now an independent, democratic and unitary republic divided into administrative units comprising 18 provinces (*aymguud*) and three municipalities (*hotuud*). The head of state is the President. He is nominated by the parties in the State Great Hural (parliament) and directly elected by popular vote for a term of four years. The President may be re-elected only once. The last elections were held on 20 May 2001, as a result of which Natsagiyn Bagabandi of the ruling Mongolian People's Revolutionary Party (MPRP) was re-elected as President for his second term in a row with 58.13 per cent of the votes cast.

The Prime Minister is the head of government. After the parliamentary elections, the leader of the majority party or majority coalition is customarily elected as Prime Minister by the State Great Hural. All legislative power is vested in the Great Hural. This unicameral parliament of Mongolia has 76 members, elected by popular vote for a term of four years.

The last general elections were held on 2 July 2000. The formerly communist Mongolian People's Revolutionary Party (MPRP) won 72 of the 76 seats in the State Great Hural, thereby regaining the power it had lost in the 1996 elections. The MPRP is the former Mongolian People's Party, which had ruled Mongolia as a one-party state from 1921 until 1991. During the first free elections held in 1992 the communists had won an overwhelming

majority, which they subsequently lost to the Democratic Union (DU) in the 1996 elections. In the 2000 elections the leading parties in the ruling DU coalition lost all but one seat. (The Mongolian Social Democratic Party (MSDP) lost all 15 seats and the Mongolian National Democratic Party (MNDP) kept only the seat of the former Prime Minister Janlaviyn Narantsatsralt.)

Nambariyn Enkhbayar, the leader of the MPRP, was elected Prime Minister on 26 July 2000 by 67 out of the 70 present members of the Great Hural. On 9 August 2000 the President and the Great Hural approved the new cabinet nominated by the Prime Minister. The new government consists exclusively of members of the MPRP.

Recently discussions have been underway regarding the manner in which the Great Hural ought to function. The parliament passed a bill to amend the constitution so as to allow the members of the Great Hural to be members of the executive cabinet at the same time. This bill was vetoed by president Bagbandi in January 2000 after it had been approved by the Great Hural in December 1999, and a similar bill was vetoed by him on 12 December 2000 after it had been approved by the (new) Great Hural on 3 December 2000. This bill had also been struck down as unconstitutional by the Constitutional Court on 15 March 2000. However, in December 2000 the Great Hural had voted 50-8 that the President had no authority to exercise his veto against the amendments.

The Constitution of Mongolia provides for the separation of powers among the judicial, executive and legislative branches. Article 16 guarantees certain fundamental rights and freedoms to the citizens of Mongolia. The rights guaranteed include, *inter alia*, the right to life, the right to property, equal rights for women and men, freedom from torture, freedom of religion and conscience and the right to personal liberty and safety. The Constitution also sets forth several procedural and legal guarantees, such as the right to judicial appeal to protect fundamental rights, the right to be informed of the reason and grounds for arrest, not to have to testify against oneself, the right to defence and to receive legal assistance, the right to a fair trial, the right to appeal and the presumption of innocence. Article 19 of the Constitution provides that, with the exception of the rights to life, freedom of opinion, conscience and religion and freedom from torture, inhuman and cruel treatment, these rights may be limited by law in case of a state of emergency or martial law.

HUMAN RIGHTS BACKGROUND

The Government established a National Commission on Human Rights in December 2000. The human rights of Mongolian citizens are generally respected by the Government. However, there have been some reports of the police beating prisoners and detainees. The conditions in prisons and pre-trial detention facilities are generally poor and have resulted in the death of several prisoners. The Committee on Economic, Social and Cultural Rights considered the third periodic report of Mongolia in August 2000 and noted with concern "the degrading conditions for detainees, who have been reported to suffer from overcrowding, inadequate medical care and hygiene and from malnourishment." The authorities denied entrance to some persons claiming refugee status, and there is no legal framework for the treatment of refugees.

The absence of women at senior levels at work and in public office is a serious problem in Mongolia. One third of the country's women are estimated to be victims of domestic violence. The Committee on the Elimination of Discrimination against Women examined the combined third and fourth periodic report of Mongolia in January 2001. The Committee noted "with deep concern the deteriorating situation of women in Mongolia in a period of economic transformation. It is particularly concerned that the Government has failed to prevent the erosion of women's rights to economic advancement, health, education, political participation and personal security."

INTERNATIONAL HUMAN RIGHTS MECHANISMS

INTERNATIONAL OBLIGATIONS

Mongolia is State Party to the International Covenant on Civil and Political Rights and its Optional Protocol, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Elimination of All Forms of Racial Discrimination. Mongolia is not a party to the International Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.

TREATY BODIES

The Human Rights Committee examined the fourth periodic report submitted by Mongolia and remarked:

The Committee recognises the substantial progress made towards the establishment of democratic institutions and the enactment of legislation which seeks to ensure many Covenant rights.... The Committee welcomes ... the improvements with respect to freedom of association made possible by the 1997 Law on Non-governmental Organisations and the emergence of a free Bar Association. ... The Committee regrets that it has been largely precluded ... from examining compliance of the State party's judicial procedures with the rights guaranteed under article 14 of the Covenant [note: article 14 guarantees rights falling under the right to a fair trial]. ... The Committee is deeply concerned that the General Department for Implementation of Judicial Decisions, within the Ministry of Justice, has not been able to ensure that victims of human rights violations obtain in practice the benefit of remedies that have been granted by the courts (art. 3 (3) of the Covenant)....The Committee is deeply concerned about all aspects of detention before trial.

JUDICIARY

Article 47 of the Constitution of Mongolia vests judicial power exclusively in courts that shall be solely constituted under the Constitution and other laws. Article 49 stipulates that judges are independent and subject only to law. Section 2 of that article expressly provides that neither any private person, nor the President, Prime Minister, members of the State Great Hural or the Government, officials of political parties or other voluntary organisations shall interfere with the way in which judges exercise their duties. However, judges of lower courts are said sometimes to contact the Supreme Court to discuss cases, for fear of making "mistakes" and risking removal from office. The Judicial Professional Committee reportedly often requests judges who made errors in rulings to take a qualification test and, if they are unsuccessful, concludes that the judges have inadequate qualifications and removes them. Furthermore, judges are said to call at times for meetings with the Minister of Justice to explain their rulings on particular cases.

THE COURT STRUCTURE

Mongolia is divided administratively into *Aimags* (provinces) and a capital city. *Aimags* are subdivided into Soums (provincial districts).

The court system of Mongolia consists of three levels of ordinary courts and a Constitutional Court. At the lowest level of the ordinary courts are the *Soum*, *Intersoum* and the District Courts. These are courts of first instance for misdemeanours, less serious crimes and civil cases with relatively small sums in dispute. Currently there exist 39 of these courts with 246 judges. *Aimag* Courts, which function in the *aimag* capitals, and the Capital City Court in Ulanbaatar are the courts of first instance for more serious crimes, such as felony cases of murder and rape, and in civil cases with large sums of money in dispute. They also hear appeals from the lower level courts. Currently there are 22 of these courts with 97 judges.

The Supreme Court of Mongolia is the highest judicial organ. It is the court of first instance for criminal cases that do not fall within the jurisdiction of the lower courts. The Supreme Court examines decisions of lower-instance courts through appeal and supervision. It decides on matters referred by the Constitutional Court and the Prosecutor General. It rules as to the official interpretation of all laws, except the Constitution. It may also consider all other matters assigned to it by law. The Supreme Court comprises the *Erönhii Shүүгч* (Chief Justice) and 16 judges. The Supreme Court selects one of its members for the position of Chief Justice, who is then appointed for a six-year term by the President. On the recommendation of the Chief Justice, the President appoints the two Senior Judges to preside respectively over the civil and the criminal chambers of the Supreme Court.

Courts of all instances function on the basis of collective decision-making. As provided by law, certain cases are tried by a single judge. The Supreme Court decides cases with the majority of its judges present. The courts of first instance are required to allow up to three representatives of citizens to participate in the proceedings when passing a collective decision.

The Constitutional Court (*Üндсэн Huулийн Tsеts*) exercises ultimate judicial authority over the implementation of the Constitution. It renders decisions on the violations of the provisions of the Constitution and resolves constitutional disputes. Article 64 of the Constitution of Mongolia provides that the Constitutional Court and its members are independent from any organisation, official or any other person and are subject only to the Constitution in the execution of their duties. The Constitutional Court has nine members. These members elect by majority vote from among themselves a chairman for a period of three years. The Constitutional Court

decides constitutional disputes on its initiative on the basis of petitions and information received from citizens or at the request of the Great Hural, the President, the Prime Minister, the Supreme Court or the Prosecutor General.

GENERAL COUNCIL OF COURTS

Pursuant to Article 49 of the Constitution, a General Council of Courts is established for the protection of the independence of the judiciary. It serves to consider the selection of judges from among lawyers, the protection of their rights and other matters pertaining to the insurance of conditions guaranteeing the independence of the judiciary. Article 35 of the Law of the Courts further provides that the Great Council of Courts is to submit proposals to the State Great Hural regarding the budget of the judiciary, its personnel and court buildings, and should organise training courses for judges.

Article 33 of the Mongolian State Law of Courts governs the composition of the General Council of Courts. The General Council has 12 members: the Chief Justice of the Supreme Court, the General Prosecutor, the Minister of Justice, a Secretary of the General Council of Courts appointed by the President, two members appointed by the Supreme Court, two members appointed by the State Great Hural, two members representing the *Aimag* and Capital City Courts, and two members representing the *Soum* and *Intersoum* and District Courts.

Article 33.3 of the Law on Courts provides that the Chairman of the General Council of Courts shall be the Minister of Justice. The General Council of Courts has far-reaching powers and influence on the selection and removal of judges and has a mandate to promote the independence of the judiciary. The composition of the General Council, with the executive at its head, threatens the independence of the judiciary in Mongolia, as it creates an inherent conflict of interest in the person who has to fulfil both positions.

APPOINTMENT OF JUDGES

All Judges of Mongolia are appointed by the President upon the proposal of the General Council of Courts. The judges of the Supreme Court are appointed by the President after the General Council of Courts has informed the State Great Hural. In 1995, the Great Council of Courts established a Judicial Professional Committee composed of nine experienced jurists to examine the qualifications of present and future judges. At the time of this writing only one member was said to be a judge.

To qualify for appointment to the Supreme Court, a person must be a Mongolian national who has reached 35 years of age with a higher education in law and a professional career of not less than ten years. Every Mongolian national of 25 years of age with a higher education in law and a professional career of not less than three years may be appointed a judge of the other courts.

The nine members of the Constitutional Court are appointed by the Great Hural for a term of six years. Three members are nominated by the Great Hural, three are nominated by the President and the remaining three are nominated by the Supreme Court. To qualify for appointment, a person must be a Mongolian national who has reached forty years of age and has high political and legal qualifications. However, the Constitution provides that the President, members of the Great Hural, the Prime Minister, members of the Government and members of the Supreme Court shall not be nominated.

SECURITY OF TENURE

Judges are appointed for an indefinite term. According to Article 35 of the Law of Courts, judges may be transferred by the General Council of Courts. Judges depend on the good will of the General Council of Courts in order to be or not be transferred. This arrangement may impact negatively on the independence of the judiciary, since judges might be prone to avoid any contention with this body in order to obtain a favourable decision.

DISCIPLINARY ACTION

According to Article 39 of the Law of Courts, the General Council of Courts establishes the Judicial Disciplinary Committee, which consists of nine judges of high professional standards with work experience, for a term of six years. The members elect the Chairman of the Committee from among themselves. The Judicial Disciplinary Committee is authorised to take disciplinary actions against judges, *inter alia*, for a breach of moral standards of the judiciary, for violations of internal regulations, and for commission of an offence while reviewing and deciding a case. The Committee can either remove or reprimand a judge pursuant to the procedures laid down in the Law of Courts. A judge may lodge a complaint against the decision of this body to the General Council of Courts within one week.

DISMISSAL OF JUDGES

Article 51 of the Constitution provides that a judge may only be removed from office at his/her own request or on the grounds provided for in the Constitution and/or the law on the Judiciary and by a valid court decision. If a judge of the Constitutional Court violates the law, that judge may be withdrawn by the Great Hural on the basis of the decision of the Constitutional Court and on the opinion of the institution which nominated the judge.

Judges of other courts are relieved or removed from their posts by the President on the recommendation of the General Council of Courts. The grounds for relieving as stipulated in Article 51 of the Law of Courts include: if the judge requests removal; if the judge is appointed to another state job with his/her agreement; health reasons; reaching of the retirement age defined by law; if the term to replace the judge has expired, or if the General Council Court decides that a judge is no longer competent and qualified to work as a judge.

According to Article 52 of the Law of the Court, the grounds for removal are the adoption of the decision to remove a judge reached by the Committee on Discipline, repeated disciplinary actions within one year, or conviction for commission of a crime.

THE WORKING CONDITIONS OF JUDGES

The working conditions of judges in Mongolia are generally very poor, a partial consequence of the general economic state of the country. Salaries of judges are quite low and diminutive pay rates inevitably gives rise to a risk of corruption. The courts lack the necessary technical equipment, such as computers, printers and copy machines. Many court buildings are in need of renovation. The situation is worse in rural areas, where courts have limited space and judges sometimes have to share offices and phones. The lack of funding provided by the Government resulted, *inter alia*, in the disconnecting of the phone in the Capital City Court for three months in the year 2000 for failure to pay the phone bill.

Judges tend to be overworked because there is not enough money to hire the amount of judicial staff needed. For example, for every two Supreme Court judges there is only one clerk. Communication among courts is very difficult as well, as many judges do not have access to internet and the phone lines are bad in Mongolia. Transportation is also difficult and judges sometimes have to travel great distances due to the size of the country. Due to the lack of means of transportation, their capacity for travel is limited.

PROSECUTORS

The Prosecutor General and his/her deputies are appointed by the President in consultation with the Great Hural for a term of six years. Prosecutors exercise supervision over the investigation of cases and the execution of punishment.

CASES

Ganzorig Gombosuren [Retired Judge of the Supreme Court of Mongolia]: Mr. Ganzorig Gombosuren served as a Judge of the Supreme Court of Mongolia for eight years and left the Court in 1998 to take a master in law degree in the United States. When he returned to Mongolia in March 2001 he was nominated by the Supreme Court to be appointed as a judge again. In spite of his prior service, he had to take a test that the Judicial Professional Committee has established as a first step in order to ensure the adequate qualification of candidates. He was unsuccessful on the test and was therefore not recommended by the General Council of Courts to the President for renewed appointment. The General Council of Courts rejected his request to reconsider this decision. Reportedly, the majority of the members of the General Council of Courts at first voted in his favour, but after the Minister of Justice, who was Chairman of this body, made comments to his disadvantage, the second round of voting confirmed the negative decision not to renew his nomination. Mr. Ganzorig Gombosuren appealed this decision to a District Court in the capital city. The outcome of his case was pending at the time of writing.

The judicial exam reportedly had been developed by the Judicial Professional Committee, composed mainly of scholars and lacking judicial members. The only reason stated for the rejection of his candidacy was his inadequate qualification. According to Ganzorig Gombosuren, the *de facto* reason behind his rejection is that he has been active in promoting the independence of the judiciary in Mongolia. In December 1993 he and his colleagues established the Mongolian Group for the Independence of Judges and Lawyers to support judicial independence and legal reform in Mongolia. He has also written a number of articles in newspapers and law journals, spoken on TV and on the radio, and in law schools and conferences.

L. Nasan Ulzii [former judge of a local court in Darhan aimag]: Judge L. Nasan Ulzii annulled electoral results from a June 2000 local election as a result of a violation of Election Law. The former Communist Party, which

had won these elections, won an appeal against Ms. Ulzii's decision. Shortly thereafter, on 10 October 2000, the Chairman of the Darhan aimag Citizen's Representative Meeting (head of the local parliament, who was nominated by the former communist party), Mr. L. Amarsanaa, reportedly summoned the judge to his office and declared that he had the right to advise judges. He stressed to her even the appeal court had overturned her decision. On 17 October 2000 Mr. Amarsanaa sent a letter to the Chief Justice of the local court and the Chief Justice of the aimag court ordering them to sanction judge Ulzii for her violation of the judge's code of conduct. As a result, the Disciplinary Committee for Judges removed Ms. Ulzii from her office on 8 November 2000. Judge Ulzii appealed that decision to the Supreme Court. The Supreme Court decided in her favour, holding that the disciplinary sanctions against the judge violated Article 49 of the Constitution that guarantee the independence of the judiciary. In spite of this ruling, the Judicial Professional Committee requested Ms. Ulzii to take a test and later concluded that she was not qualified to be a judge. On the basis of this decision, the General Council of Courts removed Ms. Ulzii on 22 May 2001 from the bench.

PAKISTAN

The independence of the judiciary was largely undermined by the order by General Musharraf in January 2000 that Pakistani judges take a fresh oath of loyalty to his administration. In May 2000, the Supreme Court, reconstituted after the dismissal of six judges who refused the oath, upheld General Musharraf's military coup of 1999, under the doctrine of state necessity.

Pakistan is a constitutional republic. On 15 October 1999, the Government promulgated the Provisional Constitution Order, (PCO), No.1 of 1999, overriding the 1973 Constitution of the Islamic Republic of Pakistan, previously suspended following the 12 October 1999 military *coup* led by General Pervez Musharraf. The PCO provided for the suspension of the National Assembly, the Provincial Assemblies and the Senate and mandated General Musharraf to serve as the new Chief Executive. On 20 June 2001, General Musharraf became President of Pakistan after dismissing the incumbent President, Muhammad Rafiq Tarar.

On 12 May 2000, the Supreme Court validated the October 1999 coup under the doctrine of state necessity. However, the Court ordered that the Government hold national and provincial elections by 12 October 2002. In response, President Musharraf presented a four-phase programme aimed at returning the country to democratic rule, with local elections to be held from December 2000 until August 2001. Subsequently, a series of local elections were held in December 2000, March 2001, May 2001 and July-August 2001. However, political parties were prohibited from participating in the contests and party leaders were disqualified from holding political office.

In the aftermath of the 11 September 2001 attacks in the United States, Pakistan played a major role in assisting the US-led campaign against Osama bin Laden, Al-Qaeda and its Taliban supporters. President Musharraf has been a crucial ally in Washington's war effort, allowing American combat forces to be stationed in Pakistan while withstanding pressure from within his own country by those who are sympathetic to the Taliban. As a result, Pakistan has benefited economically from the lifting of sanctions and assistance from international financial institutions.

HUMAN RIGHTS BACKGROUND

The human rights situation deteriorated following the military coup. Pakistan has failed to ratify the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention Against Torture. The death penalty has been imposed liberally and some 4,000 individuals are presently on death row. However, a juvenile justice ordinance promulgated in July 2000 prohibited the death penalty to punish crimes committed while the accused had been under the age of 18. Torture and other ill-treatment of those in police custody and prisons, especially those unlawfully detained remained widespread. The sexual violation of child detainees by both guards and inmates remained prevalent.

In 2000, a number of individuals died in police custody or police "encounters". Police officers are rarely tried and convicted for the perpetration of such crimes. In October 2000, a police report detailing hundreds of "encounters" killings since 1990 was presented to the Punjab provincial government for further investigation. Some 967 criminal suspects were said to have been killed in police "encounters" between February 1997 and October 1999 in Punjab. On a positive note, since the 1999 *coup*, extra-judicial executions of criminal suspects has substantially decreased.

"Honour killings", i.e., the tradition of punishing women who allegedly bring dishonour to their families, is prohibited under Pakistani law, however the practice has been *de facto* tolerated by successive governments. In April 2001, Pakistan's upper house, the Senate, rejected a bill condemning the growing incidence of honour killings. Indeed, President Musharraf's Government has made various declarations of intent against honour killings. However, the political will to combat the practice has been lacking, as police and the judiciary have not received training regarding honour killings and other gender sensitive matters.

Despite an improvement in the freedom of the press under President Musharraf's Government, self-censorship was widespread among Pakistan's journalists as a result of official pressures and threats of criminal charges under the 1985 blasphemy law. This law had been introduced to punish persons offending the name of the prophet Mohammed with the penalty of death. Unfortunately, the vague wording of the blasphemy law has led to numerous politically-motivated abuses. Although it applies equally to Muslims and non-Muslims, the law has been predominantly applied to harass religious minorities. Those who have allegedly breached the law are often arrested without any evidence other than the word of their accusers. In April 2001,

President Musharraf announced a decision to introduce a procedural change in the blasphemy law whereby all accusations would have been reviewed by local deputy commissioners before proceeding to Court. Unfortunately, in the face of protest by some fundamentalists, the proposed amendment was withdrawn.

Although no execution has following a blasphemy conviction and no death sentence has thus far taken place, hundreds of alleged blasphemers remain in jail pending the appeal of their original convictions. Even when acquitted, accused blasphemers often remain the targets of fundamentalist attacks (*see below: Blasphemy trials*).

Pakistan is composed largely of Islamic Sunnis. The Shi'a minority represents some 20 per cent of the population. During 2000 and 2001, sectarian violence between Sunni and Shi'a extremists dramatically increased. In August 2001, pursuant to plans to curb religious and ethnic violence, President Musharraf took harsh anti-terrorism measures, banning two groups involved in sectarian killings and barring extremist party leaders from obtaining political power. A national sedition law and section 16 of the Maintenance of Public Order Ordinance have been invoked to criminalize extremist political rallies and to legitimise police raids on political demonstrations.

After a brief lull, clashes between Pakistan's Sunni and Shi'a Muslims increased dramatically in October 2001, when at least 40 persons, mostly Shi'a, were murdered. The Government appeared to place the blame on the Taliban regime in neighbouring Afghanistan for allegedly training the perpetrators.

Following a trial marred by procedural irregularities, former Prime Minister Nawaz Sharif was convicted in July 2000 of hijacking and terrorism and sentenced to 14 years' imprisonment for preventing President Musharraf's plane from landing on the day of his military coup. In December 2000, Mr. Sharif was granted a presidential pardon and exiled to Saudi Arabia. The use of exile as a punishment has been widely denounced by President Musharraf's critics as an arbitrary and unconstitutional measure.

JUDICIARY

Until it was suspended on 12 October 1999, the 1973 Constitution provided for an independent and impartial judiciary. This guarantee was immediately curtailed following the coup. On 14 October 1999 the Government issued a

Provisional Constitution Order which mandated that the judiciary not issue “any order against the Chief Executive or any person exercising powers or jurisdiction under his authority”. This order effectively insulated the military Government's actions from judicial scrutiny.

On 26 January 2000, the Government further increased executive control over the judiciary through the promulgation of the Oath of Office Judges' Order 2000. This order required all Court Justices to take an oath to President Musharraf's regime. Refusing to swear allegiance to the military-led government, six Supreme Court Justices, including the Chief Justice, and nine Provincial High Court Justices, were removed from office. Suspiciously, the Oath of Office Judges' Order 2000 was issued on the same day that the trial of former Prime Minister Nawaz Sharif was set to begin and only days before the Supreme Court's hearing of the first case challenging the legality of President Musharraf's *coup*.

The first petition alleging military *coup* illegality was filed in November 1999. On 12 May 2000, a Supreme Court reconstituted by the military executive unanimously rejected the petition and endorsed the coup's legitimacy under the doctrine of State necessity. The Court went on to describe the military take over as an,

extra-constitutional... (step taken by)... the Armed Forces for a transitional period to prevent any further destabilisation, to create a corruption-free atmosphere at the national level through transparent accountability and to revive the economy before the restoration of democratic institutions under the Constitution.

Upholding the Government's legitimisation arguments, the Supreme Court added that as the Constitution did not offer any solution for the political crisis under the previous regime, the military intervention was “inevitable”. Further, the Court ignored the Oath of Office Judges' Order 2000 and the March 2000 ban on public rallies in concluding that there was “an implied consent of the governed”. Thus, the people of Pakistan in general, including politicians and parliamentarians, were deemed to have consented to the coup, as no protests had been launched against the army take-over and/or its continued rule. In addition to endorsing the *coup*, the Supreme Court granted extensive powers to the new Government, empowering it to unilaterally amend the 1973 Constitution and enact new laws without the approval of Parliament.

JUDICIAL STRUCTURE

The 1973 Constitution of the Islamic Republic of Pakistan provided for a federal Supreme Court and a High Court in each province. Additional Courts, established by Acts of Parliament or provincial assemblies, exercise civil and criminal jurisdiction.

The Supreme Court is the highest judicial body in Pakistan. The President appoints the Chief Justice and, in consultation with the latter, additional Supreme Court Justices. The Supreme Court has original, appellate and advisory jurisdiction and is competent to pronounce declaratory judgements in any dispute between the Federal and provincial government(s) or between provincial governments. It also has the power to issue orders for the enforcement of fundamental rights ensured by the Constitution. As the final appellate body, the Supreme Court determines appeals from judgements, decrees, final orders or sentences passed by High Courts, Federal Shariat Courts and appellate Tribunals.

There is a High Court situated in each of Pakistan's four provinces. Judges are appointed by the President after consultation with the Supreme Court Chief Justice, the governor of the province and the Chief Justice of the High Court to which the appointments are to be made. A High Court has original and appellate jurisdiction against decisions, including judgements, decrees and sentences, issued by civil and criminal courts.

ACCOUNTABILITY PROCESS

In November 1999, a Government ordinance created the National Accountability Bureau, (NAB), with companion accountability courts to try corruption cases. Under the ordinance, the NAB was granted extensive powers of arrest, investigation and prosecution. The extra-judicial tribunals were prohibited from granting bail. However this prohibition was later modified following a Supreme Court ruling restoring the right. The ordinance also allowed for detention periods of up to 90 days without charge and did not allow accused access to counsel prior to the institution of formal charges. Further, the burden of proof at trial continues to rest with the defendant and convictions for ordinance violations may result in 14 years' imprisonment, fines, property confiscation and the loss of the right to hold public office for a period of 10 years.

Persons charged with corruption by the NAB have included former Prime Ministers Benazir Bhutto and Nawaz Sharif. In April 1999, Ms. Bhutto and her husband, former Senator Asif Ali Zardari, were sentenced to five years'

imprisonment on NAB corruption convictions. In April 2001, the Supreme Court overturned the convictions following revelations concerning the political manipulation of Bhutto trial judges. Various tape recordings surfaced which demonstrated that the then head of the NAB, Saifur Rehman, had directed High Court Justices to impose the maximum sentence after Ms. Bhutto and Mr. Zardari were convicted. Thus, in addition to infringing the separation of powers principle, the NAB and the accountability tribunals are prone to deny due process and fundamental rights.

ANTI-TERRORIST COURTS

Under the 1997 Anti-Terrorist Act, (ATA), special Military Courts were established to try suspected terrorists expeditiously. These courts lacked essential due process and fundamental rights guarantees, including the right of appeal. In February 1999, the Supreme Court declared Military Courts unconstitutional and ordered their dissolution. The Military Courts were then replaced with Anti-terrorist Courts. Through amendments to the ATA, the jurisdiction of Anti-terrorist Courts was extended to cover the same types of offences as had been tried before Military Courts, and the executive completed the transition through an April 1999 ordinance transferring Military Court cases to the Antiterrorist Courts. As was the case with Military Courts, Anti-terrorist Courts were established to dispense summary justice, conducting trials within seven working days. The Courts are not required to adhere to due process or provide fair trial guarantees.

SHARI'A AND SHARIAT COURTS

In October 1998, the Sharif Government proposed a 15th Constitutional Amendment to impose Shari'a, (Islamic law), as the supreme law of Pakistan. The "Shariat" Amendment would have superseded all constitutional and common law provisions in empowering the executive to issue binding directives concerning permitted and forbidden conduct under Islamic teachings. Despite strong pressure from fundamentalists, a majority of the Senate opposed the amendment. A 1998 European Parliament resolution had also appealed for its rejection. President Musharraf later took a positive step by abandoning his predecessor's plan to make Islamic law omnipresent throughout Pakistan.

The Federal Shariat Court consists of eight Muslim judges, including the Chief Justice. They are appointed by the President. Four of the Justices are persons qualified as High Court Justices and three are *Ulema*, (scholars well-

versed in Islamic Law). The Court has original jurisdiction to determine the repugnance of any provision of law to the dictates of Islam. Following a Shariat Court decision, the President, in a case involving federal law, or a Governor, in a case involving provincial law, must amend the offending law in accordance with the Court's ruling. The Court has exclusive appellate jurisdiction over the decisions of criminal Courts relating to enforcement of *Hudood* Law. Cases may be appealed to the *Sharia* bench of the Supreme Court.

BLASPHEMY TRIALS

The independence of the judiciary has been jeopardised by pressure brought to bear by Islamic fundamentalists over blasphemy trials. Many lower court judges fear reprisals should they render acquittals against accused blasphemers. As recourse to higher Courts is available for the convicted, lower Court judges are forced to convict accused blasphemers on weak evidence rather than face the prospect of verbal and physical attacks for releasing them.

On 25 July 2001, the Multan Bench of the Lahore High Court in Pakistan turned down an appeal lodged by Ayub Masih, a Christian convicted of blasphemy under Section 295C of the Pakistan Penal Code. This decision marked the first time in the nation's legal history that a bench of the High Court refused to overturn the ruling of a lower court that had delivered a death sentence for a blasphemy conviction. Ayub Masih had been arrested on 14 October 1996 on a complaint filed by a person alleging that he heard Mr. Masih utter, "if you want to know the truth about Islam... read Salman Rushdie." The defence alleged that the accusations were fabricated in order to force fifteen Christian families to drop a local land dispute involving the complainant. The case appeared to have been registered without a proper investigation and no substantive evidence was proffered to prove Mr. Masih's guilt at his trial and unsuccessful appeal. The appellant level verdict is believed to be the result of immense pressure brought by fundamentalists who, on the day of the appeal, surrounded the Appeal Court to intimidate the proceedings. On numerous occasions Mr. Masih and his lawyers were threatened with death if the accused was acquitted. The case is presently on appeal to the Supreme Court.

CASES

Rana Bhagwandas [judge]: Mr. Bhagwandas is a Justice with the

Pakistan Supreme Court, who had previously been appointed to the Sindh High Court in 1999. His situation was reported in the 1999 edition of *Attacks on Justice*. In 1990, a constitutional petition was filed against the Government and Justice Bhagwandas, based on his Hindi beliefs, as under the Constitution only Muslims are capable of being appointed to Sindh High Court. As a compromise measure, in February 2000, Mr. Bhagwandas was appointed to the Supreme Court after taking an oath of allegiance to the Musharraf administration.

Mansoob Ali Qureshi [lawyer]: Mr. Qureshi, a human rights lawyer, was killed under murky circumstances on 15 September 2001. He was gunned down outside his office while in the process of defending two high profile defendants accused of terrorist activities. In response, on September 17, 2001, a large number of lawyers protested against what they deemed a “target killing” and effected a complete suspension of proceedings in 150 Courts.

Iqbal Raad [lawyer]: Mr. Raad, chief counsel to ousted Prime Minister Sharif in the above-mentioned conspiracy case, and two others were killed on 10 March 2000, by unidentified assailants. (His case was reported in the 2000 edition of *Attacks on Justice*.) Witnesses alleged that three men had entered the lawyer's office and opened fire, immediately killing Mr. Raad, who died from a volley of bullets to his chest. Other members of the Sharif defence team charged that the government had failed to provide them with adequate protection, despite repeated warnings that they were targeted for death. The Pakistan Muslim League, the party of Mr. Sharif, has said that Mr. Raad had received a number of threats, but had declined to press the matter, as he did not want to hamper Mr. Sharif's defence.

Ghulam Shabbir Chohan [lawyer]: Mr. Chohan, a Shia leader and former president of a political opposition party, was shot dead in February 2001. He was a representative of more than 34 lawyers who were assassinated over the last two years in Pakistan for being Shias. The killing was apparently sparked by sectarian violence that has witnessed hundreds of people killed in recent years in clashes between militants from Sunni and Shiite sects.

PALESTINIAN AUTONOMOUS AREAS

The Palestinian judiciary is largely under-resourced and subject to frequent political attacks and executive pressure. Judges are overworked and underpaid. Competing sources of law and overlapping court systems with conflicting jurisdiction give rise to confusion and instability within the judiciary. State Security Courts remain the primary concern, with trials occurring at night and without appropriate safeguards to ensure a fair trial. The Palestinian Authority operates in the absence of a constitutional framework guaranteeing the fundamental principles of human rights and the separation of powers.

The Palestinian Authority (PA) was established in 1994 as a consequence of the 1993 Declaration of Principles on Interim Self Government Arrangements (the Oslo Accords) signed by Israel and the Palestinian Liberation Organisation (PLO). The Oslo Accords and subsequent agreements, including the 1994 Gaza-Jericho Agreement, the 1995 Interim Agreement, the Wye River Memorandum and the Harm el-Sheikh Agreement comprise the current constitutional framework in the areas that have been returned to Palestinian control. However, the scope of powers granted to the PA is limited both functionally and territorially. The West Bank is divided into three areas. In respect of Area A, the PA maintains control over civil administration and security. In area B the PA is responsible for civil administration only. Area C remains exclusively under Israeli control. (Upon completion of redeployment specified in the Sharm el-Sheikh Agreement of September 1999, approximately 18 per cent of the West Bank should fall under the full control of the PA. In the Gaza Strip, Israel retains full control over 38 per cent of the territory, in what are referred to as Yellow Areas.) Israel has retained legal jurisdiction over Israeli settlements, all Israeli citizens, foreign relations, and external security, pending an agreement on the final status of the areas. Israeli military courts retain jurisdiction over Palestinians accused of committing security crimes in areas under the control of Israel. Israel controls all borders.

In 1996, 88 members and a President were elected to the Palestinian Council (PC). The 1995 Interim Agreement grants the PC both legislative and executive power. In practice, the legislature has exercised little effective

power. The executive branch, headed by President Arafat and his cabinet, has administered the PA without legislative direction. President Arafat has thus far declined to sign the Basic Law adopted by the legislature. The President dominates political affairs and takes major decisions, including those that may interfere with or otherwise affect the judiciary. President Arafat is able to issue new laws and create new institutions through presidential decrees and transfer cases from civil courts to the state security courts (*see section on the judiciary*). The fundamental principles of separation of powers and the rule of law are undermined by the frequent reluctance of the executive to comply with and enforce judicial decisions.

Throughout the second *intifada* (uprising), which began in October 2000, the Israeli authorities have rendered governance by the PA increasingly untenable. Following the murder of Israeli cabinet minister Rehavam Zeevi in October 2001, Israel sent troops and tanks into Palestinian cities in October 2001 and President Arafat carried out arrests against members of Hamas and Islamic Jihad. After the December 2001 attacks on civilians in Jerusalem and Haifa, Israel responded by bombing the premises of the PA and declaring it a "terror-supporting entity". Yasser Arafat, Chairman of the Palestinian Liberation Organisation (PLO) since 1969 and President of the PA since 1996, also faces domestic problems, as Palestinians become increasingly frustrated with the failure to end the occupation by Israel and secure a Palestinian state, and with high levels of corruption within the PA.

HUMAN RIGHTS ISSUES

Under article XIX of the 1995 Interim Agreement, the PC and the executive authority are required to exercise their powers with due regard to internationally accepted norms and principles of human rights. However, there continued to occur numerous incidents of arbitrary arrest and detention, torture and ill-treatment of prisoners and detainees and severe police misconduct in dealing with mass demonstrations. Additionally, the right to fair trial, freedom of expression and association have in many instances been significantly curtailed. Torture or other ill-treatment by various Palestinian security forces was widespread, with several persons having died in PA custody. Prolonged incommunicado detention in the period immediately after arrest facilitated torture. The use of torture is facilitated by the practice by the State Security Court of routinely admitting into evidence confessions extracted by force (*see section on the judiciary*). The PA has consistently failed to investigate adequately complaints of torture and to prosecute those responsible.

The PA lacks a uniform law on administrative detention, and security officials do not always adhere to the existing laws. The PA is reluctant to use the British Emergency Regulations of 1945 or Israeli military orders and is therefore left with general criminal procedures and the PLO Revolutionary Code. Laws applicable in Gaza, which do not apply to the West Bank, stipulate that detainees held without charge be released within 48 hours. These laws allow the Attorney General to extend the detention period to a maximum of 90 days during investigations. Prevailing law in the West Bank allows a suspect to be detained for 24 hours before being charged. The Attorney General may extend the detention period. In practice, however, many detainees have been held for over a year without being charged with any offence.

Palestinian human rights organisations continued to bring cases on behalf of those detained for prolonged periods without charge or trial before the Palestinian High Court of Justice. During the year 2000, the Court ordered the release of 18 detainees, but the PA failed to implement these court orders in the vast majority of cases. Human rights lawyers have had difficulty in gaining access to their clients in prisons and detention centres. A practical problem faced by lawyers representing detainees is making a determination as to where a person is being detained. While only the PA's civil police force is legally authorised to make arrests, all security forces actively arrest and detain persons. There remains great confusion as to the overlapping authority of a maze of Palestinian security forces. Such uncertainty leads to abuse of executive authority and prejudices detainees, their families and human rights advocates. The security services, including Preventive Security, General Intelligence, Military Intelligence and the Coast Guard have their own interrogation and detention facilities. It has often proven very difficult to track the whereabouts of detainees.

The Press and Publication Law of 1995, regulating every publication produced or imported into areas under PA jurisdiction, gives the PA wide power to control the media, research centres, news agencies, libraries and other institutions which process and disseminate information. The principles of freedom of press, expression and information are affirmed in article 2, but these guarantees are undermined elsewhere in the law, including in article 37 prohibiting the publication of any information considered harmful to religion, morality or national unity, or which shakes confidence in the national currency. Such broadly defined provisions are open to abuse. In November 1998, the PA issued Presidential Decree No. 3 concerning the Strengthening of National Unity and the Prohibition of Incitement. This decree goes far beyond prohibiting violence and punishes a broad range of speech.

LEGAL FRAMEWORK

The law applied in the Palestinian territories derives from a number of sometimes conflicting sources, including those of the Ottoman, British, Egyptian, Jordanian, Israeli and Palestinian regimes. In the Gaza Strip most of the laws date from the British Mandate and derive from the common law tradition. In 1950, the West Bank was unified with Jordan and a new set of legislation based on the civil law tradition was introduced to unify the West Bank and Jordanian legal systems. British Mandate and Ottoman law continued to apply until abrogated by the new unified law, which was further, modified by Israeli military orders following the occupation. The various peace agreements regard the Gaza Strip and West Bank as a single territory. The 1995 Interim Agreement provides for a single unified legal system in force in both geographical areas. In the absence of PA legislation, the courts must determine which laws from previous administrations still apply, resulting in substantial uncertainty. By decree issued in May 1994, President Arafat instructed that the laws, regulations and orders in force before 5 June 1967 are valid and remain in force. A body of PLO laws and regulations were enacted to regulate Palestinians in the Diaspora. The PLO Military Penal Law permits trial of civilians for civil offences before military courts and, problematically, has been used by the PA State Security Courts as a source of law.

DRAFT LAWS

Since its election in 1996, the PC has been debating and drafting the legal framework for a modern democratic state. Two laws, the Basic Law (adopted by the PC in 1996) and the Judicial Authority Law (adopted in 1998), have been forwarded to President Arafat for his signature. The President has thus far failed to sign them. In February 2000, President Arafat sent back the Judicial Authority Law to the PC to amend the provision regarding the appointment of the Attorney General. Although there is a procedure, stated in article 71 of the Standing Orders of the PC, by which the legislature could override executive non-action, it has not been invoked. According to article 71, if the President takes no action on a law within one month, the law automatically returns to the legislature where it enters into force with the support of an absolute majority vote.

The 1996 Basic Law would provide the constitutional framework for the interim period. It provides that the governmental system rests on the principles of parliamentary democracy, the rule of law and the separation of powers. It requires the PA to respect international norms of human rights. The Basic Law expressly secures the independence and impartiality of the judicia-

ry. The Judicial Authority Law sets out in greater detail the structure of the Palestinian court system, as will be discussed below. These two laws are generally adequate and up to international standards, including those reflected in the UN Basic Principles on the Independence of the Judiciary. Without these laws, the PA operates in the absence of a constitutional framework guaranteeing the most basic principles of democracy and the separation of powers. And without such a framework, the executive can and will continue to violate the separation of powers, judicial independence, the rule of law and protection of fundamental human rights.

THE JUDICIARY

The justice system lacks basic operational capacity. There is a substantial deficiency of trained and independent judges, bailiffs, clerks, court buildings, legal texts, and equipment. These conditions apply equally to the prosecution service. Judges and prosecutors are poorly paid and lack the security of tenure. Intervention by the executive authority in judicial decisions has further demoralised judges. The congestion of courts and overload of casework have invited such intervention. Judges have complained about a lack of respect and support for their authority by the executive. The executive frequently has declined to implement court decisions. A significant number of decisions of the High Court challenging executive actions, namely the arbitrary arrest and detention of certain persons, have been flatly ignored by the executive.

STRUCTURE

Article IX (6) of the 1995 Interim Agreement requires the PC to have an independent judicial system composed of independent Palestinian courts and tribunals. This requirement necessitates a creation of a unified judicial system. In the absence of the Basic Law and Judicial Authority Law, there remain competing sources of law and overlapping court systems with conflicting jurisdiction. The existing court system (described in detail in the 10th edition of *Attacks on Justice*) comprises ordinary civil and criminal courts applying different law in the West Bank and Gaza. There exist Magistrate Courts, District Courts (or Courts of First Instance), the Courts of appeal in the West Bank, and the High Court in Gaza, which also sits as a High Court of Justice to review administrative decisions. Religious courts, both Muslims and Christian, deal with matters relating to personal status. Outside the

ordinary courts system sit Palestinian military courts and security courts holding virtually unlimited power and jurisdiction. The PA affords itself wide discretionary powers in deciding which cases are to be prosecuted before which courts.

Israeli military orders give concurrent jurisdiction to military and civil courts over criminal matters, and authorise the removal of cases to the military courts. Cases can be removed from Palestinian courts if they involve Israelis or Israel's security. The 1995 Interim Agreement provides that the Israeli military government maintain full judicial powers over all areas not within the full territorial jurisdiction of the PA. This includes settlements wherein Israeli citizens reside, military installations, Area B (which is under partial PA civil control) and Area C in the West Bank and the Yellow Area in Gaza (which are under total Israeli control). Further, article 1 (7) of the Protocol Concerning Legal Affairs included in Annex IV of the 1995 Interim Agreement gives Israel criminal jurisdiction over offences committed within Palestinian territories against an Israeli citizen (see chapter on Israel.)

STATE SECURITY COURT

President Arafat created the State Security Court (SSC) by Presidential Decree No 7/95. This court deals with security matters outside the normal legal process. The Palestinian Authority argues that ordinary courts are not effective to deal with security matters. Analysis of several of the Tribunal's decisions reveals that it is not a "court" in any real sense of the word. The SSC sits at the discretion of the President, who appoints its judges for each particular hearing. Judges are usually selected from the ranks of security officers. The selection process is not transparent and legal training of the officers is inadequate. There is no appeal from a verdict from the SSC. The only appellate procedure is in cases of death sentences, which require personal ratification by the President himself.

These state security tribunals exist to bypass the due process requirements of ordinary courts and serve to curtail the rights of the accused while giving a semblance of "legality" to decisions of the executive. The deficiencies of the procedure carried out within these courts include: trials take place on short notice, often at night; accused persons often do not know the charges against them and are thus prevented from preparing an adequate defence; there is no right to legal representation of choice and defendants are usually obliged to accept representation by counsel appointed by the SSC. In some cases, entire trial proceedings have lasted only a few hours and have sometimes resulted in

death sentences. Since the recent intifada, alleged collaborators with Israel have been tried before the SSC.

PALESTINIAN MILITARY COURTS

Although the Oslo Agreement does not allow for a Palestinian army, a Palestinian military court system was established. These courts try members of the PLO armed forces –the police and security forces- as well as civilians accused of crimes related to the armed forces. It is unclear as to the parameters under which the military court may try civilians, On several occasions, military courts have transferred jurisdiction over cases in which the civilian Attorney General has claimed jurisdiction. However, at other times civilians have been tried by Palestinian military courts.

The structure of the military courts is based on the 1979 PLO Revolutionary Code, which addressed all persons, military officers or not, and the offences cover many civilian crimes. This structure consists of District Military Courts, Permanent Military Courts, and other special courts, which may hear all cases on which they assume jurisdiction and crimes involving officers of the rank of major and higher. Palestinian Military Courts are constituted by decision of President Arafat, as Supreme Commander, and they are under his ultimate control. Judges are selected from a separate military judiciary.

JUDGES

The Draft Basic Law and the Judicial Authority Law guarantee the independence of judges within the Palestinian territories. Articles 88-97 of the Draft Basic Law include many of the UN Basic Principles on the Independence of the Judiciary securing the independence and impartiality of the judiciary and mandating the creation of an independent Higher Judicial Council (HJC). The Draft Judicial Authority Law provides the blueprint for the Palestinian court system. It guarantees an independent budget for the judiciary and entrusts the HJC with the power to nominate judges for appointment to the judiciary. It provides greater detail than the Basic Law on all aspects of the judicial system and guarantees tenure for judges and establishes procedures for judicial discipline.

Until September 1999, the Minister of Justice had *de facto* authority over judicial matters, including the powers to promote, demote, transfer, dismiss, and retire judges at all levels, hire and dismiss court personnel and determine

salaries and pensions. In September 1999, President Arafat issued a Presidential Decree transferring the management of the judiciary from the Ministry of Justice to the Chief Justice in Gaza, who was appointed by the President in June 1999. The Decree empowers the Chief Justice with the mandate to appoint judges, to grant judicial vacations and to arrange the conditions of service of the judiciary. Under the terms of the Decree, no person or institution may intervene in judicial issues or interfere in judicial affairs. However, the Decree has also prompted serious concerns. The Chief Justice was appointed by the executive with no involvement of the legislature or the legal profession. In addition, the presidential decree bypassed the PC's draft law concerning the judicial system.

In a subsequent development, on 1 June 2000, the President of the PA issued a decree forming a Higher Judiciary Council (HJC) with mandate for all Palestinian-governed territories. The decree provides that the Council is to carry out its mandate as set out in the Judicial Authority Law.

LAWYERS

Palestinian lawyers face problems similar to those of members of the judiciary. They are frequently subject to executive interference and suffer from a general lack of training and resources. Since June 1999, the PA has instituted a policy effectively denying human rights lawyers access to their clients in Palestinian prisons. This action was allegedly taken as a reprisal against human rights advocates who had criticised police misconduct.

Historically, there have been several different associations of Palestinian lawyers. Before the occupation by Israel, West Bank lawyers were members of the Jordanian Bar Association. During the occupation, they generally refused to practice in the Israeli dominated courts. However, some lawyers did return to practice and consequently were dismissed from the Jordanian Bar and their pensions were revoked. Over the years, lawyers respecting the strike became the minority. In 1979, the Arab Lawyers Committee was established for lawyers from the West Bank. Soon after, in 1980, the Lawyers Union in the Gaza Strip was established for lawyers practising in that territory.

President Arafat, by Presidential Decision No. 78 of 1997, created the Council of the Union of Palestinian Lawyers. The Ministry of Justice then appointed the members to this Council. While the creation of the Council may be a positive step towards the creation of a unified bar, the executive's

domination of its creation and composition is highly troubling. In June 1999, Law No. 3 concerning the Organisation of the Law Profession in Palestine was issued. According to article 51, the appointed council would continue its functions until elections were held, which should be no later than six months after the law entered into force. Later, in November 1999, the PC passed and the President signed the 1999 Bar Association Law. This law requires the holding of elections for an independent Bar Council.

CASES

Iyad Alami, Hanan al Bakri, Hanan Matar, Ashraf Nasralla, Khader Shkirat, Ibrahim Sourani, Raji Sourani, Fouad Tarazi [lawyers, members of the human rights groups LAW, Palestinian Centre for Human Rights (PCHR), and the Women's Legal and Social Counselling Centre]: On 10 and 14 May 2000, the Palestinian Bar Association removed these lawyers from the list of practising lawyers. The Acting Bar Council based its decision on Article 7 of the Palestinian Bar Association Law, which prohibits, *inter alia*, the combining of the practice of law with the holding of public or private employment. This action was taken without due process and at the end of the Acting Council's tenure in office. Elections for a new council were due to be held by 9 May 2000. On 17 May 2000, the Palestinian High Court of Justice suspended the Acting Council's decision.

Lawyers of the Palestinian Centre for Human Rights (PCHR). On 18 November 2001, PCHR lawyers submitted a request to the administration of Gaza Central Prison to allow the visit of 19 political prisoners legally represented by PCHR lawyers. On 19 November 2001, PCHR lawyers were informed by the administration of Gaza Prison that lawyers' visits were prohibited by order of Mayor Gahzo El-Jabalai, Chief of the Police.

Yunis al-Jarro [lawyer]: On 18 October 2001, Mr. al-Jarro, a former deputy head of the Palestinian Bar Association in Gaza and leader in the political wing of the Popular Front for the Liberation of Palestine (PLFP), was arrested in Gaza, along with a number of other persons associated with the PLFP, by Palestinian security services. The arrest occurred shortly after the PLFP had claimed responsibility for the assassination of Israeli cabinet minister Rehavam Ze'evi on 17 October. The detention seemed to be based on his association with the PLFP and not upon any evidence of involvement in the assassination. The Palestinian High Court of Justice reportedly ordered his release, but the authorities did not immediately comply with the ruling.

PERU

The collapse of the Government of Alberto Fujimori prompted the country to take steps towards the re-establishment of the rule of law, including the dismantling of the system that had allowed for the proliferation of untenured judges. The transitional Government once again confirmed Peru's recognition of the contentious jurisdiction of the Inter-American Court of Human Rights and allowed the Constitutional Tribunal to resume its functions by reinstating the three justices who had been dismissed by the Fujimori-controlled Congress. The Inter-American Court ruled that the 1995 amnesty laws lacked judicial effect. A Truth Commission with the mandate to report on human rights violations and abuses which had occurred since 1980 was established. Former Presidential advisor, Vladimiro Montesinos, as well as a number of other military officers were arrested on charges of corruption and human rights violations. A unanimous Congress indicted former President Fujimori for crimes against humanity. He has remained in Japan, where the authorities have not responded favourably to Peru's extradition requests. Military courts, which offer few guarantees of due process, remained in some instances competent to judge civilians under the law.

BACKGROUND

The Constitution establishes Peru as a democratic, independent and unitary State and provides for the separation of powers. Peru's legal system stems from the civil tradition. The President, elected for a renewable five-year period through direct vote, is head of State and Head of Government and exercises executive power. Legislative power is vested in a 120-seat unicameral Congress, which is elected for a five-year term. In December 2000, the election procedure of the Congress was amended so that beginning with the 2001 elections, its seats are filled by simple majority vote in the 25 geographic constituencies. The judicial branch of power carries out the administration of justice.

During the period under review, Peru experienced its greatest political upheaval since 1992, when President Alberto Fujimori dissolved Congress and assumed dictatorial powers. In May 2000, President Fujimori won a third five-year term in elections that national and international observers considered to be fraught with irregularities. The National Intelligence Service (*Servicio de Inteligencia Nacional SIN*), headed *de facto* by the President's advisor, Vladimiro Montesinos, was accused of harassing opposition candidates and manipulating the press, the courts and the electoral bodies. In September 2000, revelations that Montesinos had bribed opposition senators, and that the armed forces had been smuggling arms to the Colombian armed opposition, forced Fujimori to dismiss Montesinos and announce new elections in April 2001, in which he would not be a candidate. However, in November 2000, mounting political pressure led to the collapse of the regime. President Fujimori sent his resignation to Congress while visiting Japan and Congress refused to accept his resignation and proceeded to remove him from office for "moral incapacity". The President of the Congress and member of the Popular Action Party (*Acción Popular*), Valentín Paniagua, was appointed as President on 22 November 2000. Congress ratified amendments to the Constitution that ended the term of the President and Congress in July 2001, thus making new elections possible.

The Transitional Government accelerated democratic reforms based on the *Mesa de Diálogo* (see below) and carried out democratic, independent and fair elections. The Government also brought Peru back under the jurisdiction of the Inter-American Court of Human Rights, and restored three Constitutional Court judges, who had been dismissed for opposing Fujimori's attempt to run for President for a third time in November 2000. The Transitional Government also took decisive steps to bring to account those responsible for corruption during the Fujimori regime (1991-2000).

On 8 April 2001, general elections were held in Peru. Alejandro Toledo, candidate for the moderate Peru Possible party, won a first round vote and in a runoff on 4 June 2001, defeated former President and liberal Aprista Party candidate, Alan García. On 28 July 2001 he assumed office, pledging to fight poverty, to root out corruption, to care for the indigenous peoples of the country and to investigate claims of human rights abuses. The elections resulted in the following distribution of seats in the Congress: President Toledo's party, Peru Possible, obtained 33 per cent, the Aprista Party got 25 per cent and the National Unity Party gained 12.5 per cent of the positions.

HUMAN RIGHTS ISSUES

The Organisation of American States (OAS) undertook a mission to the country in June 2000, resulting in a number of recommendations, including the strengthening of the independence of the judicial branch of power. The OAS, the Peruvian Government, opposition parties, the Ombudsman and members of civil society established a dialogue known as the Mesa de Diálogo to discuss the implementation of the recommendations. Following the collapse of the Fujimori Government, important democratic reforms, based on the Mesa de Diálogo's recommendations, were carried out, which brought improvements in the human rights situation in the country.

Freedom of expression was severely infringed during the 2000 elections process. Harassment and death threats against journalist were not adequately addressed by a non-independent judiciary, which instead served as an instrument to consolidate the abuses of the executive against the media. In May 2000, journalist Fabián Salazar, was tortured after he had received material containing information against the Government. The Fujimori Government exercised repressive measures against demonstrations and on 28 July 2000, a protest against him was dispersed by excessive force, resulting in the death of six persons and wounding of 80 others. On a positive note, the Transitional Government returned *Frecuencia Latina*, a television channel, to its owner, Baruch Ivcher, who had been stripped of his nationality in 1997 following opposition to the regime. Genero Delgado also recovered his channel *Global Televisión*, confiscated by the prior regime.

On 23 December 2000, the Transitional Government created a working group in order to evaluate the human rights recommendations issued by bodies of the Inter-American system. On 29 December 2000, Congress unanimously approved the abrogation of the 1999 legislative resolution by which Peru had withdrawn from the contentious jurisdiction of the Inter-American Court of Human Rights (See *Attacks on Justice 2000*). On 9 January 2001, Peru signed the Inter-American Convention on Forced Disappearances. The Transitional Government also established an *ad hoc* Pardons Commission to review all pardon petitions of persons sentenced for terrorism and treason. By the end of 2000, the new Commission had recommended 33 pardons, which were granted by the Paniagua Government. The Commission is also poised to review the 200 cases that could not be resolved by prior commissions due to lack of time.

According to NGO sources, some 200 people falsely charged with terrorism-related offences remained in prison by the end of 2000 and non-impartial military courts had tried at least 1,800 people since 1992. After their joint

visit, the ICJ and Amnesty International called upon Peruvian authorities to release immediately and unconditionally all "innocent prisoners" with prompt and appropriate redress.

In 2000, President Fujimori announced the dismantling of the Service of National Intelligence (SIN). The SIN, directed *de facto* by Vladimiro Montesinos, was the agent of many human rights violations and wide-scale corruption. The Paniagua Government considered President Fujimori's attempts to dismantle the SIN as an attempt to erase the information that this office possessed. A new Commission has been established to deal with the SIN.

The Paniagua Government started a process of restructuring within the armed forces, dismissing 50 Generals, 20 Navy Officers, and 14 Generals of the Air Force. A similar process was carried out within the National Police, whereby 170 officers were dismissed. The armed forces expressed its impartiality in the 2001 electoral process and pledged to return to its proper institutional role after years of undue interference in the democratic process and clear support of the 1992 Fujimori *coup d'état*.

In November 2000, the ICJ and Amnesty International (AI) carried out a visit to Peru. The delegates visited Peru before Fujimori's dismissal and met with members of the *Mesa de Diálogo*. The Minister of Justice and the Minister of Defence refused to meet the delegation. The joint mission called upon the Peruvian Government to break the cycle of impunity and restore the rule of law.

IMPUNITY

On 28 August 2001, Congress unanimously approved the lifting of former President Fujimori's immunity and the commencement of criminal proceedings against him for homicide and forced disappearance. President Fujimori was accused of being a co-author of the killings in two army death-squad (*Colina*) operations in the early 1990s, known as the Barrios Altos and Cancuta massacres (*see below*). The accusation quoted testimony from former intelligence chief, Vladimiro Montesinos, as well as laws signed by Fujimori in which congratulations, amnesties and promotions were granted to the members of the death squad. According to the accusation, President Fujimori "established a clandestine policy of systematic violations of human rights as an ingredient of the counter-insurgency efforts". It added that a death squad composed of 35 military officers, "*Colina*", had been created and had carried out its activities under the direct control of Vladimiro

Montesinos. The Supreme Court has issued two international warrants of arrest against the former President, one for dereliction of duty and the other for the Barrios Altos and Cancuta massacres.

The Peruvian Government sought the extradition from Japan of Fujimori, who after fleeing was granted citizenship there on the basis of Japanese parentage. Japan does not extradite its nationals, has no extradition treaty with Peru and has so far resisted Peru's efforts to bring to account Mr. Fujimori. Because the charges against him related to violations of international law, it may be possible to overcome the non-existence of an extradition treaty between Peru and Japan. Human rights charges also allow Japanese courts to start proceedings against Fujimori, based on the principles of universal jurisdiction. The Peruvian Minister of Foreign Affairs has asserted that the extradition of Fujimori is a top priority for the Government. On 23 June 2001, Vladimiro Montesinos was captured in Caracas, Venezuela and immediately deported to Peru. He was being held in a high-security jail in the capital, Lima.

Barrios Altos Case and the 1995 amnesty laws

In 1995, the Government adopted amnesty laws 26479 and 26497, which granted immunity from prosecution to those who had committed human rights violations between 1980 and 1995. In October 2000, the Fujimori Government proposed to broaden and extend these amnesty laws by extending them to those guilty of human rights violations, drug-trafficking and corruption during President Fujimori's terms in power (1990-2000). However, the *Mesa de Diálogo* refused this proposal. The joint visit of the ICJ and AI called upon the Government to endorse the recommendations of the United Nations Human Rights Committee, the Committee against Torture and the Inter-American Commission of Human Rights (IACHR) to repeal these amnesty laws.

In November 1991, armed men wearing masks burst into a party in the Barrios Altos district of Lima and shot to death 15 people, wound another four. In 1995, General Julio Salazar Monroe and General Juan Rivera Lazo were charged in connection with the massacre, but two months later, proceedings were interrupted due to the amnesty laws. The 26497 and 26492 laws also amnestied Generals Salazar and Rivera for another massacre. They had already been found guilty for the 1992 abduction and secret execution of nine students and a teacher from La Cancuta University. On 14 March 2001, the Inter-American Court of Human Rights, in reviewing the Barrios Altos Case, ruled that the 1995 amnesty laws lacked

judicial effect and were incompatible with the Inter-American Convention on Human Rights. The Court determined that the amnesty laws should not impede the investigation or judgement in this and similar cases. Two days prior to the Court's ruling, the two Generals and another two alleged members of the death-squad were arrested. In September 2001, the Inter-American Court of Human Rights declared that "taking into consideration the violation constituted by the amnesty laws 26479 and 26492, the decision on the Barrios Altos Case has general effect". This statement made clear that the ruling of the Inter-American Court of Human Rights did not apply exclusively to the Barrios Altos case, but to all human rights violations that had occurred during the concerned period. Therefore, the Peruvian Congress was obliged to repeal the laws, and judges, by exercising the constitutional control power they have in each particular case (*control difuso*), can initiate and continue investigations on crimes committed during the period covered by the amnesty laws. The Ombudsman had already interpreted the Court's ruling in this direction and encouraged judges and prosecutors to put aside the amnesty laws (Report 57 "Amnesty and Human Rights").

In October 2001, the highest military court overturned the amnesty law in accordance with the Inter-American Court on Human Rights ruling. This move will open the way for the prosecution of the paramilitary death squad *Colina* within the military judiciary.

Truth Commission

According to the Ombudsman's Office, from 1980 to 1996, there were 7382 cases of disappearance and 514 extrajudicial executions. The cases that took place after 1996 were still under investigation. These crimes took place in the context of the counter-terrorism efforts of the State when fighting armed opposition groups such as the Shining Path (Sendero Luminoso) and the Revolutionary Movement Tupac Amará, MRTA.

In June 2001, Transitional Government President Valentín Paniagua issued the decree 065-2001-PCM, by which a Truth Commission was established, mandated to clarify the development, facts and responsibilities of the terrorist violence and human rights violations that took place from May 1980 to November 2000. Among other objectives, the Truth Commission is to collaborate with the judiciary in the judgement of members of terrorist organisations and State agents responsible for human rights violations and other crimes. The Truth Commission will focus on murders, kidnappings, forced disappearances, violations of collective rights of Andean and native

communities, and other gross crimes and violations of human rights, as long as they may be attributed to terrorist organisations, State agents and paramilitary groups. The Truth Commission does not have judicial powers and may not displace the judiciary and the Public Ministry in their functions. In July 2001, then President Paniagua established the Commission and appointed its members. In August 2001, President Toledo expressed support for the Truth Commission, appointed an observer within it and broadened its membership from seven to twelve commissioners.

JUDICIARY

During the past eight years, a program was carried out in Peru ostensibly directed toward strengthening the judiciary. Among the positive effects were decreases in judicial workloads, the opening of new courts and modernisation of the infrastructure. On the other hand, the Fujimori Government sought to undermine the independence of the judiciary by establishing a widespread system of provisional judges. The judiciary was placed under control of the executive and served as an instrument for the persecution of political opponents. The Executive Commissions of the judiciary and the Public Ministry carried out this task.

The two Commissions, created in November 1995 and 1996 under laws 26546 and 26623, were mandated to carry out and oversee the reform programme for the judiciary and the Public Prosecution Service respectively. The Government and Congress appointed the members of both Commissions. These Commissions had power not only to organise and manage resources within the judiciary, but also to appoint, transfer and dismiss judges and prosecutors working on a temporary basis. They were also empowered to create and merge tribunals and establish specialised tribunals or chambers for certain kinds of offences. Politically sensitive cases were frequently assigned to certain courts and not to others, or assigned for prosecution to prosecutors commissioned on an ad hoc basis for that purpose. A superstructure was created to make possible the institutional control of the judiciary by the executive, and to effect direct pressure on judges by manipulating the selection, ratification and appointment of judges and prosecutors. The IACHR determined that these transitory provisions had become permanent and obliterated the autonomy of the judiciary. (See *Attacks on Justice 2000*). Both Commissions were to be dismantled in December 2000, when judicial power was to be returned to the ordinary courts.

The irregular re-election of President Fujimori called into question the reform process. As the end of the Commissions' terms was approaching, the Government proposed bills to review the reform process, which were perceived as an attempt to maintain the political control over the judiciary. However, the collapse of the Fujimori government brought about the elimination of this political control. Law 27367 created two new Transitory Councils in order to re-establish the rule of law in Peru. These Councils exercised their function until March 2001. The Transitory Council of the Judiciary (*Consejo Transitorio del Poder Judicial*) was composed of three justices and three jurists. It had as its primary functions the dismantlement of former Commissions, the reorganisation of the administration of the judiciary, the evaluation of judicial reform and the investigation of the ultimate destiny of the resources used during the judicial reform process. The findings of this Council were presented to the Congress in order to be taken into account when drafting mid- and long-term policies. The Council proposed the establishment of a permanent working group to be in charge of the application, monitoring and study of public policies regarding the moralisation of the judiciary. The Council also recommended that the judiciary be democratised, including direct election of some of its officers, in compliance with the 1993 Constitution.

During the 90 days of its existence, the Transitory Council of Public Ministry (*Consejo Transitorio del Ministerio Público*) exercised the administrative powers of the Council of Supreme Prosecutors (*Consejo de Fiscales Supremos*) and the Attorney General (*Fiscal General*). Its work was also directed toward dismissing provisional prosecutors, whose qualifications did not meet the requirements of the Law of the Public Ministry (*Ley Orgánica del Ministerio Público*). The work of this council improved the independence of the prosecution services.

STRUCTURE

Article 1 of the Law of the Judiciary (*Ley Orgánica del Poder Judicial*) provides for the political, administrative, economic, disciplinary and jurisdictional independence of the judicial branch. The judiciary is composed of a Supreme Court as the highest judicial authority in the country, High Courts in each of the 25 different judicial districts and lower courts (first instance judges and Justices of the Peace). The military justice system is a separate judicial branch, although its rulings are subject to review by the Supreme Court. There is a Constitutional Tribunal and a Public Prosecution Service (*Ministerio Público*), which according to the Constitution is independent and autonomous.

In 1998, the Executive Commission of the Judicial Branch created two specialised chambers of the Supreme Court. These chambers, composed of provisional, temporary and untenured judges, assumed control over tax, customs and narcotics crimes. In December 2000, the Supreme Court eliminated these two chambers (resolution No 008-2000-SP-CS). Evidence emerged showing that former intelligence advisor Montesinos had influenced cases through provisional judges.

The Constitutional Tribunal exercises control over the constitutionality of laws and other norms of a general character. It is also the last instance of review of sentences on petitions of *habeas corpus* and *amparo* (special actions to protect constitutional rights). In 2000, the three justices who had been dismissed by Parliament were reinstated (Legislative resolution 007-2000-CR). In 1997, three of the seven members of the Constitutional Tribunal had been dismissed on the alleged grounds of misconduct and usurpation of functions, as the three judges voted to declare unconstitutional, and therefore non-applicable, the law permitting President Fujimori to run for a third term in office.

The reinstatement of the three justices allowed the Constitutional Tribunal to resume its duties with regard to the control of the constitutionality of laws. The tribunal had not been able to take such decisions because, according to its statutory regulations, it requires six votes out of seven to take a decision on the matter. The Tribunal began to study the 23 petitions challenging laws for unconstitutionality, which had been pending since May 1997. On 6 September 2001, Congress adopted legislation reducing to five the number of votes necessary to declare a law unconstitutional. The bill was opposed by the Government and at the time of this writing was under study by a Senate Commission.

ADMINISTRATION

In 2000, only 1.43 per cent of the national budget was assigned for the judiciary. The reforms carried out by the Fujimori government, while unfavourable regarding the independence of the judiciary, did result in the acquisition of improved computer equipment for the courts, construction of new facilities and improvements in infrastructure, and training for administrative staff and judges. However, according to the report of the Executive Commission of the Judiciary, the reforms created debts for the judiciary and bloated the bureaucracy.

Following the collapse of the Fujimori Government, the Law of the Judiciary was amended in order to insure the constitutional independence of the judicial branch (Law 27465). Article 72 of the Law of the Judiciary establishes that the President of the Supreme Court, the Executive Council of the Judiciary (*Consejo Ejecutivo del Poder Judicial*) and the Supreme Court as a plenary will oversee the administration of the judiciary. The President of the Supreme Court represents the judiciary, and the Supreme Court as a plenary approves the general policy of the judiciary proposed by the Executive Council of the Judiciary.

The Executive Council of the Judiciary is composed of six members and headed by the President of the Supreme Court. It has wide administrative powers. The Executive Council of the Judiciary elaborates the budget of the judiciary and executes it once it has been legally ratified. It also determines the number of justices of the Supreme Court. Additionally, the Executive Council establishes the number of specialised chambers, either transitory or permanent, of the Supreme Court and decides on transfer of judges. It is also a second instance for disciplinary measures imposed against judges by the Office for the Control of the Judiciary (*see below*). The Executive Council of the Judiciary has a General Manager, appointed by the Council, whose duty is to execute, coordinate and oversee the administrative activities of the judiciary.

Appointment and security of tenure

Article 146 of the Constitution guarantees judges independence and security of tenure, provided that they carry out their work efficiently and observe good conduct. Judges may not be transferred without their consent and their remuneration must ensure a living standard appropriate to their position and function.

One of the greatest challenges for the present government will be to address the lack of security of tenure for the members of the judiciary. After the 1992 coup, many judges were dismissed in a process ostensibly designed to rid the judiciary of corruption. Their positions were filled with provisional appointments and alternates, resulting in a judiciary in which 80 per cent of its members lack security of tenure and are therefore susceptible to external pressure. In 1995, once the reform process was under way, new courts and positions were created, which increased the number of judges working provisionally and allowed the now defunct Executive Commissions (*see above*) to usurp the appointment powers of the National Council of the Judiciary. Both the IACHR and the Human Rights Committee (HRC)

highlighted the necessity of addressing this problem (see *Attacks on Justice 2000*).

In October 2000, Congress approved provisions directed at restoring the judiciary's independence from the executive. Laws 27368 and 27362 re-established the constitutional appointment, promotion and training systems, thereby restoring proper functions to the National Council of the Judiciary (*Consejo Nacional de la Magistratura*). The reform also abolished the system which allowed the widespread use of provisional and alternates judges. The National Council of the Judiciary, established by the 1993 Constitution to replace a less effective body, selects, appoints and ratifies the justices of the Supreme Court as well as judges of the other high and lower courts from among candidates who have graduated from the Judicial Training Institute (*Academia de la Magistratura*). The ratification of judges and prosecutors takes place every seven years. Those who are not ratified may not become members of the judiciary or the Public Ministry. Decisions on dismissals by the National Council of the Judiciary are final.

The Supreme Court, the Board of Supreme Prosecutors, the Bar Association, the deans of the public and private universities and two representatives of the professional associations each appoint a member of the National Council of the Judiciary. Principals and alternates of the Council are appointed for a five-year period. Since October 2000, the Council has worked to recuperate the functions that it was unable to perform during the last years. Hundreds of provisional judges and prosecutors were reassigned to positions more appropriate to their actual rank. Many provisional judges and prosecutors resigned or were removed from their positions permanently or were not reassigned. In May 2001, Congress approved Law 27466, which authorised the Council to call for public contests to fill positions of provisional judges and prosecutors.

In June 2001, Congress approved the election through popular vote of some 1,800 judges of peace (Law 27539). These elections will take place in June 2003. Candidates will not be allowed to carry out political campaigns. The judges of peace will be elected for a renewable four-year term.

CORRUPTION

The widespread corruption that afflicted the judiciary during the Fujimori era came to full public knowledge once the regime collapsed. The Congress systematically used corrupt means to exercise control over the judicial branch. According to the Ministry of Justice, 872 million US dollars were

expropriated from the country's accounts because of corruption. The judiciary is investigating some 624 persons allegedly involved in these acts, including Fujimori and Vladimiro Montesinos. With regard to the judiciary itself, several penal investigations are being carried out against members at all levels, which have already resulted in several prosecutions. In July 2001, Blanca Colan, a former Attorney General, was arrested for corruption charges. Ms. Colan headed the most important cases of corruption for the Fujimori administration, and in several of the most high-profile cases she found no wrongdoing.

The Office for the Control of the Judiciary (*Oficina de Control de la Magistratura - OCMA*), which has the power to impose disciplinary sanctions, with the exception of dismissal, on judicial officers failed to address the problem of corruption. Although the Office has taken steps towards the decentralisation of its functions, transferring some of these to the District Offices for the Control of the Judiciary, it has remained largely ineffective during the transitional period.

MILITARY COURTS

The Constitution (Article 173) provides for military jurisdiction for crimes committed by members of the armed forces while carrying out their functions, and for crimes of treason and terrorism committed by civilians. This recognised a *de facto* extension of jurisdiction by military courts over civilians as an outcome of the 1992 coup. The 1992 decrees on terrorism and treason granted military courts jurisdiction over civilians accused of such crimes. Some of these decrees were repealed in 1997, such as those regarding the institution of "faceless judges", but the jurisdiction of the military justice system was expanded again in 1998 when several legislative decrees were approved to fight common criminality. A new crime was added to the list of vague crimes of terrorism and treason: the crime of "aggravated terrorism" (see *Attacks on Justice 2000*). In December 1999 new legislation (Law 27235) repealed some of the provisions of these decree laws, but failed to change the formulation of the crime of "special terrorism", which remains poorly defined.

Military tribunal proceedings are summary and a number of guarantees of due process of law are restricted or disrespected. The capacity of lawyers to exercise their professional functions is therefore impeded. The investigation is carried out by a military prosecutor, thus limiting the powers of the civilian prosecution, which does not play any role in the procedure. Legislative Decree 897 makes it compulsory for the military prosecutor to issue an

indictment, even if evidence is insufficient. Similarly, the military investigating judge is required to authorise the police to maintain a suspect under arrest for investigation and to order the detention of the accused while awaiting trial. In both instances, the discretion inherent in the prosecution and judicial functions is diminished. This legislation has permitted military tribunals to try at least 1,800 persons in recent years. Apart from the powers given to it by law or decree law, the military judiciary has assumed *de facto* additional powers to try retired military officers for common crimes such as fraud and robbery in prejudice to the army, not only crimes of terrorism, treason or “aggravated terrorism”.

Following the November 2000 ICJ and AI joint visit to Peru, both organisations urged the Peruvian authorities to abolish the provision that allows civilians to be judged by military courts, as the practice was in contravention of international obligations of Peru. The HRC, the Inter-American Court of Human Rights and the Special Rapporteur on the Independence of Judges and Lawyers have also recommended that Peru abolish this practice.

The Government has expressed its intention to reform the military justice system. There are several proposals concerning the powers that the military judiciary should retain. The Lima Bar Association’s Commission for the reform of the Armed Forces and the Ministry of Justice’s Commission of Judicial Reform agreed on the following aspects: It is necessary to maintain the concept that military justice is a specialised jurisdiction; civilians or retired military officers must not be judged by the military judiciary under any circumstance; military justice should be exercised only in crimes related to the military service; and rulings by military justices should be subject to review by the Supreme Court, in compliance with the principles of jurisdictional unity and exclusivity.

CASES

Jorge Santiestevan de Noriega [Ombudsman]: Mr. Santiestevan was the human rights ombudsman of Peru. He was attacked in the media sympathetic to President Fujimori in March 2000, after he had transmitted allegations to the Elections Board relating to the forgery of signatures and had asked it to investigate these irregularities. Congressmen and ministers allied with President Fujimori contended that Mr. Santiestevan had sought to discredit the elections and hinted that they might press for his impeachment. Subsequently, President Fujimori acknowledged that the Constitution empowers the monitoring of the actions of public entities, including election

authorities. Following intervention by the OAS and the US Department of State, the pressure against Mr. Santiestevan abated.

Gorge Farfán Martínez [lawyer] and Higinio Castillo Calle [judge]: Mr. Farfán is a member of the rural development centre "Villa Nazareth" of the Chuculanás diocese, institutional member of the national Coordination of Human Rights. Mr. Castillo is a judge of peace from the Frías District. On 3 April 2000, the Bishop of Chuculanás was given a copy of police document no. 05-2000-C-PNP by the Prosecutor of Morropón, Julio Vargas Valer. This document accuses Mr. Farfán and Mr. Castillo of being at the head of an initiative to hold a peasant's cooperative march "El Común" of Frías, against the provincial Prosecutor to protest the trials against the peasant cooperatives and their members.

Martha Cueva Muñoz [lawyer]: On 7 June 2000, Ms Cueva, human rights defender and legal adviser to the *Comité Vicarial de Derechos Humanos del Vicariato Apóstolico de Pucallpa*, department of Ucayali, was falsely accused of acts of terrorism in an attempt to implicate her in a case involving other persons accused of terrorism and several other crimes. In December 1998, during the eviction of ten families that had occupied a property on the Yansen sawmill, the persons concerned and the owners of the sawmill requested that Ms. Cueva intervene. Subsequently, the owners of the sawmill commenced penal proceedings against the evicted families for crimes against public order, public safety, arson, homicide and abuse of authority. They attempted to broaden the charges by including terrorism and implicating Ms. Cueva. Although the provincial prosecutor refused the request, the Attorney General filed an appeal procedure, which has been submitted to the Superior Prosecutor of Ucalayi.

Association of Defence of Human Rights of Tacna [ADDSH]: On 12 June 2000, the wife of Mr. Jesús Agreda Paredes, President of ADDSH, received an anonymous phone call to her home. A man's voice said: "Tell your husband not to meddle in the Pachia case, because otherwise we shall kill him". This death threat is related to the legal defence carried out by ADDSH in the case of the torture and death of Mr. Nelson Tiburcio Díaz Marcos, detained in Pachia on 12 May 2000 by a police officer. A penal complaint was lodged with the provincial prosecutor of Pacna for homicide against Police officers Victor Oachs Manani and Carlos Laqui. ADDSH requested a broadening of the complaint to include the crimes of torture followed by death.

Rosalía Stork Salazar [lawyer]: Ms. Stork is the President of the Human Rights Commission "Altó Huallaga" (CODHAH), Huanuco department. She

was alerted in August 2000 to the possible destruction of her home and office, a decision allegedly taken by Major Fernando Quipes, Aucayu's Commissioner. The official assured her that he would discover evidence implicating the association in terrorist activities. The threats seemed to be a response to the complaints made by CODHAH against Major Quispe for crimes including abuse of authority, acts of torture, violation of a home, illicit appropriation and diverse threats.

Gina Requejo [lawyer]: Ms. Requejo is the lawyer representing Jenard Lee Rivera, who died in police custody on 9 May 2001, allegedly as a result of torture and ill-treatment. On 10 May 2001, Mr. Lee's family and others from the impoverished town of San Bartólome in Lima department, where he lived, carried out a demonstration in front of the Cruz Blanca Town Police station in protest at his killing. During the demonstration, police officers allegedly took pictures of the demonstrators. On 19 May 2001, Ms. Gina Requejo received a phone call from an unknown person saying "stop the inquiries, stop the investigation".

PORTUGAL

Portuguese courts are autonomous and operate independently. A large backlog of pending trials has apparently resulted in the dismissal of cases due to their exceeding the limitation period. New legislation was adopted during the period covered by this report aimed at reducing the backlog of cases.

The Republic of Portugal was established in 1976 by a Constitution which has since been amended four times. The last amendment adopted in 1997 allowed immigrants to vote in presidential elections. Article 2 of the 1997 Constitution provides that the Portuguese State is based upon the rule of law, the sovereignty of the people, the pluralism of democratic expression and the respect and guarantee of fundamental rights and freedoms. In April 2001, under Assembly Resolution n.27/2001, the Assembly of the Republic was granted the power extraordinarily to revise the Constitution.

The Constitution provides in Article 111 for the separation of powers. The Portuguese system is structured as a mixed parliamentary and presidential regime, whereby the President and the Prime Minister are directly elected by popular franchise. Executive power is vested in the President of the Republic and in the Prime Minister. The President is elected by universal, direct and secret suffrage for a five-year term, renewable once. According to Article 141 of the Constitution, the President receives advice from the Council of State, a political organ that includes the President of the Assembly, the Prime Minister, the President of the Constitutional Court, the Ombudsman, former presidents, five members chosen by the legislature and five chosen by the president. Effective executive power is exercised by the Prime Minister, who runs the government with the help of the Council of Ministers. Under Article 187 of the Constitution, the President appoints the Prime Minister after consulting the parties represented in the Assembly and with due regard for the results of the general election. The government serves a four-year mandate. It can be recalled by a non-confidence motion passed in parliament by a qualified majority or by a decision from the president based on "its inability to maintain the normal functioning of the democratic institutions." Only the President may dissolve the parliament and call for a general election.

Legislative power is divided between the Government and the Parliament, the Assembleia da Republica, the latter having a reserved sphere of competence which includes, inter alia, ratification of treaties, deferred bills, approval of the annual budget and the economic plan. Bills from the government or the Parliament must meet the approval of the President, who can use his veto powers to prevent a law from being enacted (in the case of government bills) or to force its approval by a qualified majority (in the case of parliament laws). Deputies are elected from lists presented by parties or party coalitions in each electoral constituency. The electoral term is four years, corresponding to the term of the legislature.

The autonomous regions of the Azores and Madeira have their own political and administrative regimes, with their own legislative and executive powers. Portugal handed over Macao, its last colony, to China on 19 December 1999. (Until June 1999, Macao's judiciary was structured following the provisions of the Portuguese administration. The Portuguese Supreme Court and the Constitutional Court sitting in Lisbon were the highest judicial authorities in Macao.) On 24 May 2001, an official agreement was signed providing for close co-operation between Portugal and China's Macao Special Administrative Region (SAR) in the fields of economy, culture, public security and administration of justice.

Prime Minister Guterres's Socialist Party has ruled Portugal since 1995. The last parliamentary elections for the 230-seat Assembly were held on 10 October 1999. In the presidential election of 14 January 2001, Jorge Sampaio of the ruling Socialist Party was re-elected for a second five-year term.

HUMAN RIGHTS ISSUES

In Portugal, human rights are protected by the Constitution, which stresses the principles of equality before the law and non-discrimination. Under Article 8, international law is incorporated into domestic law and both the Constitution and laws are interpreted and implemented in harmony with the Universal Declaration of Human Rights. National institutions for ensuring respect for human rights include the Office of the Ombudsman (*Provedor de Justiça*), the Women's Equality and Rights Commission, the Attorney-General's office, the Bureau for Documentation and comparative law, and the Commission on the Promotion of Human Rights and the Prevention of Educational Inequalities.

INTERNATIONAL HUMAN RIGHTS MECHANISMS

Portugal is a party to the United Nations International Covenant on Civil and Political Rights (ICCPR), the First and Second Optional Protocol to the ICCPR, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol, and the Convention on the Rights of the Child. On 6 September 2000, Portugal signed the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, as well as the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

Portugal was admitted to the Organisation for Security and Co-operation in Europe (OSCE) on 25 June 1973. It is a member-state of the European Union and of the Council of Europe. Portugal is bound by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The European Committee for the Prevention of Torture (CPT) carried out its last visit in Portugal on 19 April 1999. Portugal is also a state-party to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

THE COMMITTEE AGAINST TORTURE(CAT)

In its concluding remarks on the third periodic report of Portugal, on 8 May 2000, the CAT recommended that the country should continue to engage in vigorous measures "to maintain the momentum of moving the police culture in Portugal to one that respected human rights". The Committee suggested that Portugal should ensure that criminal investigations and prosecution of public officers were undertaken whenever evidence revealed the commission of torture, or cruel or inhuman or degrading treatment and punishment. The Committee welcomed the restructuring of the police agencies in order to emphasise the civil features of policing. It also welcomed the initiation of a practice of prison visits on a monthly basis by magistrates to receive complaints by prisoners of their treatment, as well as the enactment of regulations relating to conditions of detention in police lock-ups, and the establishment of minimum standards to be observed. The governmental delegation from Portugal told the CAT that the Government was training its law enforcement officers in human rights and ethics, and that consequently there had been a reduction in the number of complaints against public officials.

THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (CERD)

As one of 157 State parties to the Convention, Portugal must submit reports to the Committee and send a delegation to answer questions from the Committee's Experts. On 13 March 2001, the Portuguese delegation addressed a variety of issues including the treatment of the Roma and refugees. The delegation cited various punishments and fines for those guilty of racial discrimination, including losing the right to public subsidies and the right to public employment. In its comments on 21 March 2001, the Committee welcomed the enactment of Decree-Law 4/2001 modifying the regulations on the entry, stay and departure of foreigners with a view to introducing penal legislation in Portugal against the illegal trafficking of migrant workers as well as an enlarged definition of the beneficiaries of family reunification. The Committee noted that incidents of racial discrimination and xenophobia did occur in Portugal and recommended that the authorities continue to monitor such incidents closely. The Committee welcomed the establishment of the Commission for Equality and against Racial Discrimination.

It should be noted that a new law in force since January 2001 grants legal status to workers who lack proper documents.

THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Portugal's third periodic report was considered by the Committee at its November/December 2000 session. The Committee welcomed legislative amendments to promote equality between men and women, but expressed its concern as to the issue of child labour (see *Attacks on Justice 1999-2000*) and the increase in paedophilia and child pornography.

POLICE ABUSE

The Constitution and the law guarantee physical integrity. However, there are instances of police abuse during arrest, as well as during the imprisonment period. Immigrants are especially affected by police ill-treatment.

Among the most widely reported cases were the deaths of two men after they were allegedly ill-treated in custody by Public Security Police (PSP) officers in Oporto in January 2000. Alvaro Rosa Cardoso, a member of the Roma community, was reportedly severely beaten when police brought a street disturbance under control. According to the police the cause of death was heart attack. However, the autopsy report referred to a ruptured spleen as

being the cause of death. A judicial inquiry was initiated and the Interior Ministry's General Inspectorate (IGAI) initiated investigations. IGAI's preliminary report linked the death to physical ill-treatment by PSP officers. They were detained in April 2000 under investigation for homicide. The general commander of the Oporto PSP was removed from his post. Another man, Paulo Silva, who was also beaten by PSP officers, died of internal injuries in hospital on the same night. He had allegedly gone to the Cerco area in Oporto to buy heroin and returned home unable to stand upright, telling his mother he had been severely beaten by the police. The IGAI and the criminal investigation department of the prosecutor's office (DIAP) opened separate investigations. However, by June 2000, no charges had been brought against the PSP officers and they had not been suspended.

The official investigations into the death of Alvaro Rosa Cardoso gave rise to widespread anger among police officers. A number of police officers gathered at the entrance of the court-house (TIC) in Oporto, awaiting the decision of the judge regarding the extension of detention of their two colleagues or their release. When the police officers heard that the two colleagues were to remain in custody, they behaved menacingly against a prosecuting magistrate who was leaving the court-house. The magistrate was forced to ask for a Judicial Police escort to leave the house safely and PSP police officers reportedly surrounded the magistrates car and made death threats. No judicial investigation was undertaken, as no formal complaint was lodged by the magistrate, who asked not to be identified.

THE JUDICIARY

The judiciary is organised under the terms provided by Section V of the Constitution, the Statute of Judicial Magistrates (*Estatuto dos Magistrados Judiciais*- Law 21/1985) and the Law of Judicial Tribunals (*Lei Organica dos Tribunais Judiciais*-Law 3 of 1999 which modifies the Law of 1987). According to Article 202, para.4, the law may provide for alternative methods of dispute resolution that do not involve the courts.

Article 23 of the Constitution provides for the post of an Ombudsman. Citizens may present complaints concerning acts or omissions on the part of public officials to the Ombudsman, who shall undertake a review, without power of decision, and make recommendations to the competent organs as to prevent injustice. The actions of the Ombudsman are independent of any legal remedies provided for in the Constitution. The Ombudsman may also refer any provision for the constitutionality test to the Constitutional Court. The

Ombudsman is an independent person appointed by the Assembly of the Republic.

Article 203 of the 1997 Constitution provides that the courts are independent and subject only to law. The courts are organs of sovereignty with the power to administer justice in the name of the people. Portuguese courts are required to desist from the application of any rules that contravene the provisions of the Constitution or the principles contained therein. Decisions of the courts are binding on all public and private bodies and prevail over decisions of all other authorities.

Article 20 of the Constitution guarantees the right to access to effective legal assistance. This right is protected even under a state of emergency. Decree-Law No.387-B, revised by Decree-Law No.391/88, ensures the right to legal information and the right to legal protection. In this regard, the law provides for the publication and dissemination of legal information booklets, as well as the establishment of technical support offices within the legal departments. Legal protection is also granted to individuals who lack the means to pay the costs of the legal proceedings. Court hearings are public unless personal dignity or public morality would be safeguarded by closed sessions. Juries may be summoned for trials of serious crimes at the request of the prosecution, but this procedure rarely occurs in practice.

Article 29 of the Constitution provides that "citizens who have been unjustly convicted shall have the right, in the conditions determined by the law, to have their sentences reviewed and to be compensated for any injury suffered".

In the 1990s, the Minister of Justice launched the "citizen and justice" programme, which aims at transparency within the administration of justice and facilitated access to justice by setting up legal information and legal advice offices and strengthening confidence in the judicial system.

STRUCTURE

There are five areas of jurisdiction, including constitutional, general, administrative, fiscal and audit. The Constitution provides for a Constitutional Court, a Supreme Court (*Supremo Tribunal de Justiça*), an Appeal Court (*Tribunais de Segunda Instancia ou da Relação*), and a lower court system. Article 209 of the Constitution establishes the Supreme Administrative Court, other administrative and fiscal courts and the Audit Court. The Constitution prohibits the establishment of exceptional courts to

try specific categories of offences, although there are special courts to deal with labour matters, offences against public health and minor offences. Justices of the Peace are competent to hear cases from September 2001. Administrative justice is organised in administrative circuit courts, courts of first instance, a central administrative court and a supreme administrative court.

The Constitutional Court has jurisdiction in matters involving questions of a legal or constitutional nature. The Constitutional Court is composed of thirteen judges, ten of whom are appointed by the Assembly of the Republic. They remain in office for a non-renewable period of nine years. Under Article 278 of the Constitution, the President of the Republic may also request the Constitutional Court to undertake a review of the constitutionality of any provision of an international treaty before it is ratified. On the same grounds, Ministers of the Republic may also request the Court to decide on the constitutionality of any provision of regional legislative decrees or regulatory decrees. The Courts of Appeal function as second instance courts for cases heard before first instance courts. The Supreme Court is the highest judicial authority in the country, except on matters over which the Constitutional Court has jurisdiction.

The Constitution allows for the establishment of maritime courts, arbitration tribunals and military courts. The military courts have jurisdiction to try essentially military offences and their jurisdiction is defined *rationae materiae* on the basis of certain categories of offences.

According to Article 14 of the Judicial Act 38/87, civil courts have jurisdiction over cases not assigned to other courts. Apart from the criminal courts, there are also courts that carry out investigations for preliminary investigations, pre-trial proceedings, and examination proceedings (discovery). The domestic courts are responsible for preparing and hearing cases concerning matrimonial relations. The labour courts have jurisdiction over issues concerning infringements of labour law provisions. There are also courts for the supervision of sentences that exercise overall jurisdiction in relation to the modification or replacement of sentences. The Decree-Law 314/1978 organises the Juvenile courts.

The Portuguese territory is divided into four judicial sections, 55 judicial circuits and 233 districts. The Supreme Court of Justice, the Supreme Administrative Court, the Central Administrative Court and the Audit Court have jurisdiction over the entire territory.

TRAINING, APPOINTMENT AND SECURITY OF TENURE

Judges and public prosecutors are recruited according to a competitive selection procedure followed by a course of initial training. The Centre for Judicial Studies (*Centro de Estudios Judicarios*) is responsible for this training. Admission to the Centre is effected by written and oral exam sessions. The requirements for judicial appointment, as laid out in the Judicial Act 21/1985, are in accordance with the provision of Article 10 of the United Nations Basic Principles on the Independence of the Judiciary that "persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications of law..."

The judiciary, the government counsels and the state prosecutors are distinct and independent of the central power. This separation between the judiciary and the Attorney-General's department ensures that proper judicial proceedings take place within the safeguards required by the democratic process. The judiciary consists of judges in law, Appeal Court judges and judges of the Supreme Court of Justice.

Article 216 of the Constitution guarantees security of tenure for all judges. Judges may be transferred, suspended, retired or removed from office only as provided by law, and may not be held liable for the content of their decisions. Judges in office are not allowed to perform functions unrelated to the work of the courts unless authorised by the Superior Council of the Judiciary. The Superior Council of the Judiciary has the power to appoint, assign, transfer and promote the judges of the courts of law and of the administrative and fiscal courts and to exercise disciplinary control over them. The Superior Council of the judiciary is presided by the President of the Supreme Court and is composed of 16 members, two members appointed by the President of the Republic, seven members elected by the Assembly and seven judges elected by their peers under a system of proportional representation. It is notable that, under Article 218, para.2 of the Constitution, the rules relating to guarantees for judges apply to all members of the Superior Council of the Judiciary.

The judges of the Constitutional Court enjoy the same guarantees of independence and security of tenure as judges of ordinary courts.

The selection of judges of the courts of law of second instance is made largely on the basis of merit by means of competition among the judges of the courts of law of first instance and based on their curricula. The law determines the qualifications and rules for the selection of judges of the courts of law of first instance. Nomination to the post of Appeal Court judge is carried out by promotion and by means of curricula selection from amongst judges of

the court of law, and is based on the criteria of merit. Access to the Supreme Court of Justice is based on curricula selection, and is open to judges of the courts of law, public prosecutors and other jurists of merit.

The public prosecution magistrature is divided into assistant Public Prosecutors, District Attorneys, Assistant Attorneys-General, Deputy Attorney-General and Attorney General. According to Article 219 of the Constitution, public prosecutors are entrusted with representing the state and defending legitimacy. They are accountable judicial officers, hierarchically graded, and may be transferred, suspended, retired or dismissed only in the circumstances provided by law. Public prosecutors are promoted on merit and length of service. Assistant public prosecutors with more than ten years for service are eligible for the post of District Attorney. Promotion to the office of Assistant Attorney-General is by merit.

The Attorney-General is appointed by the President of the Republic, on nomination by the government. The designation to this post is the only one in the Public Prosecution service that falls within the competence of politicians. The choice is not restricted to an area of recruitment or even to particular qualifications. The post of Attorney-General requires the confidence of both the government and the President of the Republic. The Attorney-General's Office is the highest authority in public prosecution and has the power to appoint, assign, transfer and promote, as well as to exercise disciplinary control over public prosecutors. The Attorney-General's Office is presided by the Attorney General and contains the Higher Council for the Public Prosecution Service.

The Higher Council for the Public Prosecution Service is composed of four district attorneys, a deputy public prosecutor, two prosecutors of the republic and four assistant prosecutors elected by their respective peers, five members elected by the Assembly and two appointed by the Minister of Justice. Judges from other courts are regulated by their own legislation.

THE "COLLAPSE" OF THE PORTUGUESE JUDICIARY

In late December 1999 and early January 2000, the government announced a series of exceptional measures to tackle a judicial emergency. The Minister of Justice, Mr. Antonio Costa, acknowledged in a press statement that approximately one million cases were pending before the courts and that each year at least 100,000 more go into the system. It was reported that it would be impossible for the judiciary to deal with this backlog and that frequently cases are dismissed because they exceed the statutory limitation

period. The application of the Statute of Limitations to cases is frequent in the Portuguese judicial system and this is a sign of its collapse.

The measures announced by the government in January 2000 include empowering the High Council of the Magistracy to exceptionally hire retired judges as advisers in pending cases, as well as to appoint lawyers as first instance judges for a period of three years to deal with the backlog. The Council would also be allowed to hire lawyers working in the public administration. Additional measures involve reducing the training period within the Centre for Judicial Studies and the establishment of special incentives for those persons who agree to settle their disputes - mainly law suits on debts - outside the courts. Another law provides for witnesses to testify in cases heard in distant jurisdictions via teleconference. In November 2000, the Ministry of Justice announced a plan to expedite the service of subpoenas.

On his part, the President of the Supreme Court, as President of the High Council of the Magistracy, suggested enlarging the terms for investigation and preparation for trials in cases involving murder and other serious offences. He also proposed a review of the system of recourse and appeals available before the Supreme Court and the Constitutional Court.

A study by the Ministry of Justice found that between 1993 and 1998 a total of 38,531 criminal complaints did not proceed to the trial stage because the legal terms for investigations had been exhausted. In 1998 alone such cases amounted to 12,000. The situation is deteriorating and since 1993 more than ten percent of cases will not have been tried.

The cases that were dismissed because they fall outside the limitation period include those involving members of parliament (the so-called "false trips" cases) and the Aquaparque case. The case of Aquaparque concerning the death of two children in a recreation ground was dismissed due to the running out of the Statute of Limitations. The investigating judge had reportedly spent four years in the investigative stage. Concerns about impunity have also been raised surrounding the similar dismissal of a case dealing with the death of a child due to electrical problems at a traffic light in Lisbon.

In January 2000, the President (*bastonário*) of the Bar Association stressed that the main causes of impunity are non-compliance of the terms of investigations and indictments on the part of the prosecutor which lead to delays, as well as the difficulties with banking secrecy. He also stated that it is necessary to put an end to the negligence and lack of responsibility displayed by judges and prosecutors. In addition, abuse of procedural mechanisms for the purpose of causing delays by litigants and their counsel is widespread.

THE PORTUGUESE JUDICIARY AND THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (ECHR)

During the period covered by this report, the European Court of Human Rights found Portugal in 19 cases to be in violation of Article 6, para.1 of the ECHR that provides for a fair and public hearing within a reasonable time. The Court found in the subject cases that the period of duration of the proceedings was far from reasonable. In the case of *Fentiladour S.A. v. Portugal*, the company complained that civil proceedings to which it was a party had lasted almost 13 years and were still ongoing. Similarly, in the *Comingersoll S.A. v. Portugal* case, the Court found that there had been substantial delays, justifying the conclusion that the proceedings had been unreasonably long. The Court ruled that "a period of seventeen years and five months for a final decision that had to be delivered in proceedings issued on the basis of an authority to execute –which by their very nature needed to be dealt with expeditiously –could not be said to have been reasonable". The Court has ordered the Portuguese Ministry of Justice to pay a fine to all plaintiffs in similar cases.

CASES

Dr. Duarte Teives Henriques [lawyer] lodged a complaint that he had been assaulted by three PSP officers in July 1995. Allegedly, he was kicked and verbally abused, when he challenged the lawfulness of an officer's order to move his car. According to Amnesty International, the police charged him with refusing to obey orders, failing to identify himself, damaging a vehicle and insulting authority. Internal disciplinary proceedings against the police were dismissed on the grounds that the police officers were not responsible for mistreatment. In November 1999, 53 months after the incident, the IGAI reported that judicial proceedings were still pending due to a request for new preliminary investigations.

Dr. Vaz Martins, [lawyer] a lawyer originally from Cape Verde, was allegedly punched in the face and hit with the handle of a firearm by an officer at the PSP station in Alfragide, in December 1994. Allegedly, Dr. Vaz Martins had to undergo four operations in an attempt to restore his eyesight. The same lawyer had also reportedly become impatient after waiting 45 minutes to see a client at the same PSP station, in September 1996. An argument about racism reportedly ensued with the duty officer and the lawyer was allegedly forced to leave the station at gunpoint. Concerning the incident in

1996, the IGAI reported in 1997 that no complaint had been lodged by the lawyer and therefore no investigation had been undertaken by the PSP. A judicial inquiry was under way concerning a complaint by Vaz Martins and a counter-complaint by the officer in connection with the 1994 incident. In 1999, the IGAI reported that it could find no evidence of misconduct by the police in connection with the 1996 incident. Regarding the 1994 incident, there was no evidence found during the disciplinary procedures against the two officers "because Mr. Vaz Martins had an aggressive attitude towards the officers which justified the use of force." In November 1999, 60 months after the incident occurred, a new preliminary investigation was being conducted.

THE RUSSIAN FEDERATION

The judiciary required extensive reform. President Putin has announced a commitment to such reforms, but they have yet to be implemented. Many judges did not function independently and corruption and bribery remained rampant.

Following the collapse of the Soviet Union, the Russian Federation gained independence on 24 August 1991 and adopted its Constitution on 12 December 1993. The Russian Federation consists of 89 territorial units, which include 21 republics, one autonomous region, 49 administrative units, six provinces, ten autonomous districts and the cities of Moscow and St. Petersburg, which have federal status.

The President is the head-of-state. He is elected by direct, popular vote for a term of four years. The President, with the consent of the *Duma*, appoints the Prime Minister. The Prime Minister heads the government.

Legislative power is vested in the Federal Assembly, which comprises two chambers. The lower house, the *Duma*, consists of 450 deputies, 50 per cent of whom are elected in single mandate constituencies, with the remaining half elected from party lists. The Federation Council (upper house) has 178 members. Under the previous system, half of these were the Chief Executives of the regional administrations (many of whom had been appointed by the President), and the others were the 89 chairpersons of the regional legislatures. However, President Putin successfully pushed for legislation that stripped the regional leaders of their seats in the Federation Council. Each region now sends two representatives to the Federation Council: one nominated by the governor and approved by the regional legislature, and the other elected from among candidates nominated by the Speaker of the regional legislature or one third of the deputies.

The *Duma* was newly elected on 19 December 1999. The Inter-regional Movement "Unity", which had been formed in September to contest the elections on behalf of the Russian government and the Yeltsin presidency, won 24.29 per cent of the vote, thereby securing the largest vote among the competing blocs. The Communist Party of the Russian Federation (KPRF) came in second place. Because of the alliance of "Unity" with the Union of Rightist Forces (SPS), pro-government parties won the majority in the *Duma*. Due to the ongoing war in Chechnya, no elections could be organised there and

consequently the one seat in the *Duma* reserved for Chechnya was not filled. On 20 August 2000 a by-election was held to fill that vacant seat. Aslan Aslakhonov, a senior Interior Ministry official, won with 31 per cent of the vote.

The Constitution provides the President with substantial powers. According to Article 80, the President is the guarantor of the Constitution and of human and civil rights. Article 84 of the Constitution enables the President to introduce draft laws in the *Duma* and Article 90 empowers the President to issue decrees and executive orders. The Federal Assembly cannot annul these decrees, it can only advise on them. The President may also veto legislation adopted by the Assembly. Article 85 gives the President the authority to suspend acts by organs of the executive, pending the resolution of the issue in court, if such acts contravene the Constitution of the Russian Federation and federal laws or the international obligations of the Russian Federation, or if they violate human and civil rights and liberties.

On 31 December 1999, President Boris Yeltsin resigned from office in advance of the expiry of his term. In accordance with the Constitution, the Prime Minister, Mr. Vladimir Putin, became acting President. The presidential elections were held on 26 March 2000. Vladimir Putin competed with ten other candidates and won with 52.94 per cent of the vote, thereby making a second round of voting unnecessary.

The Organisation for Security and Cooperation in Europe's (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) published a report on its election observation. This report noted that "(i)n general, and in spite of episodic events that sometimes tested the system's capacity to uphold principles of fairness and a level playing field, the presidential election was conducted under a constitutional and legislative framework that is consistent with internationally recognised democratic standards (...). The Central Election Commission performed effectively as an independent and professional body that endeavoured to fully implement the electoral legislation on an equal basis. The competence and expertise of election administrators to carry out well-organised and accountable elections is fully institutionalised." Nevertheless, the report also highlighted some shortcomings. It commented that despite a legal framework that provides liberal rules for the formation of political parties and blocs, a strong "party system" had yet to develop. Another matter of concern noted in the report, was the dependence of much of the media on subsidies from the State and regional authorities and the vulnerability of the opposition and independent media to administrative pressure.

The International Election Observation Mission, however, declined to observe polling day activities in the Chechen Republic. Polling took place in 12 of the 15 districts of the Chechen Republic. In the final report the OSCR noted that "(S)tandard conditions for pre-election activities, candidate campaigning, opportunities for domestic observation and full transparency of polling and counting processes did not exist."

Vladimir Putin was formally inaugurated as the new Russian President on 7 May 2000. After his inauguration Putin relinquished the post of Prime Minister and formed a new Russian government. He nominated the former First Deputy Prime Minister Mikhail Kasyanov as Russian Prime Minister on 10 May 2000. The *Duma* confirmed this nomination on 17 May 2000.

During his first weeks in office Putin began to diminish the power of the elected regional governors in Russia's 89 constituent regions and republics. On 13 May 2000 he issued a decree that formed seven federal districts which largely correspond to Russia's military districts. These districts include the Central, Northwest, North Caucasus, Volga, Ural, Siberian and the Far Eastern Federal districts. Putin renamed the North Caucasus federal district by a decree on 23 June 2000 as Southern federal district because it included regions not officially part of the North Caucasus. These districts are headed by presidential envoys who supervise the compliance of the local regions with Russian federal legislation. The envoys are funded by Moscow, so as to prevent any possibility of the regional governors impeding their work. This new system changed the previous system under which there was one presidential representative in each of the 89 constituent regions beside the more powerful elected regional governors. The seven presidential envoys include only two civilians and senior officers from the military or the security services.

President Putin also pushed through further legislation that curtailed the power of the regional governors. These bills extended the president's power to remove incompetent governors, and the governor's *ex officio* right to seats in the Federation Council was abolished.

On 1 September 2000 President Putin issued a decree which formed the State Council of the Russian Federation. This new body consists of the leaders of the 89 constituent parts of the Russian Federation. The State Council has only consultative power and participation is voluntary. It advises the President mainly on matters regarding central administration and the regions.

CHECHNYA

Chechnya broke away from Russia in 1991 and on 12 March 1992, the Constitution of the Chechen Republic was adopted by the Chechen Parliament. However, the self-proclaimed Chechen Republic is not recognised by Russia or the United Nations. A brutal war erupted in 1994, which ended in 1996 with a peace agreement. According to this accord an agreement on Chechnya's constitutional status was postponed until 2001.

In September 1999 the war in Chechnya broke out for the second time and Russia's armed forces began bombing the Chechen capital Grozny and moving into Chechnya. In February 2000 federal forces took control of Grozny. On 8 June 2000 President Putin introduced "temporary" direct presidential rule in Chechnya. The Russian President appointed Mufti Akhmed Kadyrov as the interim head of administration in Chechnya, to be supervised by the presidential representative in the Southern federal district. However, frequent violent incidents demonstrated Russia's difficulties in controlling the Chechen fighters. There were also several reports of Chechen fighters killing pro-Russian Chechens in the Russian administration.

On 19 January 2001 Putin issued a decree which gave more autonomy to the local administration. He appointed Stanislav Ilyasov, former head of the Stavropol krai government, as Chechen Prime Minister and first deputy to Mufti Akhmed Kadyrov.

On 22 January 2001 President Putin issued a decree which transferred control of operations in Chechnya from the Defence Ministry to the Federal Security Service (FSB). He announced that most Defence Ministry and Interior Ministry forces would be withdrawn from the region because there were no longer any large-scale hostilities in Chechnya. On 6 May 2001 the Russian Defence Minister announced the completion of Russian troop withdrawals from Chechnya. At that point only 5,000 of the estimated 80,000 troops stationed in Chechnya had been withdrawn although Putin had announced in January that the majority of forces would be withdrawn.

The Russian presidential representative in the Southern Federal District appointed Beslan Gantemirov, the former mayor of Grozny, to the newly created post of federal inspector on 13 June 2001. This post entails the drafting of a constitution and the preparing of elections for Chechnya.

The low-level conflict in Chechnya, with frequent clashes continued. Moscow has established shaky control over the territory and says it is making progress in restoring peaceful life though its troops still die almost daily from rebel attacks.

HUMAN RIGHTS BACKGROUND

Mass violations of human rights in Chechnya continued unabated during the period covered in this report. There also continued to be reports throughout the country alleging numerous instances torture and ill-treatment of detainees in police custody and during pre-trial detention. Torture by the police in order to extract confessions was said to be systematic. In addition, prosecutors often use coerced confessions in court and failed to investigate torture allegations promptly and adequately. Prisons and pre-trial detention centres are severely overcrowded, and there is a lack of adequate food and medical care. As a result, it is reported that more than 10,000 inmates die every year. There are reports of widespread torture and ill-treatment in the Russian armed forces that result in deaths of soldiers and officers.

Freedom of the media

The independence and freedom of expression of the media have come under threat. Access to Chechnya was denied to the media. The major media was said to be reluctant to examine or challenge Government policy and activities in Chechnya.

The media conglomerate Media Most was targeted for its critical reporting. This outlet included the independent television station NTV, the radio station *Ekho Moskvy*, the daily newspaper *Sevodnya* and the weekly news magazine *Itogo*, which had been critical of many government policies, particularly its conduct of the war in Chechnya. They had also criticised the handling of the sinking of the nuclear submarine *Kursk* in August 2000. Media Most was indebted to the state-controlled energy company Gazprom and charges of embezzlement were brought against owner Vladimir Gusinsky. In May 2000 its offices were raided and Gusinsky was arrested, but released for lack of evidence in June 2000. The ongoing prosecution of Gusinsky and the involvement of Mikhail Lesin, the Minister for the Press, Broadcasting, and Mass Media, in the commercial negotiations between Gazprom and Media Most suggested that the true intentions of the Russian authorities were politically motivated. Although the authorities have denied such motivations, many independent observers believed that the main goal of these actions was to move Media Most under Gazprom control so as to stem critical reporting. This goal was finally achieved in April 2001 when Gazprom took over NTV, the only independent nation wide TV company.

CHECHNYA

Civilian areas were bombed and civilians attacked with frequency by Russian armed forces, in clear violation of international humanitarian law. There were reports of extra-judicial executions of hundreds of Chechen civilians and prisoners of war. Journalists and independent monitors were refused access to Chechnya. Chechen rebel fighters targeted members of the Russian-appointed civilian administration and executed Russian soldiers that they captured. Several non-governmental organisations reported the existence of "filtration camps", in which Chechens suspected of connection with the armed opposition were detained arbitrarily, held without access to relatives or lawyers and reportedly tortured and ill-treated. In the 1994-1996 war between Russian and Chechnya such camps had been the venue of serious human rights abuses.

In February 2001, a mass grave with 51 bodies was discovered in Dachny, an abandoned village close to the main Russian military base in Chechnya. Many of the bodies found were severely mutilated and showed evidence of having been extrajudicially executed and bore unmistakable signs of torture. Of the 19 victims whose corpses were identified by relatives, 16 had reportedly last been seen as Russian federal forces took them into custody. The bodies were dumped among streets in the village and in abandoned cottages over an extended period of time, which provided striking evidence of the practice of forced disappearances, torture, and extrajudicial execution of civilians by Russian federal forces.

Impunity

Following the first war in Chechnya, the authorities failed to prosecute any of its military personnel for violations of humanitarian law. According to the International Helsinki Federation, Russia's main military procuracy opened and investigated 1,500 criminal cases against Russian soldiers serving in Chechnya. Only 27 were convicted and only six of these convictions involved crimes against the civilian population. Thus far it does not look like Russian investigations will be any more effective in bringing perpetrators to justice after the second war in Chechnya. Civilian prosecutors charged with the investigations have no authority to force testimony from Russian military officers and soldiers who may have witnessed the killings.

On 10 July 2001, the European Committee for the Prevention of Torture of the Council of Europe issued a public statement criticising the Russian Federation for failing to cooperate, in investigations into human rights abuses

in Chechnya, including by blocking inquiries and preventing publication of the Committee's findings. In a joint statement with several other leading NGOs to the 57th session of the Commission on Human Rights the International Commission of Jurists stated that

Federal authorities in Russia are not committed to a meaningful accountability process. Criminal investigations into abuses by military and police forces in Chechnya have been shoddy, ineffective, and incomplete. The recent trial of a Russian colonel for the murder of a Chechen woman is the exception that shows diligent investigations are possible, but that the political will to follow up on all serious violations has been lacking.

The federal government has not committed the necessary resources to investigations, nor are they empowering the relevant agencies to conduct them. Nowhere is the failure to investigate more obvious than in the mass "grave" at Dachny village, where at least fifty-one bodies were found beginning in January 2001. No autopsies were performed on the corpses, and the authorities have rushed to bury, rather than preserve for the purpose of further investigation, those corpses that have not yet been identified.

Russian mechanisms set up to protect human rights

Russia has established several bodies to protect human rights. Although these bodies are weak and lack full independence, they have been increasing their activity. The Office of the Ombudsman is funded from the federal budget and has 150 staff. The Ombudsman may initiate civil and criminal action, ask the *Duma* to investigate violations of human rights and send reports to the President and the Prime Minister. Oleg Mironov, human rights ombudsman since May 1998, has played an increasingly public role and has spoken out against human rights abuses in pre-trial detention and in Chechnya.

The Presidential Human Rights Commission investigates complaints and promotes human rights education. This Commission has not played a vital role and only receives limited financial means from the government.

The Office of the Special Representative of the President of the Russian Federation for Ensuring Human and Civil Rights and Freedoms in the Chechen Republic is a nominally independent national commission headed by the former Minister of Justice, Mr. Krasheninnikov. The Office of the Special Representative receives individual complaints and has secured the

release of many Chechen detainees in Russian custody. This body has also established a working relationship with the Council of Europe. Three European experts assist in the investigations. Nevertheless, the Special Representative is not empowered to investigate complaints of violations committed by Russian forces. The office of the Presidential Representative for Securing and Defending Human Rights and Freedoms in Chechnya, Vladimir Kalamonov, is understaffed and underfunded and its mandate is limited. This body can neither subpoena witnesses nor evidence. It is also not competent to submit evidence to prosecutorial authorities, and there is no cooperation with domestic prosecutorial agencies.

INTERNATIONAL HUMAN RIGHTS MECHANISMS

INTERNATIONAL OBLIGATIONS

The Russian Federation assumed the membership of the former USSR in the United Nations bodies on 24 December 1991. The Russian Federation has ratified six main international Treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

COUNCIL OF EUROPE

On 6 April 2000 the Parliamentary Assembly of the Council of Europe voted to suspend Russia's membership in the Council of Europe unless Russia made substantial progress to end human rights abuses in Chechnya. The Committee of Ministers, however, did not follow this recommendation. A majority of the Parliamentary Assembly also voted to withdraw Russia's voting rights. However, on 25 January 2001 the Parliamentary Assembly of the Council of Europe adopted resolution 1241, which reads in pertinent part.

Despite some recent progress made, the Assembly remains gravely concerned about the human rights situation in the Chechen Republic. It nevertheless believes that the Russian parliamentary delegation deserves to be given another chance to prove that it is willing - and able - to influence the situation in the Chechen Republic for the better. The Assembly, having examined the issue, decides to ratify the credentials of the new Russian delegation.

COMMISSION ON HUMAN RIGHTS

The Commission on Human Rights in its 56th session in April 2000 adopted the first resolution of the Commission to censure a permanent member of the UN Security Council. This resolution called on the Government, *inter alia*, to establish a national, broad-based and independent commission of inquiry to investigate alleged violations of human rights and breaches of international humanitarian law committed in Chechnya. However, before the 57th session of the Commission in March - April 2001 the Government of the Russian Federation had failed to implement the resolution. In its 57th session the Commission voted to establish, according to recognised international standards, a national broad-based and independent commission of inquiry to investigate promptly alleged violations of human rights and breaches of international humanitarian law committed in the Republic of Chechnya of the Russian Federation in order to establish the truth and identify those responsible, with a view to bringing them to justice and preventing impunity. The resolution also called on the Russian Federation to ensure that both civilian and military prosecutors undertake credible and exhaustive criminal investigations of all violations of international human rights and humanitarian law.

HUMAN RIGHTS COMMITTEE

On 20 July 2000 the Human Rights Committee (HRC) decided on a communication submitted to it by Mr. Dmitry L. Gridin, under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). The HRC found numerous violations, including that his arrest without a warrant constituted an unlawful deprivation of liberty, and the failure by the trial court to control the hostile court atmosphere and pressure created by the public in the court room, which made it impossible for defence counsel to properly cross-examine witnesses.

THE JUDICIARY

The judiciary of the Russian Federation is governed by chapter seven of the Constitution. Article 120 of the Russian Constitution provides that judges shall be independent and subordinate to the Constitution and federal law only. However, in reality the Russian judiciary is still subject to executive, military and private influence and corruption. In addition, one of the main concerns is that so far the judges themselves have failed to understand the concept of judicial independence.

COURT STRUCTURE

The judicial system of the Russian Federation consists of the Constitutional Court of the Russian Federation; constitutional courts of the republics and other entities of the Russian Federation; and a four-tiered system of courts of general jurisdiction, which include a Supreme Court, lower ordinary District and Municipal Courts (*rayoniye*) and Regional and City Courts (*oblastniye*). There are also arbitration courts to consider disputes between business entities and arbitration courts to decide on economic disputes brought against the government. Military courts are organised into a special branch of the judiciary, regulated by a special statute. Their jurisdiction may extend to certain civil cases, a feature for which Russia was criticised in 1995 by the United Nations Human Rights Committee.

The Constitutional Court, which consists of 19 judges nominated by the President and appointed by the Federal Council, reviews the constitutionality of the law applied in a specific case in accordance with procedures established by federal law. The 1993 Constitution empowers the Constitutional Court to arbitrate disputes between the executive and legislative branches and between Moscow and the regional and local government. The Court is also authorised to rule on violations of constitutional rights, to examine appeals from various bodies and to participate in impeachment proceedings against the President. The July 1994 Law on the Constitutional Court prohibits the court from examining cases on its own initiative and limits the scope of the issues the court may hear. The Constitutional Court has assumed an active role in the judicial system since it was re-established in early 1995 following its suspension by President Yeltsin in October 1993 (see *Attacks on Justice 1996*).

The Supreme Court is the highest judicial body on civil, criminal and other matters heard by general jurisdiction courts, and is responsible for judicial supervision over the activity of these courts. The Supreme Arbitration Court is the highest judicial body resolving economic disputes and other cases considered by arbitration courts. It also carries out judicial supervision over their activities in line with federal legal procedures.

The Supreme Court of the Russian Federation has prepared a draft bill on Administrative Courts. The bill proposes the establishment of 21 such courts, adequately resourced and with well paid specialised judges to deal with appeals and complaints by citizens against unlawful actions of government officials; normative acts by ministries and departments; Presidential decrees; Government decisions; acts promulgated by the Chambers of Parliament; and laws of the subjects of the Russian Federation. Furthermore

the administrative courts are to consider cases involving violations of electoral and some tax laws and disputes between bodies of state power.

APPOINTMENT, QUALIFICATION AND TENURE OF JUDGES

Article 83 and Article 128 of the Constitution provide that judges of the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation are appointed by the Federation Council following nomination by the President of the Russian Federation. Judges of other federal courts are appointed by the President of the Russian Federation in accordance with procedures established by federal law.

According to Article 119 of the Constitution a judge must be at least 25 years of age, must have attained a higher education in law and must have at least five years experience in the legal profession. The Law on the Status of Judges requires a judicial candidate to take a qualifying examination administered by the Examination Commission, which is composed of executive appointees who are approved by the Qualifying Collegium of Judges. The Qualifying Collegium is charged with reviewing applications of candidates for posts in federal courts. If the Collegium approves a candidate, the President reviews the application for final approval or rejection. The President thus has the power to veto candidates selected by the Qualifying Collegium.

Judges of the Supreme Court are required to have ten years of experience and are selected directly by the President of the Russian Federation. The Federation Council then confirms the nomination. Courts of first instance in civil and criminal matters consist of one professional judge and two "people's assessors", who maintain all the powers of the professional judge. They are elected for a term of two years and cannot be called for more than two weeks during the year.

DISCIPLINE

The Qualifying Collegia are in charge of the discipline and supervision of the judiciary. The Qualifying Collegia are composed of judges elected by the Congresses of Judges at the district, regional and federal levels. The Constitution establishes that a judge may not have his or her powers terminated or suspended except under procedures and on grounds established by federal law. Articles 13 and 14 of the Law on the Status of Judges establish

the conditions for the suspension of a judge, as well as the grounds for removal. A judge may be suspended, *inter alia*, for involvement in criminal activity. A judge may be removed from office for undertaking activities incompatible with his post or for medical reasons. The decision of suspension or removal may be appealed.

STATE OF THE RUSSIAN JUDICIARY

One of the principal problems confronting the judiciary is the undue influence of the executive on composition of the courts. Firstly, judges are typically appointed when they are very young and almost always after they have served in a public prosecutor's office or in an investigation office of the police. It is extremely rare for one to be appointed as a judge after having worked as a lawyer. Thus, almost all judges come from an organ of the State. A judge that has previously worked as an investigator may be more reluctant to question the quality of the evidence in a case than would a lawyer from the private bar. Secondly, judges must serve an initial period of three years before they may receive life appointment. During the selection procedure after these three years, judges who were compliant with the executive were said to stand the best chance of receiving a life appointment (see the case below of **Lubov Osipkina**.) However, even after the initial three years judges are under the constant threat of losing their job. As every judge is routinely overloaded with work, it is reportedly a common practise to dispense with unwanted judges by accusing them of unnecessarily delaying cases and working too slowly. (see the case below of **Tatyana Glazkova**.)

Although the salaries of judges have increased somewhat, they are still inadequate, and the lack of sufficient remuneration contributes to the risk of corruption, including bribery. The material conditions within the judiciary are extremely poor and courts must therefore appeal to local authorities for support, even for elementary expenditures such as stationary, heating and photocopies. (According to the Constitution, the federal government is responsible for financing the courts.) Judges are thus extremely vulnerable to improper influence from the local authorities on whom they may depend. Another serious problem is the excessive workload that encumbers many judges. Due in part to the low wages, many judicial posts remain vacant, contributing to the backlog and long trial delays.

The decision of the Supreme Court on 13 September 2000 to dismiss the appeal of the prosecution against the acquittal of Mr. **Aleksandr Nikitin** is a sign of progress of the rule of law and independence of the judiciary in Russia. He had been charged with treason in February 1996. His arrest was

part of a pattern of persecution of environmental activists from the Bellona Foundation and the principle of due process had been severely violated.

PROPOSED JUDICIAL REFORMS

President Putin himself acknowledged that the Russian judiciary is in dire need of reform. In his second state of the union address to Parliament on 3 April 2001, he referred to the judiciary as a "political problem" because it violates the rights and interests of Russia's citizens. He recognised that for many people who are seeking to restore their rights in law, the courts have not been quick, fair, and impartial.

Legal concerns that were under review in the Russian Federation at the time of writing were the role of the Prosecutor General's Office, the introduction of jury trials, the status of judges and organisation of the bar.

IMPLEMENTED JUDICIAL CHANGES

The institution of the Justices of the Peace was re-established in Russia in 2000. During the year, some 1,000 justices of the peace were appointed in 33 regions throughout the country. These judges handle family law and criminal cases where the maximum sentence is two years.

Thus far, jury trials have been introduced in only nine regions. Traditionally, many judges in the Russian Federation have shown some favour towards the prosecution. On average, less than one per cent of defendants are acquitted each year. Proponents of introducing jury trials argue that the acquittal rate of juries is about 20 per cent. They argue furthermore that this would also help combat the corruption and bribery of judges.

By the end of September 2001 the new Code of Criminal Procedure had not been adopted by the *Duma*.

JUDICIARY IN CHECHNYA

The Special Representative of the President of the Russian Federation on the protection of Human and Civil Rights in the Chechen Republic, Mr. Kalamanov, addressing the 57th session of the Commission on Human Rights on 5 April 2001, outlined a number of steps taken to reassert judicial authority and to create an effective judicial system in the Chechen Republic. He reported that as of March 2001 the Supreme Court (six judges) and 12 district courts (four in Grozny and courts in Groznenskoselsky, Naursky,

Nadterechny, Urus-Martanovsky, Gudermessky, Shalinsky, Nozhai-Yurtovsky and Vedensky) were operational in Chechnya, with a total of 24 judges, as opposed to 10 district courts and 17 judges previously. He reported that during the entire period of their operation the courts had received 1,213 civil cases of which 920 were examined, and 178 criminal cases, of which 29 were examined. One hundred criminal cases were forwarded to the Supreme Court of the Russian Federation for determination of jurisdiction. A service of 132 bailiffs had been established to guarantee the functioning of the courts, the protection of judges and the implementation of court decisions. According to Mr. Kalamanov, the Bar of Chechnya comprises 150 lawyers and is fully operational and providing legal assistance to the population. Offices of the Bar were created in 17 regions of the Republic.

The Memorial Human Rights Centre in an appeal to the 57th session of the Commission on Human Rights expressed scepticism about the efficacy of the Chechen judiciary, asserting that some of the district courts are not located on the territories of the district themselves, which creates a significant obstacles for the Chechen citizens under present conditions. Memorial also maintained that courts in Chechnya were not working at full capacity and only accepted criminal cases for review for which the punishment does not exceed five years. The more serious crimes were not under the jurisdiction of these courts.

LAWYERS

There are reports by professional associations at local and federal level that defence lawyers have been the target of police harassment, including beatings and arrest, throughout the country. Police were said to intimidate certain defence lawyers and simultaneously to cover up their own criminal activities (see the cases of defence lawyer **Karina Moskalenko** and **Mikhail Konstantinidiy**) In a number of cases, investigators denied lawyers access to their clients.

PROSECUTORS

Prosecutors are extremely influential in the criminal procedure system, and judges are said frequently to refer cases for additional investigation when no guilt is proven, rather than face confrontation with a prosecutor. The

police are allowed, by presidential decree, to detain a person suspected for organised crime for up to 10 days without official charges. Investigations often drag on for many months and suspects can be in pre-trial detention for longer than the official sentence they would receive if convicted immediately. Prosecutors can extend the period of criminal investigation to six months in complex cases and until 18 months in exceptional cases. The court system is overloaded and as a result suspects may be held in pre-trial detention even longer.

CASES

Tatyana Loktionova [Chair of the Primorskiy kray Arbitration Court]: In July Ms. Loktionova announced that the governor of Primorskiy kray, Mr. Yevgeniy Nazdratenko, had been interfering in the court's activities and that, consequently, she and her colleagues feared for their safety. Mr. Nazdratenko had apparently blamed the court for causing enterprises in the region to go bankrupt and damaging the economy, and launched an investigation into the functioning of the Arbitration Court for illegal conduct. Ms. Loktionova was removed from the Kray Arbitration Court. She lost her final appeal to the Supreme Court, which upheld the decision of the lower court on 23 August 2000.

Sergey Pashin [former judge in the Moscow City Court]: On 11 October 2000, the Moscow Qualification Board of Federal Judges made the decision to dismiss Sergey Pashin ostensibly for infractions of professional etiquette. The official pretext of this decision was a complaint by D. Krasnov, Chair of the Kaluga Regional Court, to the Moscow City Court. Sergey Pashin had written an expert opinion upon the request of a human rights activist in which he questioned the legality of Dmitry Neverovsky's conviction for draft evasion. Dmitry Neverovsky had refused to serve in the Russian army during the war in Chechnya because he is a pacifist. In November 1999 he had been sentenced to two years' imprisonment by the Obninsk City Court and was released in April 2000 after his conviction was overturned on appeal by the Kaluga Regional Court. Mr. Pashin said the court had violated procedural laws and had disregarded Neverovsky's right to do civilian service as an alternative to entering the army. His second offence was that he took part in a phone-in programme on Ekho Moskvyy radio station and gave a caller who was asking for help his office phone number over the air. Krasnov's opinion was that Pashin's actions undermined judicial authority and were incompatible with the status of a judge.

Observers have commented that Sergey Pashin was dismissed for political reasons as punishment for his outspoken views, his independence and for a famous *obiter dictum*, in which he revealed that Moscow judges work at the command of the City Mayor and that the Moscow Qualification Board often ignores gross violations committed by while at the same time in other cases annihilating a judge for the most trivial reasons. The Supreme Court annulled the dismissal in 2001. Shortly thereafter Sergey Pashin resigned voluntarily from his office.

Tatyana Glazkova [former federal judge in Pavlovsky Posad]: Ms. Glazkova was dismissed by the regional collegium of judges in May 1999 “for actions disgracing the honour and dignity of a judge and damaging judicial authority.” Ms. Glazkova and 13 other judges dismissed on similar grounds appealed the dismissal to the Constitutional Court. The Constitutional Court decided that their cases were within the purview of the collegium. Ms. Glazkova also wrote to President Putin, but her letter was not answered. Subsequently, Ms. Glazkova complained to the European Court of Human Rights, claiming that her right to a fair trial was violated because she did not get a fair hearing and that her right to respect in her private and family life was breached because her good name and reputation were ruined. At the time of writing no date had been set for the hearing of the case.

She was dismissed for allegedly unnecessarily delaying certain cases and failing to follow appropriate procedures in others. but she has contended that her removal was in fact a reprisal for exercising her independence. Ms. Glazkova accuses the Chief Justice, Sergei Generalov, of illegally intervening in cases on the request of local lawyers and of ensuring that some of her rulings were overridden by a higher court. She maintained that after she protested the release from custody of a vandal she had convicted, without his paying the 16,000 rubles (\$ 571) damages, the Chief Justice intentionally assigned her the toughest cases so that she could be accused of working too slowly. This rationale for dismissing judges overloaded with work is reportedly a common tactic.

Karina Moskalenko [Moscow defence lawyer]: On 28 March 2000, defence lawyer Karinna Moskalenko suffered assaults by members of Moscow’s Organised Crime Unit while trying to assist a client who had been illegally detained by the Unit at a residence. Her complaint to the Moscow City Procurator was rejected at the end of April 2000. Mrs. Moskalenko then complained to the Moscow District Court. The Moscow District Court, however, refused to hear her case without receiving the formal decision of the Moscow City Procurator that her claim was rejected. The Moscow City

Procurator's office asserted that it did not have the power of decision to reject her complaint and that the necessary document was now probably at the Procurator General's office. Thereafter she submitted all her papers from the Moscow City Procurator rejecting her initial complaint to the Moscow District Court. In September 2001 Mrs. Moskalenko was still waiting for the opening of her case at the Moscow District Court.

Mikhail Konstantinidiy [Public Defender in Novorossiysk]: Mr. Konstantinidiy was arrested on 30 September 2000 for "illegal entrepreneurial activity". However, it is alleged that the arrest was undertaken in retaliation for Konstantinidiy's professional successes against an oil company and a local politician.

Yury Skuratov [Prosecutor-General]: Mr. Yury Skuratov's investigations into high-level corruption in Russia had come close to implicating associates of former President Yeltsin. He had resigned in February 1999 under pressure from the presidential administration, allegedly because he had discovered a corruption scandal that involved the head of the Presidential Administration Office, Mr. Borodin, and the Swiss construction company Mabetex, which had carried out reconstruction work in the Kremlin. The Federation Council, however, refused his resignation.

On 2 April 1999, Mr. Skuratov was suspended by decree by Boris Yeltsin pending charges in an allegedly fabricated sex scandal and consequently submitted his resignation again, which was again refused by the Federation Council. Mr. Skuratov, however, remained suspended. On 13 October 1999, the Federation Council refused for the third time to accept Mr. Skuratov's resignation. The Federation Council then put the case before the Constitutional Court and on 1 December 1999 the Court ruled that the President had the right to suspend Mr. Skuratov pending charges in a sex scandal. The Court, however, also ruled that Mr. Yeltsin could not overrule the Federation Council in its decision not to accept the resignation of Mr. Skuratov. On 19 April 2000 the Federation Council approved President Putin's recommendation that the suspended Prosecutor General should be removed from office. Mr. Skuratov was a candidate in the presidential election in March 2000 and alleged that President Putin had been involved in some of the cases of corruption which he had investigated.

Mr. Borodin was arrested on 17 January 2001 under an international arrest warrant issued by Swiss authorities in January 2000 on charges of money laundering. On 11 May 2001 the Russian Prosecutor General's office confirmed that it had dropped the criminal case against Yury Skuratov.

Victor Malischenko [lawyer, human rights activist, and head of the Nigny Novgorod division of the International Protection Center, the Russian Affiliate of the ICJ]: During the past four years, Mr. Malischenko has been arrested several times by the local police. Each time the Regional Court ruled that he had been arrested on unfounded grounds. The Regional Court ordered his release in each instance and awarded compensation. When the local police attempted to arrest him yet another time on, he refused to cooperate. On 26 June 2001 Mr. Malischenko was sentenced by the Dzerdzinski District Court to a one-year sentence in a low security penitentiary institution on the charge of resisting arrest. At the time of writing Victor Malischenko was being held in a detention centre although the current sentence only provides for a low security penitentiary institution. He appealed the decision. In September 2001 his appeal was pending.

The International Protection Center alleges that the reason behind Mr. Malischenko's continuous arrests and harassment is the disapproval by the local authorities and the police department of his human rights activities. Victor Malischenko's sentence includes a two-year ban from any human rights activity. Russian Legislation, however, does not provide for such a sentence. The previous harassment and the nature of his sentence appear to substantiate these allegations.

Lubov Osipkina [former judge of the Olgograd Regional Court]: Mrs. Osipkina served the initial three years as a judge in the Olgograd Regional Court without any irregularities. After this period, she was recommended by the members of the Olgograd Region Board for life appointment. However, the Presidential Commission did not recommend her and she was dismissed for no apparent reason. Her inquiries as to the reason for her dismissal went unanswered. Her husband is a famous Russian lawyer, who has been criminally convicted, allegedly for political reasons, and is still appealing his sentence. Ms. Osipkina publicly stated that his conviction had been a judicial mistake and that the Supreme Court should review his case.

SAUDI ARABIA

Despite the adoption of the Basic Law of Government, Saudi Arabia continues to be lacking in basic constitutional safeguards and civil liberties. The nation is a monarchy deriving religious legitimacy from the Wahhabi doctrine. Although the law in Saudi Arabia recognises the principle of the independence of the judiciary, it also subordinates the judiciary to the authority of the executive organ, in particular the Minister of Justice, the Minister of the Interior and regional governors. Serious human rights violations continued in Saudi Arabia. Women face systematic discrimination, and suspected political or religious activists suffer arbitrary arrest and detention or punishment under secretive criminal judicial procedures that violate basic tenets of the right to a fair trial. An alarming increase in executions and amputations continued to be reported, as well as torture and ill-treatment. The Saudi government continued to enforce a ban on political parties and trade unions and to impose restrictions on access to the country by human rights NGOs.

Saudi Arabia is a monarchy without elected representative institutions or political parties. The name Saudi Arabia refers to King 'Abdulaziz Ibn Sa'ud, who founded the Kingdom in 1932 by unifying all the areas he ruled under one political system. Since the death of King 'Abdulaziz in 1953, four of his sons have ruled successively, namely, King Sa'ud (1953-1964), King Faisal (1964-1975), King Khalid (1975-1982), and the present King Fahd. The prominent fixture of Saudi Arabia in international affairs is due both to its dominant position in world oil markets and to its status as the spiritual home of Islam. Saudi Arabia is the site of the two Muslim holy cities, Mecca, where the Grand Mosque – *Ka'ba* – is located and Medina, the burial place of the Prophet Mohammed.

THE DEVELOPMENT OF CONSTITUTIONAL AND LEGAL STRUCTURES

The ruling family has maintained absolute political power by controlling the political and administrative institutions created in response to internal and external pressures. The ruling family has sought religious legitimisation of its policies through the adoption of the Wahhabi doctrine as a state ideology, thereby linking the political structures in the Kingdom with the religious establishment. The constitutional and reform developments have involved three actors: the secular-educated Saudis, who have advocated change in terms of socio-economic and political reforms; the religiously inspired traditionalists, who have desired to reaffirm the religious character of the Kingdom; and the royal family, with its ultimate goal of maintaining its absolute political power by using religion as a source of legitimisation, on the one hand, and by controlling the institutions it has created, on the other hand.

The development and reform of political institutions reached its peak in March 1992 when King Fahd approved three laws: a Basic Law of Government, The Statute of the Consultative Assembly, and the Statute of the Provinces. The disruptive impact of the Iraqi invasion of Kuwait and subsequently the second Gulf War, as well as dissatisfaction among the citizenry concerning al-Sa'ud's absolute monarchy prompted King Fahd to issue this reform package.

THE BASIC LAW OF GOVERNMENT

The Basic Law of Government emphasises the religious as well as the monarchical nature of the state. Art. 1 identifies Saudi Arabia as an Arab Islamic state, while art. 7 states: "God's Holy Book and His Prophet's traditions are the source of authority of the government. They are the arbiters of this Law and all other laws". According to art. 5 (a), the "law of government in the Kingdom of Saudi Arabia is monarchy", while art. 5 (b) reserves the right to rule to the House of Sa'ud. The King also has the power to appoint and dismiss his heir apparent in accordance with art. 5(c). The Basic Law strengthens the King's absolute authority, as art. 55 affirms that the king carries out the policy of the nation, a legitimate policy in accordance with the provisions of Islam; and that the king oversees the implementation of the Islamic *Shari'a*, the state general policies, and the protection and defence of the country. The Basic Law might seem to provide for the separation of powers, as according to art. 44 the powers of the state are divided into the judicial, executive, and regulatory branches. However, in the final analysis,

the powers of government remain in the hands of the King, who is accountable to no other institution in the scheme of government.

The Basic Law reserves the legislative power for the King and the Council of Ministers. Although the Consultative Council, established by the Basic Law, is granted powers to discuss, interpret and to a limited extent, to propose laws, the authority of enacting laws is reserved to the Council of Ministers and the King. Thus, according to art. 2 of the Basic Law of Government, and art. 3 of the Consultative Council Law, the 1958 Law of the Council of Ministers remains intact, since the two articles provide explicitly that nothing in them may be interpreted as superseding or amending existing legislation. According to the 1958 Law, the Council of Ministers has broad powers which can only be checked by the King, who has a final veto power on any decision adopted by the Council.

The Basic Law lacks provisions for the establishment of a constitutional court to arbitrate conflicts which may arise among the King, the Council of Ministers, and the Consultative Council or between individuals and the government over the interpretation of constitutional issues. Instead, the new laws reserve solely to the King the function to adjudge such matters.

The Basic Law of Government is important in that it makes explicit the supreme and expansive role of the monarchy. It emphasises the role of the family of al-Sa'ud in government, the hereditary principle of succession, and other features pertaining to the royal family and its central role in the affairs of the state.

THE LAW OF THE CONSULTATIVE ASSEMBLY

The second statute, the Law of the Consultative Assembly, establishes an assembly of sixty appointed members and one speaker. The assembly is meant to express views, in an advisory capacity, on policies submitted to it by the King, as well as on international treaties and economic plans. It also has the power to interpret laws and examine annual reports referred to it by ministers and government agencies. The membership of the assembly is restricted to men over the age of thirty, who must swear allegiance to "the faith, the King, and the country".

The Law of the Consultative Assembly, although falling far short of its Hejazi predecessors or a true assembly or parliament, marked a departure in modern Saudi history. The statute not only offered a national public forum for discussion, but also provided for limited public participation in the decision-making arena.

THE LAW OF PROVINCES

The third statute, the Law of Provinces, is concerned with reforming local government. It defines the rights and duties of provincial governors and affirms the dominant role of the interior minister in the regional system. The statute creates provincial councils, composed of the governing prince, his deputy, other local representatives of government ministers, and at least ten well qualified citizens appointed by the king. This statute is intended to curb corruption, establish tighter control over financial matters in the provinces, and strengthen the ministry of the interior.

HUMAN RIGHTS BACKGROUND

The Basic Law provides for a small number of political and civil rights, as well as a rather progressive commitment to economic, social, and cultural rights. Art. 26 provides that the state shall protect human rights according to *Shari'a*. Despite the endorsement of the principle of human rights, the qualification by reference to *Shari'a*, negates the concept. Non-codification of laws in Saudi Arabia leaves the interpretation of precepts of *Shari'a*, including the treatment of rights, to the competency of a government-appointed Council of Senior Scholars, which in turn is responsible to the King. Thus, the Basic Law instead of defining human rights by reference to internationally acknowledged standards, defines them by reference to national law, i.e., the principles of *Shari'a* as interpreted by the strict Wahhabi doctrine.

The Basic Law lacks any provisions for freedom of religion, freedom of speech and expression, equality and equal protection of law, freedom from torture, cruel or inhuman punishment, freedom of association and assembly, right to a fair trial, and freedom of thought and opinion. The Basic Law tends to formulate provisions in terms of obligations of the State rather than in terms of rights belonging to individuals or the citizenry. This conception of Saudi subjects as dependent on the State, presents the State as a paternalistic entity with the duty to care for its subjects, rather than treating Saudi citizens as individuals with entitlements.

Saudi Arabia has failed to ratify the principal international human rights instruments and has abstained from voting for the adoption of the Universal Declaration of Human Rights. Its abstention was based in part on its contention that article 18 on freedom of thought, conscience, and religion, particularly the right to change one's religion or belief, violates the precepts

of Islam. The Government also argued that the human rights guaranteed by the Islamic-based law of Saudi Arabia surpassed those secured by the Universal Declaration. These arguments have been repeated to justify the refusal of Saudi Arabia to sign most of the two Covenants.

However, the position of Saudi Arabia regarding the accession of human rights instruments has changed since the mid-nineties, with a trend toward ratifying certain instruments with "Islamic reservations". Thus, in January 1996 Saudi Arabia ratified the Convention on the Rights of the Child (CRC), with a general reservation to "all such articles as are in conflict with the provisions of Islamic law". The reservation does not make explicit which provisions of the CRC are seen to be in conflict with Islamic law. When considering the initial report of Saudi Arabia, the Committee on the Rights of the Child (CRC) stated that the broad and imprecise nature of the State party's general reservation potentially negates many of the Convention's provisions and raises concern as to its compatibility with the object and purpose of the Convention, as well as the overall implementation of the Convention. The Committee recommended that Saudi Arabia withdraw its reservation. Moreover, the Committee observed that "noting the universal values of equality and tolerance inherent in Islam ... the narrow interpretations of Islamic texts by State authorities are impeding the enjoyment of many rights protected under the Convention".

Saudi Arabia made a similar reservation in September 1997 when it ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). But in contrast to its sweeping Islamic reservations with respect to the CRC and the CERD Conventions, Saudi Arabia, ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) with three limited reservations. The first Saudi reservation relates to Article 3 (1), which prohibits the forcible return of anyone to another state where she/he would be at risk of being subjected to torture. With its second reservation, Saudi Arabia does not recognise the jurisdiction of the Committee Against Torture as provided for in Article 20 of the Convention to investigate allegations of systematic torture. By its third reservation, Saudi Arabia declares that it shall not be bound by Article 30 (1), which requires the submission of disputes concerning the interpretation or application of the Convention to the International Court of Justice, if they have not been solved by negotiation and arbitration.

In September 2000, Saudi Arabia acceded to the Convention of the Elimination of All Forms of Discrimination Against Women, but entered the reservation that "[i]n the case of contradiction between any form of the

Convention and the norms of Islamic law, the Kingdom is not under any obligation to observe the contradictory terms of the Convention”.

At the regional level, Saudi Arabia strongly supported the adoption of the Cairo Declaration on Human Rights in Islam, which was adopted by the Organisation of Islamic Conference (OIC) in 1990. Saudi Arabia has signed the Arab Charter on Human Rights, adopted by the Council of the Arab League in 1994. The Arab Charter has affirmed some but not all internationally recognised human rights.

Widespread human rights violations persisted in Saudi Arabia. Women faced severe discrimination, and a number of suspected political or religious activists were subjected to arbitrary arrest and detention or punishment under secretive criminal judicial procedures that contravened the fundamental precepts of the right to a fair trial. An alarming increase in executions and amputations, torture and other ill-treatment was reported. The Saudi government continued to enforce a ban on political parties and trade unions and to impose restrictions on access to the country by human rights NGOs.

THE JUDICIARY

The Basic Law of Government contains several general articles on the independence of the judiciary. Art. 46 proclaims that the judiciary is independent, while art. 47 guarantees the right to file suits to all citizens and other residents according to procedures specified by law. By virtue of art. 48, the courts shall apply the provisions of *Shari'a* according to the Holy Book and the Traditions and the laws issued by the King. Although the law in Saudi Arabia recognises the principle of the independence of the judiciary, it also subordinates the judiciary to the authority of the executive organ, in particular the Minister of Justice, the Minister of the Interior and regional governors. The Statute of the Judiciary vests the Minister of Justice with broad powers for supervision over all courts and judges, including, inter alia, the approval and reconsideration of the decisions of the Court of Cassation. The King appoints members of the Supreme Judicial Council, the highest judicial body in the Kingdom, responsible for interpreting *Shari'a* and reviewing all court verdicts resulting in the imposition of the death penalty, amputation and stoning.

The independence of the judiciary is further undermined by powers invested in the Ministry of the Interior, which is responsible for the entire process of arrest and detention and for taking the decision as to whether a

detainee is released, sent to trial or detained indefinitely without trial. The judiciary is denied any role in supervising these processes. Thus, the proper role of judges to administer justice fairly and independently is undermined by a system which provides for the executive authority's intervention and undue involvement both in law and in practice. With the principle of an independent and impartial judiciary eroded, detainees are inevitably treated differently by reason of their sex, nationality, religious beliefs or social standing.

The Kingdom does not recognise internationally acknowledged standards for fair trial and there is no judicial review of the duration of detention or procedures of search and arrest. The practice of setting up special tribunals to adjudicate political cases is notorious in the Kingdom, since, legally speaking, the prosecution is not obliged to bring cases to the regularly constituted courts. Frequently, the government bypasses the court system altogether, disposing of suspects either by administrative action or by forming closed summary tribunals.

Codification of many laws is still lacking in the Saudi legal system. Criminal laws are vague and open to wide interpretation by judges who enjoy powers unconstrained by written rules. Court hearings are summary and secret. Defendants are invariably denied access to legal counsel and the right to mount their own defence, and they have no opportunity for effective exercise of the right of appeal. These shortcomings are compounded by the reliance of the criminal justice system on confessions obtained by arresting authorities in order to secure criminal convictions. Arbitrary arrest, particularly of suspected political and religious opponents, which is a routine practice in Saudi Arabia, is facilitated and perpetuated by the lack of meaningful safeguards to restrain the executive power in this area.

WAHABISM

The justice system in Saudi Arabia is based on the Wahabi interpretation of *Shari'a*. Wahabism is an interpretation of the Hanbali school of jurisprudence, one of the four schools in Sunni Islam. (The others are Malaki, Hanafi and Shafi'i.) The system is particularly influenced by the teachings of the Hanbali jurist Ibn Taimiya. The Hanbali School had its origin in the writings of Ahmad Ibn Hanbal during the ninth century in Baghdad. Hanbalism marks a deliberate stage in the distinction between state and religion in Islam. Hanbalism denounced *ilm al-kalam* (scholastic theology), *qiyas* (analogical reasoning), *ijma'* (consensus), *'aql* (reasoning), and any other accretion which gave too much leeway to the interpretation of the Qur'an and Sunna and which affected the "purity" of Islam. Thus, according to the Hanbali School,

the precepts of Islam must be derived only from the Qur'an and Sunna, and everything else is *bid'a* (unacceptable innovation).

The teachings of Ibn Taimiya had three major implications for the Wahhabi doctrine. Firstly, the views of Ibn Taimiya on state and religion. Those views rest on the principle of cooperation, which means that the ulama have to support and advise the ruler as long as he applies the *Shari'a*. The government is considered Islamic by virtue of the support it gives to Islam; and it is perfectly legitimate to accept the rule of anyone who follows the *Shari'a*. According to those views, the Wahhabi doctrine accepted Al Sa'ud as a legitimate and hereditary government for Arabia. The second implication was the fundamental doctrine of tawhid (the doctrine of the Unity of God). The third implication, which came as a logical development of the doctrine of *tawhid*, relates to a harsh condemnation of saint worship, shrine visits and grave cults, and became an important element in the Wahhabi doctrine.

A set of issues can be identified as distinguishing Wahhabi theology from other Islamic schools of thought. The central tenet of the Wahhabi doctrine is the doctrine of tawhid (monotheism), which consists of three parts: the assertion of the unity of God; unity of divinity; and unity of names and attributes of God. Linked to the concept of monotheism in the Wahhabi doctrine is the concept of *takfir* (charge of unbelief), which according to Wahhabism indicates that mere affiliation with Islam is not sufficient in itself to prevent a Muslim from becoming a polytheist. Wahhabism defines an infidel as a person who has known the religion of the Prophet and yet stands against it, prevents others from accepting it, and shows hostility to those who follow it. The Wahhabi doctrine further states that an infidel should be killed and that it is the duty of every able believer to fight infidels.

The literal approach to interpretation of religious texts is manifest in the Wahhabi doctrine. Its strict adherence to Qur'an and Sunna as the only sources of Islamic law leads it to reject all interpretations provided by the four Sunni schools of jurisprudence, including the Hanbali school which the Wahhabis follow, if these are not in conformity with the two primary sources. The Wahhabis reject the idea that the "door of *ijtihad* (juristic reasoning) is closed". Their strict adherence to the literal approach denies their doctrine flexibility and adaptability to modern conditions and leads them to reject modern technology and inventions on the basis of the concept of *bid'a*.

Judges in Saudi Arabia are free to refer to and apply interpretations of the law according to all four Sunni schools of jurisprudence. *Shari'a* applies to many spheres of law, including personal status and criminal law. However,

Shari'a is supplemented by laws enacted by the government, particularly in the area of economic affairs.

COURT SYSTEM STRUCTURE

The court system in Saudi Arabia is composed of lower courts, the Court of Cassation and the Supreme Judicial Council. *Shari'a* courts exercise jurisdiction over common criminal cases and civil suits regarding marriage, divorce, child custody and inheritance. Cases involving relatively small penalties are tried in *Shari'a* summary courts, while more serious crimes are adjudicated in *Shari'a* courts of common pleas. According to Saudi Arabian law and practice, defendants are asked by the judge if they accept the verdict and sentence in cases involving less serious offences. For those who do, the sentence becomes enforceable with immediate effect. For those who contest the verdict, and in all cases of capital punishment and amputation, the cases are referred to the Court of Cassation for review. However, under article 20 of the Statute of Justice, the decision of the Court of Cassation becomes final only upon approval by the Minister of Justice, who may refer the case back to the court for reconsideration if he disagrees with its decision. If the court maintains its initial decision, the Statute requires that the matter be referred to the Supreme Judicial Council for final resolution.

The Supreme Judicial Council, the highest judicial body in the Kingdom, is responsible for interpreting *Shari'a* and reviewing all court verdicts resulting in the imposition of the death penalty, amputation and stoning. The members of the Council are appointed by the King.

Other civil proceedings, including those involving claims against government and enforcement of foreign judgements, are held before specialised administrative tribunals, such as the Commission for the Settlement of Labour Disputes and the Board of Grievances. Military courts have jurisdiction over military personnel and civil servants charged with violations of military regulations. The decisions of the military courts are subject to review by the Minister of Defence and the King.

LAWYERS

While certain laws in Saudi Arabia refer to the possibility of detainees having access to a lawyer, legal representation is the rare exception, not the norm. Lawyers are not considered an integral part of the Saudi judicial

system, the rationale being that the judge acts as the defendant's lawyer and challenges every piece of evidence presented by the prosecution. In late 1999, there were media reports of plans to promulgate a law regulating the legal profession, but no details were revealed and there was no indication as to whether this new law would lead to the establishment of a fully independent bar association. The same plans were mentioned by the Saudi Representative during the March/April 2000 session of the UN Commission on Human Rights. The Saudi Representative informed the Commission that Saudi Arabia was committed to the protection and promotion of human rights through carefully studied measures within the context of a comprehensive human rights strategy. These measures include, inter alia, an invitation to the UN Special Rapporteur on the independence of judges and lawyers to visit the country and the adoption of a new law for the legal profession and legal counselling. The visit of the Special Rapporteur, which was scheduled for the second week of October 2001, was postponed due to security concerns.

In late September 2001, the Saudi Council of Ministers approved a new law regulating the licensing of lawyers, which allows defendants to appoint lawyers to represent them before courts and other governmental agencies. The new law prohibits torture and limits the period of arrest to five days if charges were not filed against the defendants. However, the law gives broad powers to the Minister of the Interior to detain people indefinitely.

SIERRA LEONE

Judicial institutions in Sierra Leone are moribund or almost completely ineffective as a consequence of a devastating civil war dating from 1991. Judges are poorly resourced and often ill-trained. The expectations for rebuilding State institutions which arose following the 1999 peace agreement by rebels and pro-governmental forces in 1999 has yet to be realised. Heightened concern from the international community has led the UN Security Council to endorse the proposition of the Sierra Leonean Government for the establishment of an International Special Court devoted to judging crimes committed in Sierra Leone during the civil war. This Court has yet to be set up due to the lack of funding commitment by UN member states.

Sierra Leone gained independence from the United Kingdom on 27 April 1961 as a constitutional democracy. Since that time, it has experienced several coups d'état leading to the alternation of civil and military governments. The political situation of Sierra Leone has been highly influenced by its regional context. The outbreak of a civil conflict in Liberia in December 1989 and the intervention of the Sierra Leonean Government as part of the cease-fire monitoring group (ECOMOG) of the Economic Community of West African States (ECOWAS) preceded the eruption of conflict in the territory of Sierra Leone. Indeed, in April 1991 troops of the National Patriotic Front of Liberia (NPFL) as well as a Sierra Leonean resistance movement, known as the Revolutionary United Front (RUF), advanced 150 km inside Sierra Leone. The country has since been submerged in a fierce civil war opposing the RUF and other military factions against the pro-governmental forces.

In October 1999, the UN Security Council adopted Resolution 1270, establishing a 6,000-member force, the UN Mission in Sierra Leone (UNAMSIL) in order to supervise the implementation of a peace agreement and to assist in a programme for the disarmament and reintegration of the former rebel factions. However, implementation of key provisions was limited. Reports of atrocities perpetrated against the civilian population by rebels continued and division between the Armed Forces Revolutionary Council

(AFRC) and RUF leadership emerged. Fighting among the former allied factions was reported in northern Sierra Leone. The deployment of UNAMSIL and disarmament and demobilisation were stalled. In early 2000 the implementation of the Lomé agreement collapsed when RUF forces attacked UNAMSIL troops in Makeni, seizing a number of UN personnel as hostages. The international presence was stepped up considerably, with United Kingdom troops deployed to defend Freetown, support UNAMSIL and provide training to the Sierra Leone Army.

In July the UN Security Council adopted a resolution imposing an international embargo on the purchase of unauthenticated diamonds in an effort to end the rebels' principal source of funding for armaments. In early August the UN Security Council adopted Resolution 1315, requesting the Secretary-General to negotiate with the Government of Sierra Leone to create an independent special court and recommending that "the subject matter jurisdiction of the special court should include ... crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone ." The Secretary-General subsequently submitted proposals for the establishment of such a court. In November, following further negotiations mediated by ECOWAS, the Government and the RUF signed a cease-fire agreement in Abuja providing for the demobilisation and disarmament of all militia forces, and the deployment of UNAMSIL throughout the country. In the meantime, some 331000 Sierra Leonean refugees fled to Guinea. Guinean President Conté then alleged that Liberian and Sierra Leonean refugees were supporting the rebels attempting to overthrow his Government and ordered them to leave the country. In March 2001 the Liberian Government expelled the ambassadors of Guinea and Sierra Leone from Liberia. Large quantities of refugees began to return from Guinea to Sierra Leone.

The current Constitution was formally approved by the House of Representatives in August 1991 and later endorsed by a national referendum. It has been suspended twice since its adoption, first between April 1992 and March 1996, following a military-led coup, and again in June 1997, after dissident members of the armed forces led by Maj. Johnny Paul Koroma seized power, deposing the President, A. A. T. Kabbah. President Kabbah regained power with international assistance in March 1998 and the 1991 Constitution was reinstated.

According to article 5 (1) of the Constitution "[t]he Republic of Sierra Leone shall be a State based on the principles of Freedom, Democracy and

Justice". Chapter III provides for "[t]he recognition and protection of fundamental human rights and freedoms of the individual". Chapter IV grants political rights to every citizen of Sierra Leone "eighteen years of age and above and of sound mind" and establishes a multi-party system. Chapter V vests executive power in the President, who is to be elected by the majority of votes cast nationally and by at least 25 per cent of the votes cast in each of the four regions (the Northern, Eastern and Southern Provinces, and the Western Area). The President appoints the Cabinet, subject to approval by the legislature. The maximum duration of the President's tenure of office is two five-year terms. Under Chapter VI, legislative power resides in a unicameral 80-member Parliament, which is elected by universal adult suffrage for a five-year term. The parties that have secured a minimum of five percent of the votes in the legislative elections are allocated seats on a system of proportional representation, while 12 seats are allocated to 12 Paramount Chiefs representing the provincial districts. According to article 76 of the Constitution, members of the Parliament are not permitted to hold office concurrently in the Cabinet. Further chapters of the Constitution provide for the establishment of various other institutions, including the Ombudsman (Chapter VIII) and Commissions of Inquiry (Chapter IX).

HUMAN RIGHTS BACKGROUND

Extensive and serious human rights violations have been constant since the outbreak of the Sierra Leonean civil conflict. Reports have consistently revealed a pattern of massive and widespread violations. Among the forms of abuse reported are rape, extortion, indiscriminate use of helicopter gunships, child recruitment, extrajudicial execution and ill-treatment of detainees and of persons at checkpoints. Rebel forces have engaged in deliberate and arbitrary killings of civilians, torture including mutilation and rape, abduction of civilians and hostage-taking, forced labour and forced conscription.

The political and human rights crisis deepened in January 1999 as rebel forces attacked Freetown. On this occasion, an estimated of 5,000 people were killed, mostly arbitrarily, but sometimes as a result of deliberate targeting. Among those killed were governmental officials, journalists, lawyers, human rights activists, prison officials and especially police officers. Freetown suffered indiscriminate aerial bombardments by governmental forces, which resulted in large numbers of civilian casualties. Atrocities continued after rebel troops were forced to retreat from Freetown and moved to the city's outskirts, killing or mutilating civilians accused of sympathising

with government forces. Pro-government troops extrajudicially executed large numbers of captured or suspected rebels and ill-treated staff of humanitarian organisations, including the International Committee of the Red Cross. During the nine months following the signing of the Lomé Agreement, there was a relative reduction in human rights violations. However, certain kinds of abuses, such as sexual assault against women and girls, continued unabated. After some 500 United Nations peacekeepers serving with UNAMSIL were captured in May 2000, renewed conflict ushered in increases in human rights abuses by both sides.

The deterioration of the situation led to renewed insecurity and caused hundreds of thousands of people to flee, some to Guinea, but mainly to other parts of Sierra Leone, thus bringing the number of internally displaced persons to some 500,000. After September violence erupted along the Guinean border, and Sierra Leonean refugees escaping from arrest and harassment by the local population returned to Sierra Leone and were exposed to RUF and AFRC abuses.

The collapse of the peace process has provoked a reassessment of the provision for a general amnesty in the Lomé Agreement and mobilised national and international support for a war crimes tribunal. During 2000, Sierra Leone ratified the Rome Statute to establish an International Criminal Court and enacted legislation to incorporate the Convention Against Torture and the International Covenant on Civil and Political Rights and its Protocols into Sierra Leonean law.

THE JUDICIARY

INSTITUTIONAL FRAMEWORK

Chapter VII of the Constitution (arts. 120-145) provides for the Judicial power of Sierra Leone. The independence of the Judiciary is declared in article 120 (3): "In the exercise of its judicial functions, the Judiciary shall be subject only to this Constitution or any other law, and shall not be subject to the control or direction of any other person or authority".

Provisions for the structure of the Judiciary derive from both the Constitution and legislation. According to art. 120 (4), "[t]he Judicature shall consist of the Supreme Court of Sierra Leone, the Court of Appeal and the High Court of Justice, which shall be the superior courts of record of Sierra Leone and which shall constitute a Superior Court of Judicature, and such

other inferior and traditional courts as Parliament may by law establish". More precisely, the judicial system consists of a Supreme Court, the Court of Appeal, the High Court and Magistrates' Courts, and local courts. The Supreme Court is the ultimate court of appeal in both civil and criminal cases and has supervisory jurisdiction over all other courts and over any adjudicating authority in Sierra Leone, as well as original jurisdiction for constitutional issues. The Court of Appeal has jurisdiction to hear and determine appeals of decisions of the High Court in both criminal and civil matters, and also from certain statutory tribunals. Appeals against its decisions may be made to the Supreme Court. The High Court has unlimited original jurisdiction in all criminal and civil matters, as well as appellate jurisdiction against decisions of Magistrates' Courts. Magistrates' Courts have jurisdiction in summary criminal cases and over preliminary investigations to determine whether a person charged with an offence, should be committed for trial. Local courts have jurisdiction, according to native law and custom, in matters that are outside the jurisdiction of other courts.

A number of additional Constitutional provisions address judicial independence. According to Art. 120 (9), "[a] Judge of the Superior Court of Judicature shall not be liable to any action or suit for any matter or thing done by him in the performance of his judicial functions". Art. 138 (4) provides that "a Judge of the Superior Court of Judicature shall not while he continues in office, hold any other office of profit or emolument, whether by way of allowances or otherwise, whether private or public, and either directly or indirectly."

Concerning appointment, "[j]udges of the Superior Court of the Judicature shall be appointed by the President by warrant under his hand acting on the advice of the Judicial and Legal Service Commission and subject to the approval of Parliament" (art. 135 (2)). Remuneration is governed by article 138 (3), which states that "[t]he salary, allowances, privileges, rights in respect of leave of absence, gratuity or pension and other conditions of service of a Judge of the Superior Court of Judicature shall not be varied to his disadvantage". As for removal, art. 137 (7) provides that "[a] Judge of the Superior Court of the Judicature shall be removed from office by the President (a) if the question of his removal from office has been referred to a tribunal appointed under subsection (5) and the tribunal has recommended to the President that he ought to be removed from office; and (b) if his removal has been approved by a two-thirds majority in Parliament".

The Constitution suffers from an important institutional problem in terms of judicial independence. According to art. 120 (1), the Head of the Judiciary

is vested in the Chief of Justice, who benefits from the same guarantees as Judges of the Superior Court of the Judicature. However, his supervisory power and more generally the independence of the Judiciary are threatened by section 64 of the Constitution, which merges the positions of Minister of Justice and Attorney General. Thus, functions which are innately executive and judicial reside in the same person.

THE SIERRA LEONE JUDICIARY IN PRACTICE

An editorial in a Sierra Leonean newspaper of July 2000 remarked: "It is no gain-saying that the Judiciary is the most neglected branch of government. While the Executive and Legislative branches are head over heels about fat salaries and better conditions of service, the Judiciary is left to wallow in a state of disrepair and utter neglect". Indeed, the conflict in Sierra Leone has had a serious negative impact on the legal system as a whole. The institutional framework described is barely functional. Since 1995, the administration of justice outside Freetown has been almost non-existent. The High Court of Sierra Leone has not sat outside Freetown. In the provinces, only the Local Court system has been functional with the exception of the provincial towns of Bo and Kenema where Magistrates' Courts are still in place. Although the primary cause is the rebel war, even prior to 1995 the judiciary faced acute problems sitting in the provinces. Judges and Magistrates had, and still have, no proper accommodation. The courtrooms, which were then in an extremely precarious situation, have now been destroyed, and transportation to and from the corresponding provincial towns has been always unavailable.

According to various reports, national judicial institutions desperately lack almost everything a judicial system needs to deliver justice efficiently, independently and impartially. The judiciary lacks training necessary to enable it to carry out trials of those accused of international and national crimes. The Judiciary is forced to operate from the overcrowded law-courts building in the centre of Freetown, which lacks the most basic infrastructure and equipment, and faces acute problems such as infrequent electricity supply. In addition, having no vehicles, the Judicial Department has been forced to hire a vehicle on a daily basis at a high rate (Le 60.000 a day) in order to transport some five judges to and from work every day.

The remuneration and conditions of service of judges are seriously deficient. Judges in the Superior Court of Judicature receive less than US\$ 700 per month including allowances, while magistrates receive between US\$ 77 and US\$ 160 per month. Court clerks and registrars are paid US\$ 19-20 per month. These conditions clearly are conducive to the emergence of corrupt

practices. Furthermore, they deter private legal practitioners, who would otherwise have wished to serve on the bench, from taking up judicial appointments. Another grave flaw of the current system is that it lacks a library necessary for reference to verify the law and consult jurisprudence, which makes it extremely difficult for members of the Judiciary to discharge their duties in a professional manner. There are no recording facilities for the proceedings in court and almost no secretarial services. As a result, files and documents are regularly misplaced, which leads to formal justice denials. Moreover, the judiciary has difficulty functioning without an effective and professional police force, which is nowadays absent as a result of the devastating impact of the civil conflict.

The Sierra Leone Bar Association, aware of the situation, has noted among other things that in practice judges are employed "by means of renewable contracts after retirement (which) is incompatible with judicial independence and is likely to compromise the quality of judicial performance".

Another source of concern is that given the strong sentiments of the Sierra Leonean public regarding the atrocities committed by rebels and the high complexity of some trials, it is uncertain whether the judiciary will be able to withstand internal and external political and public pressure. This is particularly worrying in a country where the death penalty is in force.

As a result of the scarcity of the constitutional administration of justice, traditional justice systems continue to supplement the central government judiciary extensively in cases involving family law, inheritance, and land tenure, especially in rural areas.

THE INTERNATIONAL SPECIAL COURT

BACKGROUND

The collapse of the peace process in May 2000 and the subsequent apprehension of Foday Sankoh, the rebel leader, placed the issue of impunity and deliverance of impartial justice on the international agenda. In June, the Government of Sierra Leone asked for United Nations assistance to establish a court in Sierra Leone, combining local and foreign prosecutors and judges in order to ensure independence and impartiality. On 14 August 2000, Resolution 1315 was adopted requesting the Secretary-General to negotiate an agreement with the Government of Sierra Leone for the creation of "an

independent special court". On 5 October, the Secretary-General submitted a report containing an agreement between the UN and the Government, the draft statute of the Court, as well as the Secretary-general's commentaries regarding the agreement and the statute. This report remains under consideration by the Security Council.

According to the Secretary-General's proposals, the Special Court would consist of three organs: the Chambers (two trial Chambers and an Appeal Chamber); the Prosecutor's office; and the Registry. The Trial Chambers would be composed of three judges appointed by the Sierra Leonean Government. The Secretary-General, upon nomination by members of the Economic Community of West African States and the Commonwealth, would appoint two additional international judges. The Appeals Chamber would be composed of five judges, two appointed by the Sierra Leonean Government and three appointed by the Secretary-General under the same procedures as above. The judges would be appointed for a four-year term and eligible for reappointment. The Secretary-General would appoint the Prosecutor of the Court, with a Sierra Leonean deputy appointed by the Sierra Leonean Government. Each prosecutor would sit for a four-year term. This provision is critical, as the selection of an international Prosecutor is expected to guarantee the independence and the impartiality of trials. The Registrar of the Court would also be appointed by the Secretary-General. The function of the Registry covers servicing the Chambers and Prosecutor's office, as well as recruiting staff and administering financial resources.

THE PROPOSED STATUTE OF THE SPECIAL COURT

The Security Council recommended that the subject matter jurisdiction of the Court include crimes against humanity, war crimes, other serious violations of international humanitarian law and crimes under relevant Sierra Leonean law, committed in Sierra Leone. The proposed statute in the Secretary-General's report also includes these four crimes. In order to fully respect the legality principle, almost all of the crimes included are considered to be part of customary international law already existent at the time of the outbreak of the conflict.

Article 5 contains certain crimes under Sierra Leonean law, thus extending the Special Court jurisdiction beyond international crimes. While in the case of international crimes the elements of the crimes are governed by international law, crimes committed under Sierra Leonean law are governed by Sierra Leonean criminal law. The rules of evidence also differ, according to the nature of the crimes.

One of the most controversial issues of the draft statute is the question of juvenile perpetrators. The Sierra Leonean Government and representatives of Sierra Leonean civil society expressed their wish to set up a process of judicial accountability for child soldiers. However, many international and national non-governmental organisations of child-care and rehabilitation objected to any kind of judicial accountability for children below 18 years of age, arguing that it would endanger the children's rehabilitation program. Article 7 of the statute extends the jurisdiction of the Court to persons over the age of 15, but at the same time it provides for a special treatment for children between 15 and 18.

Another important question is that of the penalties and enforcement of sentences. The death penalty is currently in force in Sierra Leone and has been widely used in unacceptable conditions. Indeed, one of the main threats to the independence of the judgements emanating from the proposed tribunal is the public pressure on magistrates to pronounce death penalties. Like the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the Special Court is authorised to impose only prison sentences.

Another crucial question is that of the impact of amnesties granted under the Lomé Agreement on the Court's Jurisdiction, which have been considered as a serious obstacle to the administering of credible justice. Amnesties are permitted under international law only in so far as they do not concern cases of international crimes which give rise to an obligation of *aut dedere aut iudicare* (to prosecute or extradite). Although article 10 of the draft statute reaffirms the UN representative declaration that amnesties do not apply to genocide, crimes against humanity or any other serious violations of international law, the obligation *aut dedere aut iudicare* in respect of crimes against humanity or war crimes committed during the internal conflict has been questioned. A possible argument against the application of the Lomé Peace Agreement amnesties is that amnesties are only relevant to national court procedures. However, the legal problem remains whether or not amnesties are valid in cases involving a mixed national-international court.

Concerning the cost of the Special Court, it is estimated at US \$22 million for its first year of operation. The Security Council insists that the Special Court should be funded by voluntary contributions and has consequently rejected the Secretary-General's recommendation that the new Court be financed in the manner of other international criminal tribunals, i.e. through mandatory fees levied on all UN member States. However, material support to the Court by member States has proved disappointing. On April 20, 2001,

the UN Commission on Human Rights decided to request the international community to support the UN Secretary-General's appeal for financial and practical support for the Court, but few firm commitments have followed. Only 13 states were represented at a meeting held by the UN Office of Legal Affairs to discuss funding of the Court, and even those States showed some reluctance regarding the projected costs. More recently, the Security Council has approved plans to move forward with the court. As of mid-July, Canada, the Czech Republic, Denmark, Germany, Mauritius, the Netherlands, Norway, Sweden, the United Kingdom and the United States were among the states that had pledged monetary contributions. At the present time, concern about insufficient funding remains the main issue.

SOLOMON ISLANDS

The human rights situation in the Solomon Islands deteriorated significantly following the eruption of ethnic conflict in 1998. After the 5 June 2000 coup, the Townsville Peace Agreement was signed. The accord was intended to end the conflict between the Malaitan and Guadalcanalese ethnic groups. The courts have confronted difficulties in carrying out their functions, as many police officers have sided with armed groups and the government seems unable or unwilling to prosecute perpetrators of human rights violations. The 20 December 2000 Amnesty Law has contributed to an atmosphere of impunity.

BACKGROUND

The Solomon Islands, a twin chain of islands located in the South Pacific Ocean, became a British Protectorate in the late 1880s and an independent member of the British Commonwealth in 1978. This tropical archipelago with a population of 408,000 ranks amongst the poorest and least developed nations, according to United Nations statistics.

The present form of government is parliamentary democracy, with the British monarch serving as Head of State. Legislative power is vested in a single chamber National Parliament composed of 50 members elected by popular vote for a four-year period. The Cabinet, led by the Prime Minister, effectively holds executive authority.

Since independence in July 1978, the country's parliamentary democracy has been weakened by traditional loyalties of politicians to their home islands and by unresolved social and legal differences, particularly those concerning customary and other forms of land use and ownership. The last democratic elections were held in August 1997.

The island's communities are grouped into nine provinces, including the main island of Guadalcanal, location of the national capital Honiara, and Malaita, the most populous island. The country is composed of over 27 islands, with approximately 70 languages groups. Each community maintains its own ethical and cultural values, history and identity. More than half the population live in Guadalcanal and the neighbouring Malaitan islands.

Following the Second World War, thousands of Malaitans migrated to Guadalcanal, finding work in the development of Honiara from a former US military base. Malaitan dominated Honiara has enjoyed special political status as the national capital, separated from the Guadalcanal provincial government, and has an elected provincial assembly with limited powers representing the interests of the rural population at the national level.

ETHNIC CONFLICT

In October 1998, tensions between two of the main ethnic groups in the country, the Malaitans and the Guadalcanalese, resulted in violence. Fighting broke out when an armed group of unemployed youths in Guadalcanal, identifying themselves as the Isatabu Freedom Movement (IFM); from the Gwale majority, took up arms and resorted to intimidation and assault. The IFM were angry about perceived governmental inaction in addressing their grievances and resorted to arms, atrocities and intimidation. The Gwale majority has long complained that migrants from elsewhere in the Solomon Islands have been acquiring local jobs and lands. The situation worsened in January 1999, when Ezekiel Alebua, Premier of Guadalcanal, asked the government to provide funds to his province for hosting the capital, Honiara, and suggested that people from outside the province should not be allowed to own land there. Throughout 1999, Guadalcanalese militants forced an estimated 25,000 persons in Malaita and other provinces to flee their homes and/or return to their provinces. On 28 June 1999, the Honiara Peace Accord was signed, but violence continued to escalate. In January 2000, Malaitan militant forces, under the name of Malaitan Eagles Forces (MEF), stole police weapons and actively began to combat the Guadalcanalese. On 5 June 2000, armed Malaitan militants reportedly assisted by paramilitary police officers, took over Honiara, the capital and forced the Prime Minister Ulufafalu to resign. The Parliament chose a new Prime Minister, Manasseh Sogavare, under duress. A new government, known as the Coalition for National Unity, Reconciliation and Peace was formed.

On 15 October 2000, representatives of the central government, the opposing armed groups MEF and IFM, Australia and New Zealand signed the Townsville Peace Agreement. The signing of the Agreement ended the state of emergency that had been declared on 24 June 2000. According to the Agreement, all weapons and ammunition possessed by the armed groups were to be surrendered in return for granting of amnesty. Furthermore, the Townsville Peace Agreement provides that more autonomy will be given to the Malaita and Guadalcanal Provinces by devolution or by constitutional

amendment in order to allow the respective people to look after their own affairs. The Solomon Islands government undertook to establish a Constitutional Council to rewrite the Constitution providing for more autonomy to the provinces. Since November, in accordance with the Agreement, a team of international observers has been in the country to verify the relinquishing of weapons and to monitor implementation of the peace. By year's end, a stable peace had not been secured, as hundreds of weapons had not been relinquished. Apparently, guns are still in the hands of Malaitan militants and their allies in the police, and there have been reported raids on Guadalcanal villages. Rebel Guadalcanalese leaders who did not sign the Townsville Peace Agreement refuse to surrender their arms. In June 2001, the International Peace Monitoring Council reported a serious outbreak of armed violence in West Guadalcanal, and there have been shooting attempts against peace monitors.

STRUCTURE OF THE GOVERNMENT

The 1978 Constitution established a modified Westminster form of government with the British Monarch as Head of State. The Head of State is represented by a Governor-General whose discretionary power is deliberately kept to a minimum. The Governor-General is a Solomon Islands citizen appointed on the recommendation of the National Parliament. He formally appoints a Prime Minister who has been elected by Parliament and can only dismiss him after a successful vote of no confidence by the latter. The governor general's term is five years, with the possibility of re-appointment for another five years.

Effective executive power is exercised by a cabinet consisting of the Prime Minister, elected by and from the members of the National Parliament, and seventeen other Ministers, appointed from among the members of the National Parliament on the advice of the Prime Minister. The cabinet is collectively responsible to the National Parliament (Chapter V, Sections 30-45).

The unicameral national Parliament is directly elected for a four-year term from single member constituencies on the basis of universal suffrage (Chapter VI, Part I and II, Sections 46-74). Citizens have the right to change their government through periodic free and fair elections. Since independence in 1978, there have been five parliamentary elections, most recently in August 1997, and several elections for provincial and local councils. In the 6 August 1997 elections, Bartholomew Ulufafalu, a former labour leader who headed the Alliance for Change and its dominant Solomon Islands Liberal Party, pledged to implement public service and finance reforms to end

government corruption and mismanagement. The restructuring program attracted critical support from foreign banks and aid donors and the party won 24 seats in an expanded 50-seat parliament. On 27 August, the parliament elected Ulufa'alu prime minister. Following the 5 June 2000 armed take-over of the capital by the MEF, Ulufafalu was forced to resign and the Parliament chose Manasseh Sogavare as the new Prime Minister. On 19 June 2001, Mr. Ulufa'alu launched a constitutional challenge in the High Court, requesting a declaratory judgment that the election of Mr. Sogavare was invalid and that the applicant was entitled to continue as care-taker Prime Minister. The High Court dismissed the case and awarded costs against him.

The Parliament was dissolved on 28 August 2001, and the Sogavare government sought to extend its life through a constitutional amendment designed to add one year onto the four-year Parliamentary term. Resisting this effort, the general population and international aid donors voiced their opposition, while the Electoral Commission continued with election preparations. The Sogavare government regrouped and again attempted to push through a constitutional amendment to extend Parliament's life. A public outcry culminated in the threat of the Solomon Island National Union of Workers to call a general strike. In response, Mr. Sogavare's government withdrew the proposed amendment and a general election was scheduled to proceed on 5 December 2001.

Government efforts in May-June 2001 focussed on developing a governance system that would best suit the country. Three of the country's nine provinces have already expressed their intention to break away from the Solomon Islands. Therefore, the country is moving towards a major constitutional change by which a federation of states will be established. Under the proposed federal system, state governments will determine their own development activities and taxation level.

HUMAN RIGHTS BACKGROUND

The Solomon Islands is a state party to the International Covenant on Economic, Social and Cultural Rights, the UN Convention on the Elimination of All Forms of Racial Discrimination, and the UN Convention on the Rights of the Child. As a state party to these conventions, the state is required to submit periodic reports to monitoring bodies. However, since the Solomon Islands ratified the International Covenant on Economic, Social and Cultural Rights in 1982 it has not submitted any reports to the Committee.

Until the eruption of armed conflict between Guadalcanalese and Malaitan militants, human rights were generally respected by the authorities, and were defended by an independent judiciary. However, the ethnic conflict has led to a serious deterioration of the human rights situation.

In July 2001, the United Nations Office for Human Rights approved a project to address the post-conflict needs of the Solomon Islands. The project will focus on building the human rights capacity of the civil society, including assessment of the situation of internally displaced persons.

The police and human rights

The Solomon Islands has no army. Most police officers are ethnic Malaitans, and many of them joined MEF forces, especially after the June 2000 coup. Police officers seem to be involved in a number of paramilitary activities including human rights violations. Therefore, civilians have been left without protection against human rights abuses, internal displacement or ordinary crimes. The Malaitan-dominated police has failed to stop revenge killings between the two groups. In February 2000, governor-general Sir John Lapl formally outlawed both the IFM and the MEF. Amnesty International reports that since June 2000, the MEF has continued the so-called Operation Eagle Storm against IFM-controlled territories. Following the coup, more than 100 police officers who joined the MEF have reportedly been reinstated in the police service, although there was no prior investigation concerning allegations that many of them had committed human rights abuses. Since then, many officers have been given accelerated promotions. Many more former members of the MEF were taken on as "special constables".

In June 2000, prisons were closed and prisoners were set free by the MEF. The prisons have since re-opened, but conditions inside the prisons are said to be extremely poor and the Government has not made funds available to improve conditions.

According to common Article 3 of the Geneva Conventions, all armed political groups like the IFM and the MEF are obligated to respect a minimum of humane standards, including refraining from torture. However, both the IFM and the MEF have been involved in torture, mainly as a form of retribution. There have also been reported cases of arbitrary and deliberate killings by both armed groups.

INTERNALLY DISPLACED PERSONS

The ethnic conflict has resulted in an estimated 25,000-35,000 internally displaced persons. According to UN reports there are considerable difficulties in assessing the full extent of displacement. It is estimated that during 1999, 15,000-20,000 Malaitan people living on Guadalcanal fled to Malaita and that up to 12,000 Guadalcanal people have fled their homes.

IMPUNITY

Both the Ulufa'alu and the Sogavare governments have failed to investigate and address human rights abuses, thus contributing to impunity among police officers and armed political groups. It has been reported that since the signing of the Townsville Peace Agreement, the police force has recruited more than 1,100 former ethnic militias as special constables, without holding such officials accountable for human rights violations committed during the ethnic conflict. The governmental plan is to turn militias recruited as police auxiliaries into a Solomon Islands military force.

Immediately upon taking office on 30 June 2000, Prime Minister Sogavare promised to consider an amnesty for members of armed political groups involved in the conflict, as an incentive to negotiate a cease-fire. The amnesty law was approved in the Parliament on 19 December 2000, implementing the most controversial clause in the Townsville Peace Agreement. This blanket amnesty law for virtually all crimes and human rights abuses committed during the two-year ethnic conflict has served to undermine the rule of law, as it provides for immunity for all members of armed political groups and their civilian advisors. On 6 April 2001, the Parliament passed a second Amnesty law, the Constitution Amendment Bill, which grants amnesty to the leaders and other civilian advisers associated with the Malaita Eagle Force, Isatabu Freedom Movement and the Marau Eagle Force militant groups. The legislation also covers officers of the Royal Solomon Islands Police Force and the Prison Services. It provides for immunity from criminal prosecution for certain acts committed from 1 January 1998 to 15 October 2000, or on 7 February 2001, in connection with conflicts on Guadalcanal or Marau. A second Bill seeking to revise the powers of the Director of Public Prosecutions is now before Parliament.

Against this background of lawlessness, it is difficult for the courts to carry out their functions properly, as there are no organised police or even prison authorities to ensure implementation of court orders. The government seems unable to investigate and prosecute those responsible for human rights

abuses and several judges have been threatened or abducted. According to the Solomon Islands Chief Justice, prosecution of offenders has come to a virtual halt. The Director of Public Prosecutions abandoned his office in July 2000 due to threats against his life. He only returned to office in June 2001.

THE JUDICIARY

COURT STRUCTURE

The court system is composed of the Court of Appeal, the High Court, Magistrates Courts, Local Courts and the Customary Land Appeal Court.

The Court of Appeal, established under Chapter VII, Part IIb of the 1978 Constitution, has jurisdiction to hear and determine appeals in civil and criminal matters as conferred on it by the Constitution and Parliament. Every Judge of the High Court is also a member of the Court of Appeal. The Court also consists of six overseas Judges.

The High Court, established under Chapter VII, Part IIa of the 1978 Constitution, has unlimited original civil and criminal jurisdiction. The High Court also hears appeals from the Customary Land Appeal Court on questions of law, other than customary law, or where there is failure to comply with a procedural requirement. The decision of the High Court is final. There are presently three High Court judges.

Magistrates' courts have civil jurisdiction as well as jurisdiction to hear appeals from decisions of the local courts. Local courts have civil and criminal jurisdiction over cases and matters in which all parties are islander residents or which are within the area of the jurisdiction of the Court. There are five principal magistrates, four senior magistrates and three second class magistrates.

The Customary Land Appeal Court operates as a separate appeal court which has been established to deal with customary land appeals. It applies customary law and hears appeals from the Local Courts relating to land issues. Its decisions are subject to appeal to the High Court on points of law only.

APPOINTMENT AND SECURITY OF TENURE

According to Section 78(1), Part II, Chapter VII of the Constitution, the Chief Justice and the puisne judges of the High Court are appointed by the

governor-general, acting in accordance with the advice of the Judicial and Legal Service Commission. The same procedure is followed for the appointment of judges of the Court of Appeal. Judges of the High Court and of the Court of Appeal hold office until they attain the age of sixty. Judges may be removed from office by the Governor-General if the question of removal has been referred to a tribunal, consisting of a Chairman and not less than two other members, selected by the Governor General. The tribunal must advise the Governor-General that the judge ought to be removed from office for inability or for misbehaviour. If the Governor-General considers that the question of removing a judge ought to be investigated, he can appoint a tribunal composed of persons who hold or have held high judicial office in some part of the Commonwealth, in order to inquire into the facts.

The Judicial and Legal Service Commission (JLSC), established under Section 117, Chapter XII of the Constitution, is composed of the Chief Justice, the Attorney General, the Chairman of the Public Service Commission, the President of the Solomon Islands Bar Association and one other member. The JLSC appoints and promotes all Magistrates and other "designated" judicial officers.

The Constitution, in Section 92, Part IIb, Chapter VII provides for a Public Solicitor, who is charged with providing legal aid, advice and assistance to persons in need in such circumstances and subject to such conditions as prescribed by the Constitution and by the Parliament. However, in 1999, the Public Solicitor reported that due to lack of resources his office could accept only those cases in which persons faced serious charges or those involving the protection of children.

OMBUDSMAN

There is a constitutional provision for the establishment of the office of the Ombudsman. The Ombudsman is appointed by the Governor-General, acting in accordance with the advice of a committee consisting of the Speaker, the Chairman of the Public Service Commission and the Chairman of the Judicial and Legal Service Commission. The Ombudsman is charged with investigating claims of unfair treatment by the authorities, but the office's effectiveness is limited in practice by a lack of resources. The Ombudsman office in 2000 failed to report any incidents.

STATE OF THE INDEPENDENCE OF THE JUDICIARY

The Constitution provides implicitly for the separation of powers and the independence of the judiciary, and procedural guarantees are adequate. However, courts are hampered by a lack of resources and threats against the lives of judges and prosecutors.

Both the Magistrates and the High Court judges continued to carry out their functions after the 5 June 2000 coup that ousted the democratically elected government, even without the necessary back-up from the police. The majority of police officers, from Malaita, had joined the Malaitan militants forces. Thus, there have arisen substantial problems in enforcing the orders of the Courts and many judges in the Solomon Islands have characterised the judiciary as powerless.

There have been numerous threats made to the safety of judicial officials in the country. In August 2000, the Central Magistrates Court in Honiara was stoned by a group of Malaitan youths, said to be members of the MEF protesting that they had not been paid for security services they had rendered to the Government immediately following the coup. In another instance, a Local Court sitting in North Malaita was about to give its judgement in regard to a land dispute when a group of men armed with bush knives, spears and clubs rushed into the courthouse. They threatened the Local Court Justices, stole papers and made it impossible for the Court to continue. The Courthouse is located less than five meters from the local police station, which was fully manned at the time, but the police declined to restore order or assist the Justices.

THE JUDICIAL RETREAT SOLOMON ISLANDS MEETING

The Pacific Judicial Education Programme organised the Judicial Retreat Solomon Islands meeting from 15 to 17 November 2000 in the Yandina Plantation Resort, with the aim of allowing members of the judiciary to get away from the stress and pressures of Honiara and the ethnic crisis and to define strategies to deal with the worsening situation. During the two-day meeting, the participants were informed about international conventions, declarations and principles on the independence of the judiciary, and considered the Townsville Peace Agreement and its immunity provisions. The Chief Justice advised magistrates to refer cases involving immunity implications to the High Court.

Participants also discussed the impact of the January-October 2000 events on themselves and their families. Themes that were repeated illustrate the

situation in the country: a total absence of law and order and law enforcement machinery, i.e., courts were operating in a vacuum; fear, for personal, family, and professional safety; restrictions on personal movements, communications blackouts and subsequent isolation; inability or loss of the right to work. The participating judges also referred to the use of custom as a means of extortion by individuals. Moreover, MEF militants were enforcing unjust customary settlements, e.g. payment of US\$ 100 and a pig within one day.

The most valuable outcome of the meeting was that judicial officers could share their experiences during a crisis situation. Participants agreed that they were emerging from the crisis and drafted the Yandina Statement on the Principles of the Independence of the Judiciary in the Solomon Islands.

LAWYERS

It should be noted that the leader of the MEF is Andrew Nori, a lawyer in private practice and a member of the Solomon Islands Bar Association (SIBA). His legal expertise was reportedly pivotal in drafting the legalistic documents concerning the MEF's preconditions for any peace talks. He is the MEF spokesman. Another lawyer, Leslie Kwaiga, is member of the SIBA and also involved in the MEF.

CASES

David Chetwyn [Registrar of the High Court]: While exercising his magisterial jurisdiction, Mr. Chetwyn was refused entry into the prison by the MEF personnel controlling the premises. He was thus unable to gain access to detainees awaiting trial. Shortly thereafter, all prisoners were set free by the MEF.

Thomas Kama and Denis McGuire [lawyers]: Mr. Kama is a Solomon Islander from Guadalcanal. He was approached by the IFM/GRA in 1999 with the that he provide legal representation to them. He refused on the grounds that the organisation was illegal. In August 2001, Mr. Kama and one of his Australian partners, Dennis McGuire, were dining at a restaurant in a local hotel. Joseph Sangu, an IFM/GRA leader approached the two lawyers and became abusive. He accused Mr. Kama of abandoning his own people and then hit him on the head with a bottle. The lawyers managed to escape and reported the assault to the police. The police refused to take any action, although they were aware that there is an outstanding warrant of arrest against Sangu.

Frank Kalea [Magistrate]: In May 2000, Magistrate Kalea was abducted on his way home from work by persons in a MEF car. The MEF members took him to his home, but then dragged him 20 meters back to the car. He was driven blind-folded to the central MEF camp and questioned by members of the MEF, as he was mistakenly identified as a lawyer or associate of Ulufa'alu. He was later identified as a magistrate and was released. The MEF officer who had made the mistaken identification was beaten by the group. Mr. Kalea has not returned to work since the incident for fear of further persecution.

Timothy Kwaimani [Sheriff of the High Court]: Timothy Kwaimani was pulled over by MEF armed members who demanded that he surrender his vehicle. The Sheriff managed to ward off his attackers.

Nelson Laurere [Magistrate]: This judge allegedly was severely assaulted in 1999 and did not return to work for a prolonged period. Mr. Laurere was arranging to move his family out of Honiara, he and his wife being from Guadalcanal. While he was returning to Honiara on a bus, a truck with MEF personnel chased down the bus. Mr. Laurere was picked out as a Guadalcanal man and identified as a magistrate by somebody who had been convicted by him. He was thereupon severely beaten. He would not go to the hospital, as this was the location where some injured combatants were murdered by the opposing fraction. In November 2000, he returned to work but was "visited" by a group of men, who demanded compensation for some unspecified act. In May 2001, the Magistrate started to work again, but felt unsafe living in Honiara and so moved some 20 kilometres to the west of the capital. He was forced to stop work again, when his vehicle was seized by Keke's men to be used for the "benefit of the Gwale people". Eventually, a message was received from Keke that the vehicle was being returned. In fact, Keke simply turned it over to another group of former Gwale militants to the east of Honiara. When the vehicle was finally recovered, it had been badly damaged.

John Muria [Chief Justice of the High Court]: On 10 June 2000, at 7:00 a.m., armed MEF members demanded entry into the Chief Justice's residence. When the MEF members entered the residence, they demanded the keys to the Chief Justice's official car and to another vehicle used by his family. They allegedly took both vehicles and left. In the afternoon, the same group came to the residence and removed a third car parked on the Chief Justice's premises. After contacts with the relevant authorities, the official car was returned in the evening of the same day. The two other vehicles were not returned until the evening of the day after.

Patrick Lavery [Public Solicitor]: Mr. Lavery has been threatened several times. On one occasion, while he was driving down the main road in Honiara, a car pulled alongside him and a passenger in the car pointed what appeared to be a pistol at him. More recently, the lawyer received threats for representing Mr. Ulufa'alu in his upcoming case.

SPAIN

The outbreak of a new wave of killings by ETA, the Basque armed separatist group, has led to increased pressure from public opinion on Judges and Magistrates in cases concerning ETA members or activists whose activities have been imputed to them. Concerns have also arisen in recent years regarding media pressure on the judiciary in sensitive cases such as those concerning immigrants and the emergence of "celebrity judges." Judges have also been burdened by excessive caseloads. As a response to these problems, the Government and the two main political parties have endorsed a programmatic declaration, the State Pact for the Reform of Justice, which sets common objectives and goals to improve the functioning of the judicial system.

The Spanish Constitution was approved by popular referendum and adopted in December 1978. According to article 1, the Kingdom of Spain is "a social and democratic State, subject to the rule of law, and advocating as higher values of its legal order, liberty, justice, equality and political pluralism". Spain is a parliamentary hereditary monarchy, with the King as Head of State. Article 56 (3) of the Constitution provides that "[t]he person of the King is inviolable and shall not be held accountable. His acts shall always be countersigned in the manner established in Article 64. Without such countersignature they shall not be valid, except as provided for under Article 65.2. " Thus, responsibility for the acts of the executive is shared by the Government.

The Government is headed by the President of the Government (Prime Minister), who is appointed by the King and receives investiture by the Congress of Deputies. Since May 1996, José María Aznar Lopez, head of the Conservative People's Party (*Partido Popular* or PP), has occupied this position. All the members of the Government are appointed and removed from office by the King on the proposal of the Prime Minister.

Legislative power is vested in the *Cortes Generales* or National Assembly. Title III of the Constitution provides for a bicameral system, consisting of the Congress of Deputies and the Senate. The Congress of Deputies is formed by a minimum of 300 and a maximum of 400 deputies, elected by universal free, equal, direct and secret suffrage. The number of deputies per

province corresponds proportionally to the population. The tenure of the legislature is four years, unless an early dissolution intervenes. The Senate, which is the territorial representation organ, currently has 256 members serving terms mandated in general elections (four representatives per province) or nominated by the Autonomous Communities (one per Community and another for every million inhabitants in the corresponding region).

The Constitution provides for checks and balances between the executive and the legislative power. The person of the King cannot be held accountable for the acts of the executive, but the Government may be censured by the Congress of Deputies by means of the censure motion or constructive vote of censure. The Prime Minister is empowered to propose the dissolution of the Legislative Chambers and according to Article 62 b) of the Constitution, the Head of State has the capacity to “summon and dissolve the Cortes Generales and ... call elections under the terms provided in the Constitution”.

HUMAN RIGHTS BACKGROUND

Spain's human rights practice has given rise to concerns in relation to the Basque issue and to immigration matters. Since January 2000, there has arisen a spate of killings and attempted killings by the Basque armed separatist group *Euskadi Ta Askatasuna* (ETA), mainly against Spanish officials from the national ruling party, but also against other civilians. In November 1999, ETA ended its cease-fire, which it had declared in September 1998. ETA has perpetrated numerous acts of violence since 1968, including the killing of more than 780 people in Spain as well as other human rights abuses such as abductions and hostage-taking. During 2000, many civilians were murdered, sometimes for “strictly political” motives, as a subsequent ETA statement asserted. Examples include the journalist José Luis López de Lacalle, the PP member Jesús María Pedrosa Urquiza, the PP councillor José María Martín Carpena and Juan María Jáuregui, a Socialist and former governor of the Basque province of Guipúzcoa. María Korta Uranga, the president of Adegí, an employer's organisation in Guipúzcoa was murdered for her opposition to the payment of a “revolutionary tax” demanded under threat by ETA. Another modality of ETA action is street violence or “urban struggle” (*violencia callejera* or *kale borroka*). Politically-motivated street violence has been on the increase, aimed at intimidating councillors, judicial figures, teachers and professors, journalists, transport workers or others by means of attacks using explosive devices and related threats.

The escalation in human rights abuses by ETA, as well as the use of *kale borroka* has prompted the adoption of new anti-terrorist legislation and the arrest of Basques by the Spanish authorities. Some of these measures, including the increasing of penalties against juveniles convicted of politically motivated violence, have raised concerns as to their conformity with international human rights standards. The authorities have allegedly taken the commitment of persons to the concept of Basque sovereignty to be tantamount to support for, or membership of, ETA in order to justify arrests. Civil Guards or police officers have also allegedly resorted to torture in incommunicado detention, against alleged ETA suspects.

A number of cases of human rights violations against immigrants by police officers have been reported, mainly involving nationals from African countries. These violations mostly consist of ill-treatment of detainees, but there have been cases of shooting and homicide as well. For example, in December 2001, the Algeciras court opened a judicial inquiry, and the Director General of the Civil Guard opened disciplinary proceedings, into the conduct of an officer who fired on and killed Abdelhadi Lamhamdi, an undocumented Moroccan national in Tarifa (Cadiz). In October 2000, another Moroccan national filed a judicial complaint against six officers of Madrid's municipal police on the grounds of ill-treatment. Also in October 2000, a judicial inquiry was opened into allegations that two Algerians, one a minor, had been severely ill-treated by municipal police officers in the Spanish North African enclave of Ceuta. Other human rights violations alleged concern inhuman and degrading treatment inflicted by Spanish authorities on African nationals, many from Nigeria, Senegal and Sierra Leone, who disembarked on the beaches of the Campo de Gibraltar and Canary Islands during the year 2000. Most of the immigrants were held in overcrowded, inappropriate and unsanitary conditions in Civil Guard barrack cells and a municipal sports centre, before being expelled. Some ferry captains alleged that police officers had pressed them to accept the Moroccans as cargo rather than as passengers.

THE JUDICIARY

STRUCTURE

Article one of the Constitution of Spain provides that Spain "constitutes itself into a social and democratic state of law which advocates liberty,

justice, equality, and political pluralism as the superior values of its legal order". Under article 24, "all persons have the right to the effective protection of the judges and courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence ... Likewise, all have the right to the ordinary judge predetermined by law, to defence and assistance of an attorney, to be informed of the accusation made against them, to a public trial without delays and with all the guarantees, to utilise the means of proof pertinent to their defence, to refrain from self-incrimination, to refrain from pleading guilty, and to the presumption of innocence." Articles 117 to 127 of the Constitution provide for the establishment of a Judiciary, which shall be "independent, irremovable, and liable and subject only to the rule of law". The Judicial system of Spain consists of two main parts, namely the Judicial Administration and the Administration of Justice.

Judicial Administration

The Judicial Administration, which is the administrative part of the Judiciary, is headed by the General Council of the Judicial Power set up in Article 122 (2) and (3). This body consists of "the President of the Supreme Court, who shall preside it and of twenty members appointed by the King for a five-year period, amongst whom shall be twelve judges and magistrates of all judicial categories, under the terms established by the organic law; four nominated by the Congress of Deputies and four by the Senate, elected in both cases by three-fifths of their members from amongst lawyers and other jurists of acknowledged competence and over fifteen years' experience in the exercise of their profession". At the legislative level, the Organic Law of the Judicial Power (6/85) was modified in 1998 and in 2001. This second reform affected only the Judicial Administration and more precisely the composition of the General Council of the Judicial Power.

Administration of Justice

The task of administering justice "both in passing judgement and having judgements executed, lies exclusively within the competence of the Courts and Tribunals laid down by the law, in accordance with the rules of jurisdiction and procedure which may be established therein". In this regard, the Spanish judicial system has two main pillars.

The first pillar consists of *Judges and Magistrates*. Admission to the judiciary is by public competition supervised by the General Council of the judiciary (*Consejo General del Poder Judicial*). An applicant must be of Spanish

nationality, of majority age and good character, and hold either a Bachelor or Doctor of Laws degree. Applicants must complete written and oral examinations on all aspects of the law. The top candidates are chosen and sent to a judicial school. Those who successfully complete the school are appointed to the judiciary after a two-year practical orientation. According to Article 127 (1) of the Constitution, "Judges and Magistrates, as well as Public Prosecutors, while actively in office, may not hold other public office nor belong to political parties or trade unions". This pillar is headed by the Supreme Court (*Tribunal Supremo*) established by Article 123 of the Constitution which "with jurisdiction over the whole of Spain, is the highest judicial body in all branches of justice, except with regard to the provisions concerning Constitutional guarantees". In this latter matter, the highest authority is given to a Constitutional Court governed by Articles 159 to 165, with jurisdiction "over the whole of Spanish territory".

The Supreme Court is the court of last resort in criminal, civil, administrative, social and military matters. It is divided into six chambers, each with its own president and judges: civil; criminal; litigation (two chambers); legal administration; and social and labour matters.. The President of the Supreme Court is formally appointed by the King, after being elected by the General Council of the judiciary. The Supreme Court hears petitions for cassation of judgements, which may be brought by the parties to a case or by the State, for an alleged breach of legal doctrine, law or procedure. It also hears petitions for the revision of judgements, which are filed in situations where crucial evidence or testimony either has been discovered or proven false.

The Constitutional Court is composed of twelve members appointed by the King pursuant to nominations by the *Cortes*, the Government and the General Council of the Judicial Power. Members are appointed for a nine-year term, with three members retiring every three years. The Constitutional Court hears appeals grounded upon the unconstitutionality of laws or regulations; appeals grounded upon violations of basic constitutional rights and liberties; and conflicts of authority between different Autonomous Communities or between an Autonomous Community and the State. A State body (a chamber of the *Cortes*, the Government or the General Council of the Judicial Power) is entitled to appeal to the Constitutional Court when it considers that another State body is violating its constitutional authority. The Constitutional Court also has the power to review, upon request, the constitutionality of Organic Laws, Statutes of Autonomy and international treaties not yet ratified. According to Article 164 (1) of the Constitution, the judgements of the Constitutional Court "have the validity of *res iudicata* from the day following their publication, and no appeal may be brought against them".

There are three types of High Courts, namely Provincial, Territorial and National High Courts. Concerning the first type, there are fifty Provincial High Courts (one per province), which sit in three-judge panels to hear cases. They deal primarily with criminal matters, as an appeal body against decisions of Courts of Instruction and acting as trial courts for crimes of a certain importance. Concerning the second type, there are seventeen Territorial High Courts, which sit in panels composed of three to five judges. These courts hear appeals from matters in which the Courts of First Instance exercised original jurisdiction. Their decisions, as well as those from Provincial High Courts, are not subject to appeal, although a petition for cassation of a judgement may be addressed to the Supreme Court. The third type was introduced in 1977 to supplement the functions of the Supreme Court and the Territorial High Courts. The National High Court is composed of an administrative chamber and a criminal chamber, each with its own judges and president. The Court has jurisdiction over crimes associated with a modern industrial society, such as currency offences. Three Central Courts of Proceeding are attached to this court.

Three types of Courts provide the lower level. Courts of Peace are headed by a lay justice of the peace that sits alone and deal with small infractions and disputes. They are found in communities that are too small to have a Municipal Court. Municipal Courts have jurisdiction to administer justice in areas with populations of 30,000 or more. They are composed of one judge who sits alone and have competence to hear small civil and criminal matters. Their decisions may be appealed to the Courts of First Instance and Instruction. These latter courts consist of one judge who sits alone. Courts of First Instance have original jurisdiction over all civil matters not specifically reserved to other courts. Their decisions may be appealed to the corresponding Territorial High Courts. Criminal matters are treated by Courts of Instruction, which have original jurisdiction over minor crimes and prepare major criminal cases to be tried at the Provincial High Court level. Decisions of these courts may be appealed to the corresponding Provincial High Court.

The second pillar consists of *Procurators*. This institution is found at every level of the Spanish judicial system. The main function of Procurators is to prosecute criminal cases. More generally their mission is "that of promoting the working of justice in the defence of the rule of law, of citizen's rights and of the public interest as safeguarded by the law ... as well as that of protecting the independence of the Courts and securing through them the satisfaction of social interest". The State Public Prosecutor, which is the highest authority "shall be appointed by the King on being proposed by the Government, after consultation with the General Council of the judiciary".

The Office of the Public Prosecutor is exceedingly hierarchical. This characteristic, as explained below, constitutes a source of difficulty with regard to the independence of the judiciary.

THE FUNCTIONING OF THE SYSTEM

Although many Judges have expressed their satisfaction as to the guarantees of stability and independence of their posts, there are many concerns that have arisen in recent years as to the functioning of the judicial system. First, pressure from the media is often intense in respect of delicate issues, such as immigration, extradition demands for international criminal suspects, Basque terrorism and trials involving high officials. Also, the politicisation of justice (*politización de la justicia*) remains problematic. During the period covered by this chapter, a case arose involving a Spanish Minister in which the Prosecutor was dismissed from the case by the Attorney General. (see cases below).

Other concerns include the emergence of "celebrity Judges" (*jueces estrella*), such as Baltazar Garzón, who became internationally famous following his request for extradition of General Augusto Pinochet, and the spectacular increase in the number of cases, which raises doubt concerning the capacity of the Spanish State to adapt the judiciary to social changes.

These many problems have led to the adoption of a State Pact for the Reform of Justice (*Pacto de Estado para la Reforma de la Justicia*), endorsed by the Spanish Government and two political parties, namely the Conservative People's Party (PP) and the Socialist Party (*Partido Socialista Obrero Español*, PSOE). This Pact is a programmatic declaration on how to reform the judicial system and represented the first time that the two main parties agreed on a substantial and co-ordinated reform of the judiciary since the return of Spain to democracy. The pact also constitutes an historic agreement as during the several negotiations that preceded the Spanish Constitution, no agreement on the judiciary was reached. The pact also provides democratic support for the reforms to be undertaken and a joint view of the objectives and goals of the reform. This latter consists of several points such as: reform of the procedure of election of vocals in the General Council of the Judicial Power, which is the most controversial issue of the reform and has been translated into a modification of the Organic Law (6/85); the idea of bringing justice closer to citizens, including expedition of procedures, enhancing the transparency of judicial offices and adoption of a Charter on the rights of citizens; the modernisation of the judicial career by increasing the number and preparation of Judges and Magistrates and relating

promotions to productivity criteria; the establishment of new procedures that enable the overcoming of the backlog suffered by Spanish courts; reform of the judicial procedures to make them faster (without affecting judicial guarantees), and promote alternative dispute resolution methods; and incorporation of new technologies.

LEGAL PROFESSION

Article 36 of the Constitution provides that “the law shall regulate the special features of the legal status of the Professional Colleges and the exercise of the degree professions. The internal structure and operation of the Colleges must be democratic”. The Organic law of Professional Colleges (2/74) was modified by Decree-Law 5/96, liberalising the system. More precisely, the Statute for the exercise of the law profession was approved by Royal Decree 2090/82. The system provides for two types of legal practitioners: the attorney (*procurador*) and the advocate (*abogado*), whose functions are similar to those of the English solicitor and barrister, respectively.

The attorney is retained by a party in a matter, given a power of attorney, and then handles the case, making sure to satisfy all procedural requirements such as filings and statutes of limitation. The attorney will retain an advocate if the matter is to go before a court. To be competent to practice, the attorney must be of legal age; be of good repute, hold Spanish nationality; hold at least a Bachelor of Laws degree; be licensed by the State; be part of the local bar association; have made out a financial responsibility bond; and have taken an oath before the highest local court.

Only advocates are entitled to appear in court. Several conditions are required to be able to practice: the person must meet the age, reputation, degree and nationality requirements of the attorney, and must enrol in the local bar association of advocates. In contrast to attorneys, advocates do not need a State license. Although no practical training is required from new advocates to exercise their profession, in practice they usually apprentice with experienced advocates or take advocacy courses. There is a local Bar in each Spanish Province, and all of these are federated in a General Council. There is also a General Council of Advocacy (*Consejo General de la Abogacía*), which federates all local Colleges at a national level.

CASES

VICTIMS OF ATTACKS BY ETA

There have been a number of death threats against a wide range of persons, including judicial figures and law enforcement officers, emanating from ETA or ETA-related extremist groups. In October 2001, some 79 judges and nine prosecutors were reported to be on a list of targets drawn up by ETA.

José Francisco Querol Lombardero, the Magistrate of the Military Chamber of the Spanish Supreme Court, was murdered when his car was blown up by an ETA device on 30 October 2000.

Luis Portero, the Chief-Procurator of the High Court of Andalucía, was shot on 9 October 2000 when he was preparing to take the elevator in the building of his residence.

José María Lidón Corbi [Judge] Mr. Lidón was a Magistrate of the Court of Bilbao (*Audencia de Bilbao*). Judge Lidón Corbi was shot by two gunmen three times in the presence of his wife and one of his children on 7 November 2001 in Gexto Municipality, near Bilbao. The gunmen were widely considered to have been acting on behalf of ETA. In a public statement, the ICJ condemned the attack as a serious assault against the independence of the judiciary and the rule of law in Spain and called on ETA immediately to cease such criminal practices.

THE ERCROS CASE

In 1991, the company Ercros sold a subsidiary, Ertoil, to the French Oil Company, Elf, through the intermediary of the Luxembourgian firm GMH (General Mediterranean Holding). Reportedly, GMH acted as a cover for Elf in order to evade tax payments. Moreover, the French company retained a buying option over Ertoil, even though the Ministry of Industry had vetoed the operation. Eventually, an Elf-controlled company, Cepsa, bought Ertoil from GMH for 249 million Euros, thus avoiding the official veto of the sale.

At the time of the operation, Mr Josep Piqué, the current Spanish Foreign Affairs Minister, was the Director of Ercros. The involvement of Mr Piqué in this controversial operation led a Supreme Court Prosecutor, Mr Bartolomé Vargas, to write a report asserting that there was enough evidence for Piqué to be summoned as a suspect on the charges of funds embezzlement and tax evasion. This report apparently embarrassed the Spanish Prime Minister, José María Aznar, who until recently had viewed Mr Piqué both as his own

protégé and as a leading light in his government. One of the more controversial points of the accusation was the fact that in 1998, Mr Piqué, at the time Minister of Industry and member of the Governmental Commission for Economic Matters, consented to the elimination of about 8 per cent of Ercros' debt to Government. The situation became more pressing after the majority of the Spanish Supreme Court's Prosecutors voted in favour of Mr Vargas' report. Piqué strongly denied the accusation and stated that his "conscience was clear".

The final decision on whether to call Piqué to face charges rested with the Spanish Attorney General, Jesús Cardenal. He recently dismissed Mr Vargas from the instruction of the case and transferred him to another section. At the same time, Mr Cardenal ordered the prestigious and independent Anti-corruption Prosecutor, Mr Carlos Jiménez Villarejo, not to request measures on the case without his previous authorisation. These actions seem to constitute a clear attack on the independence of the judiciary.

SUDAN

The judiciary remained largely under the control of the executive. A significant number of lawyers were subjected to various forms of harassment, including arbitrary arrest and detention. The state of emergency declared in December 1999 remained in force. Gross human rights violations continued to occur on a large scale, both in areas marked by armed conflict and those relatively at peace. Although the Government has accepted a Libyan-Egyptian peace initiative aimed at ending the armed conflict, it has not been implemented.

BACKGROUND

Sudan is Africa's largest country in terms of land mass. It covers one million square miles with a population of approximately 27 million, 20 per cent of whom live in urban centres and 80 per cent, including nomads, inhabiting rural areas. Women and children make up more than 60 per cent of the population. Since it gained independence in 1956, Sudan has been ruled by various regimes, fluctuating between military dictatorships, totalitarian systems and civilian parliamentary governments. Three parliamentary regimes have governed the country from 1956-1958, 1965-1969 and 1986-1989. Three military Governments have ruled from 1958-1964, 1969-1985 and from 1989 to the present.

The December 1998 presidential and parliamentary elections resulted in the election of President Umar Hasan Ahmad al-Bashir for a further five-year term, and the assumption by the National Congress (NC) of 340 out of 360 seats in the Parliament. All major opposition political parties boycotted the elections, and there were allegations of electoral irregularities, official misconduct and interference in the election process. National Congress members and supporters have continued to hold key positions in the government, army, security forces, judiciary, academic institutions and media. An internal power-struggle within the NC toward the end of 1999, resulted in President al-Bashir declaring a state of emergency and dissolving Parliament. The Parliamentary speaker, Hassan al-Turabi, an Islamist hardliner who helped then-General al-Bashir to assume power in 1989, created a new political party in May 2000, the Popular National Congress (PNC). In February 2001,

Hassan al-Turabi was arrested a day after the PNC signed a memorandum of understanding with the southern rebel Sudan People's Liberation Army (SPLA), who have been waging war with consecutive governments since the 1980s. Mr. al-Turabi was placed under house arrest in May 2001.

The 1998 Constitution provides for a federal system of government consisting of a President, Council of Ministers and a unicameral parliament at the federal level. At the state level, there is a similar structure consisting of a Governor, State Assembly and a Council of Ministers. However, the 1998 Constitution also reflects an Islamic fundamentalist ideology. The 1998 Constitution grants wide-reaching powers to the President. The state of emergency declared in December 1999 remained in force.

HUMAN RIGHTS BACKGROUND

During the period under review, gross and widespread violations of human rights continued in both the war and non-war zones. The 1998 Constitution provides for protection of some human rights, including the right to life, freedom from slavery and torture, freedom of religion, and the right to not be arrested, detained or confined except by law. However, the Constitution is an inadequate protector of human rights. First, the Constitution does not reflect the obligation of the Government to comply with international human rights instruments that have been ratified by Sudan. Second, the Constitution fails to protect a number of fundamental rights, such as freedom of assembly and the prohibition of torture. Third, several rights have either been vaguely formulated or inadequately defined, such as article 30 (immunity from detention) and article 32 (presumption of innocence). Fourth, many of the provisions of the Constitution in this chapter are weakened by phrases such as "subject to law", "according to law" or "as regulated by law". Such phrases may potentially limit the scope of the right guaranteed. Moreover, these phrases make the constitutional provisions on rights and freedoms subject to subordinate legislation, with the risk of abrogating these rights and freedoms. Fifth, the Constitution has taken a minimalist approach with regard to the principle of equality and non-discrimination. Article 21 forbids discrimination "only by reason of race, sex or religious creeds". It fails to extend the non-discrimination clause to all categories enshrined in international standards, which include race, language, religion, political or other opinion, national or social origin, property, birth or other status. Sixth, in relation to political pluralism, the 1998 Constitution employs the term *tawali*, supposedly an old Islamic concept implying

solidarity and unity of purpose. The term is extremely ambiguous and has caused tremendous confusion. Article 26 of the Constitution does not define the term, and whether it actually connotes political participation and pluralism remains doubtful.

Several laws restrictive of freedom continue to apply. These laws include:

- The National Security Act of 1999, which repealed the 1994 Security Act, allows derogations from ordinary procedures of arrest and custodial detention. In particular, the 1999 Act prescribes that: (a) a security agent may carry out an investigation, including acts such as search and arrest, with the sole authorisation of an order issued by the Director General of the Security Services; and (b) within the first three days of the detention, the security agent must provide reasons for arrest. This detention may be prolonged for a further 30 days by the Director General, who is under an obligation to inform the competent prosecutor. The prosecutor, however, is under no obligation to review the case until it becomes eligible for another 30-day extension period. Custodial detention may then be extended for an additional 30 days with the approval of the competent prosecutor. The former Special Rapporteur on Sudan has noted that while the Prosecutor's Office exercises full state authority under the Ministry of Justice, there appears to be a lack of counterbalancing institutional guarantees in favour of the suspect, such as prompt and adequate access to a defence lawyer and the right to independent judicial review of the detention.
- The Workers Trade Unions Act, 1992, which places professional associations and labour unions under the authority of the Registrar of Trade Unions and the Minister of Labour, thereby divesting such organisations of independence.
- The Press and Publications Act, 1999, which imposes a number of restrictions on publications and grants the Press and Publications Council wide powers to suspend and cancel licences of newspapers.
- Public Order Laws adopted by the National Capital and State legislatures restricting freedoms of public gatherings, celebrations, social events and discriminating between women and men in matters relating to public transport, travel, work and dress.
- Laws establishing popular defence forces (mujahdeen) and popular police forces (militias) and granting wide powers that restrict personal liberties.

- The Basis of Judicial Judgements Act, 1983, which rejects any source other than the principles of *Shari'a* in the interpretation of laws, an obvious discrimination between citizens on the basis of religion.
- The Penal Code and Code of Criminal Procedure, both of 1991, which include the Islamic punishments of Hudud and which discriminate between citizens on the basis of religion.

Despite the constitutional safeguards, human rights continue to be systematically and massively violated. Most violations have resulted from the continuing armed conflict and the Islamist government's suppression of political opposition and religious dissent. Torture was practised on a widespread basis and at least 12 persons were sentenced to have limbs amputated during 2000, with at least one amputation being carried out.

Violations of the rights of women were widespread. Women faced severe restrictions on their freedom of movement. Public Order Police frequently harassed women and monitored women's dress according to the government's stereotype of Islamic propriety, Public Order Courts, using summary procedures, often sentenced women to flogging, with no effective right of appeal. Thousands of persons were believed to be held in forced labour or slavery. Sexual slavery of women, torture, including rapes, and forced marriages were widely reported, especially in the areas affected by the armed conflict. Although it denied the prevalence of such practices, the Government set up a Committee for the Eradication of Abduction of Women and Children (CEAWC) to investigate cases of abduction of women and children. The former UN Special Rapporteur on Sudan expressed hopes that CEAWC would address concerns raised in a number of human rights circles regarding the existence of the slavery-like practices that arise in connection with war strategies.

INTERNAL ARMED CONFLICT RELATED VIOLATIONS

The civil war, which resumed in 1983, continued to have a considerable impact on the deteriorating human rights situation in Sudan. An estimated two million persons have been killed, more than four million have become internally displaced, and some half million were believed to have sought asylum abroad. All parties to the conflict have committed gross human rights abuses against civilians living in the contested areas, including indiscriminate bombing, abduction, enslavement, forcible recruitment, torture and killings. The former Special Rapporteur on Sudan has observed that oil exploitation in western Upper Nile has exacerbated the conflict, thereby causing a

deterioration in the overall situation of human rights and respect for humanitarian law and narrowing the chances of peace. The drive for control of oil production and territory by both the pro-government forces and armed opposition groups has resulted in widespread displacement, destruction and destitution of the local civilian population. Negotiations to end the conflict appeared fruitless, whatever the form or the venue. The parties remained stalled on the issues of the relation of religion to the state and self-determination. At the time of writing the Sudanese government had accepted a Libyan-Egyptian peace initiative, which aims at ending the civil war that has racked Sudan for 18 years. The initiative, which calls for the establishment of a transitional government, a plural democracy and a unified country has yet to be implemented and has been greeted with a wide degree of scepticism by most observers.

THE JUDICIARY

The judiciary is regulated by Part V of the 1998 Constitution and the Judiciary Act of 1986. Article 99 of the 1998 Constitution provides that judicial competence in Sudan shall be vested in an independent authority, the Judiciary, which shall assume judicial power in adjudication of disputes and judgements on the same in accordance with the Constitution and law. Article 100, however, makes the judiciary responsible to the President of the Republic for the performance of its work.

The independence of the judiciary has been further undermined by the establishment of a new judicial body, purported to be an Islamic institution, the Public Grievances and Corrections Board (*Diwan al-Hisba wa al-Mazalim*). This newly created organ is entrusted with powers to adjudicate and decide upon matters normally within the exclusive domain of the judiciary. Article 130 of the Constitution provides that the Public Grievances and Corrections Board is an independent organ, with the president and members to be appointed by the President with the approval of the National Assembly. The Board is responsible to the President and the Assembly. The second paragraph of the same article provides that without prejudice to the jurisdiction of the Judiciary, the Board shall work at the federal level to address grievances, assure efficiency and purity in the practice of the State and extend justice after the final decisions of the institutions of justice. This provision represents a serious encroachment on the principles of the independence of judiciary and separation of powers. Alleviating grievances and upholding justice are basic functions of the judicial authority. The new body is not only granted such

powers, but is also provided the capacity to reserve final judicial decisions. The reference in the paragraph to “without prejudice to the jurisdiction of the Judiciary” remains largely inconsequential, considering the overall terms of the provision.

Yet another encroachment on the independence of the judiciary is the establishment in article 127 of the 1998 Constitution of the Employees Justice Chamber, which enjoys the competence to consider and determine the grievances of employees in public service. The decisions of this chamber are final and beyond judicial review and its mandate may be seen as conflicting with that of the above-described board of the Public Grievances and Corrections.

COURT STRUCTURE

According to article 103 of the 1998 Constitution, the judicial structure consists of a Supreme Court, the courts of appeal and the courts of first instance. The Supreme Court works according to a “circular” system, whereby there is a criminal circle, civil circle and circles for personal matters and administrative objections. The 1991 Code of Criminal Procedure permits the Chief Justice to set up special courts and determine their jurisdiction. The Public Order Courts have been established under this power. The procedures of these courts violate the basic components of the right to fair trial, as they hear cases summarily and their decisions are immediately executed, even though there is a right to appeal to higher courts.

Special military and security courts have also been established to hear cases involving civilians and military personnel. Although article 137 (1) of the 1998 Constitution repealed all the Constitutional Decrees, including Constitutional Decree No. 2 of 1989, which established Revolutionary Security Courts, the Constitutional Court upheld the legality of military courts to try cases involving civilians. However, the decision as to whether and when to institute cases is left to the discretion of the Minister of Justice. Moreover, the 1999 National Security Act provides for the creation of a special court, composed of security officers and with no participation of members of the ordinary judiciary, to exercise jurisdiction over cases of abuse of power by security agents.

THE CONSTITUTIONAL COURT

The most significant innovation of the 1998 Constitution is the establishment of a Constitutional Court. The jurisdiction, procedure and appointment

of the Court members are regulated by article 105 of the Constitution and the Constitutional Court Act of 1998. The Court's jurisdiction includes, inter alia, interpreting constitutional and legal provisions submitted by the President of the Republic, the National Assembly, half the number of Governors or half the States' Assemblies; claims from any aggrieved person to protect the freedoms, sanctities or rights guaranteed by the Constitution; claims of conflict of competence between federal and state organs; criminal procedures against the President or the State Governors; and review of the constitutionality of judicial procedures, orders and judgements.

In order for an aggrieved party to gain legal standing before the Constitutional Court, it must exhaust all domestic remedies. Criminal procedures against the President or a Governor may not be instituted without the permission of the National or State Assembly.

The Constitutional Court comprises a President, Deputy President and five other judges, who are appointed by the President of the Republic with the approval of the National Assembly. According to article 3 (3) of the Constitutional Court Act, judges of the Court hold office for renewable five-year terms. Judges of the Constitutional Court may be removed upon conviction of an offence, by a competent court, in a matter inconsistent with honour and honesty. Additionally, the President of the Republic has the power to remove Court judges on the grounds of loss of capacity and health. This competency, in practice, could undermine the independence of the Court.

JUDGES

Although the 1998 Constitution provides for the establishment of an independent judicial authority, the power of appointing the Chief Justice and his deputies is vested in the President of the Republic. Moreover, the President of the Republic appoints all the other judges on a recommendation from the Supreme Council of the Judiciary (SCJ). The SCJ is composed of the Chief Justice, Deputy Chief Justice, the Attorney General, the President of the Bar Association, and the Dean of the Faculty of Law of Khartoum University. The constitutional powers of the SCJ include, inter alia, planning and general supervision of the judiciary, the preparation of the budget of the judiciary and provision of recommendations to the President of the Republic for the appointment, promotion and removal of judges. However, the role of SCJ remains advisory and under the control of the executive power represented in the President of the Republic.

LAWYERS

The Sudanese Bar Association has historically played a role in the country's public life, in particularly in the defence of fundamental rights and freedoms and upholding the rule of law. Unlike other professional associations and trade unions, the Bar Association had been governed by its own special law, the Advocacy Act of 1983, addressing formation and organisation. However, in 1993, the government amended the 1983 Advocacy Act, effectively reducing the status of the Bar Association from an independent self-governing entity to a trade union subject to control of the Minister of Labour and the Registrar of Trade Unions.

Throughout the years 2000 and 2001, lawyers were subjected to attacks and repression by government authorities. A number were arbitrarily arrested or detained, tortured, denied freedom of expression and association and subjected to interference in the performance of their professional duties by the security and police forces.

CASES

Rifaat Makkawi [lawyer]: Since 16 April 2000, the police have kept Mr. Makkawi and other lawyers working with PLACE (a legal aid organisation for internally displaced persons) under investigation. The Chairperson of PLACE and its various lawyers have frequently been detained at the police station under accusation of spying and sending information to foreign countries. It is believed that this harassment has resulted from the criminal case brought by Mr. Makkawi before the Attorney-General accusing a policeman of raping a displaced eleven year-old girl. Mr. Makkawi has also allegedly been pressured by the police to disclose information that he receives from his client.

Abdullah Ahmed Abdullah [judge]: On May 17, 2000, Mr. Abdullah Ahmed Abdullah, a First District Judge, was subjected to assault and inhumane treatment by police officers. The abuses came in response to Mr. Abdullah's intervention to stop police officers who were beating a Sudanese citizen in the Judge's presence.

Ali al-Said [lawyer]: Mr. al-Said was arrested on December 6, 2000 together with seven other leading members of the National Democratic Alliance (NDA), during a meeting with a US diplomat, on suspicion of conspiring to overthrow the Sudanese government. The charges against him included spying and "conspiracy against the State". The trial of Mr. Al-Said

and the other members of the NDA began at the end of March 2001, but was repeatedly postponed as a result of the failure of the Government to produce key witnesses in court. On 1 October 2001, President al-Bashir decided to suspend the trial, apparently as part of measures to improve relations between Sudan and the United States after the September 11 attacks in the United States.

Ghazi Suleiman and Ali Mahmoud Hassanain [lawyers]: Both lawyers were arrested on December 9, 2000, after signing a petition, along with 12 other lawyers, to the Ministry of Justice in protest at the arrests of the leading members of the NDA. The lawyers had also agreed to defend the NDA members. They were held in solitary confinement in a secret place of detention and released, without charge, on 22 February 2001.

Saati Mohammed al-Haj and Hadi Ahmed Osman [lawyers]: Both lawyers are members of the National Alliance for the Restoration of Democracy (NARD), a group of lawyers that has undertaken to defend the seven leading members of the NDA. Mr. Al-Haj was arrested at his office on December 17, 2000, while Mr. Osman was arrested three days earlier. No official reason was given for their detention.

Abu Bakr Abdel Razig [lawyer]: Mr. Abdel Razig was arrested on 24 December 2000. He was among the 12 lawyers who had signed a petition submitted to the Justice Ministry protesting the detention of the seven leading members of the NDA (see above case).

Osman Yousif [lawyer]: Mr. Yousif was arrested on 13 February 2001 at his office in Khartoum. The security forces searched his office and confiscated his computer as well as papers concerning Mr. Yousif and his clients. His arrest occurred after the Democratic Front for Lawyers had issued a memorandum regarding the Bar Association elections. The memorandum criticised the current laws restricting freedom of expression and association. Mr. Osman is a well known human rights defender who provides free counselling for prisoners of conscience and victims of human rights violations. He was one of the lawyers campaigning for the release of Mr. Ghazi Suleiman. Mr. Osman Yousif and his brother, Siddig Yousif Ibrahim, who also was arrested on 13 February, were released in March.

Mustafa Abdel Gadir [lawyer]: Mr. Abdel Gadir was arrested during the afternoon of 5 June 2001 and released the same evening without charge. He was ordered to report to the Political Section of the security offices in Khartoum on Wednesday 6 June for interrogation and was held for four hours. He was ordered to return for subsequent interrogation. Mr Abdel Gadir

is the principal defence lawyer for NDA members who are awaiting trial. He is a prominent human rights defender and has defended many prisoners of conscience and victims of human rights violations free of charge. Mr. Abdel Gadir has been subject to continual harassment by the government authorities and his office has been subject to continual surveillance. He had previously been arrested three times and has spent over two years in prisons.

Togo

Human rights defenders and political opponents throughout Togo were said to have come under constant harassment. Lawyers have difficulties in the exercise of their profession, notably when assisting detainees en garde à vue. Security guards frequently prevent lawyers from meeting with their clients. The International Inquiry Commission on Togo concluded in its 2001 report that hundreds of people were extrajudicially executed throughout 1998.

Togo gained independence from France in 1960, and Togo's first President, Sylvanus Olympio, was assassinated in a military coup three years later. The current President, Gnassingbe Eyadéma, seized power in a 1967 *coup d'état* and dissolved all political parties. President Eyadéma ruled unchallenged for two decades and did not face a multi-party election until 1993, following a liberalisation in 1992 allowing for the operation of political parties. A new Constitution was adopted by referendum in September 1992 providing for the basis of democratic institutions, but power in the country is still overwhelmingly concentrated in the presidency.

According to the Constitution, the country is led by an elected President as the Head of State. The President is directly elected for a five-years term and may be re-elected only once. The President, taking into consideration the parliamentary majority, names the Prime Minister, as head of the government. The Council of Ministers is appointed by the President on proposal of the Prime Minister. The President of the Republic presides over the Cabinet and has the power to dismiss the Prime Minister as well as the members of the government. The President is responsible for promulgating the laws voted by the National Assembly and transmitted to him by the Government 15 days thereafter. The President may, before the expiration of the above periods, demand that the National Assembly deliberate a second time on any particular Article, and this deliberation can not be refused. Any laws which are not promulgated by the President within the applicable period set out above are decreed by executive order of the Constitutional Council.

Legislative power is exercised by a unicameral National Assembly, whose deputies are elected for a five-year term and may be re-elected. Under Article 84 of the Constitution, the National Assembly approves legislation

concerning the organisation of courts of law and administrative courts, as well as the procedure before them.

Fraud and intimidation marred the 1993 presidential election, the 1994 legislative election, and President Eyadéma's re-election in 1998. On 28 June 1998, the Minister of Interior and Security proclaimed Eyadéma the winner, although competency for this function belonged to the Electoral Commission (CENI). In July 1998, the Constitutional Court ruled that the Minister could replace the CENI. The European Union suspended aid in 1993 in protest at alleged voting irregularities and human rights violations, but assistance has since been resumed. In the March 1999 election boycotted by the opposition, the ruling party won 78 out of 81 seats. In the June 1998 and March 1999 elections, hundreds of people were allegedly extrajudicially executed, and many civilians including opposition activists were arrested and tortured. On 5 April 2000, a new electoral code was adopted by Parliament establishing an independent Electoral Commission.

In June 1999, President Eyadéma and his party (Rally of the Togolese People-RPT) met with the opposition parties in Paris in the presence of international facilitators to initiate negotiations aimed at breaking the political deadlock that has existed since the 1998 elections. On 29 July 1999, the negotiating parties signed the Lomé Framework Agreement (*Accord-Cadre de Lomé*). According to the agreement, President Eyadéma would respect the Constitution and not run for another term as President in 2003 pursuant to Article 59 of the 1992 Constitution. The agreement addresses the rights and duties of political parties and of the media as well as the issue of the safe return of refugees. The agreement also contains a compensation plan for victims of political violence, but Article 2 of the 1994 Amnesty law, which provides impunity for those who have committed human rights abuses, was not challenged.

President Eyadéma serves as the Chairman of the Organisation of African Unity. There is also controversy over his alleged support for the Angolan rebel leader, Jonas Savimbi, in contravention of UN sanctions. A detailed report by the UN sanctions committee accused President Eyadéma of trading in the diamonds that Savimbi mines illegally to finance his rebellion.

HUMAN RIGHTS BACKGROUND

Togo has ratified the International Covenant on Civil and Political Rights (ICCPR) and its first Optional Protocol, the International Covenant on

Economic, Social and Cultural Rights (ISCER), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CRRC).

On 23 March 2001, the Committee of the CERD examined the implementation of the CERD in Togo. As Togo had failed since 1991 to file a report with the Committee, it urged the country to file the outstanding reports and to avail itself of the technical assistance programmes offered by the Office of the High Commissioner for Human Rights. Expert Ion Diaconu, the Committee's Rapporteur on Togo said the Minister of Justice in Togo had maintained that the country did not have an administrative structure to draw up such reports and that it would forward a report to the Committee when able to do so. The latest report submitted by Togo to the Committee was in 1991. The 1992 Constitution prohibits discrimination based on ethnicity, as well as regional or family origin and indicates that all discriminatory manifestations are punishable by law. However, no law had been enacted to punish such acts.

On 4 May 2001, the Committee on Economic, Social and Cultural Rights considered the situation in Togo. The Rapporteur on Togo, Eibe Riedel said that the country has not yet filed its initial report since 1984, when it became a state-party to the Covenant. The Rapporteur said that despite the findings of the Commission of Inquiry to Togo, there were a few positive aspects to be recognised, such as a technical co-operation project entered into with the OHCHR to strengthen the rule of law. The Committee recommended that "the Togolese government address the persistence of societal discrimination patterns, in particular in relation to women and girls, and between the various ethnic minorities living in Togo, with a view to eliminate such discrimination patterns".

THE 1999 AMNESTY INTERNATIONAL REPORT ON TOGO AND PROCEEDINGS AGAINST AI

On 5 May 1999, Amnesty International (AI) published a report entitled "Togo: Rule of Terror" based on a fact-finding visit to Togo in November and December 1998. The report alleged that hundreds of people had been killed by the security forces shortly before and after the June 1998 elections, and that bodies dumped at sea by military aircraft had washed up on beaches in Togo and neighbouring Benin. The Togo government employed a top

French lawyer and declared it intended to sue the human rights body for libel. In September 1999, the Togolese authorities started legal proceedings against Pierre Sane, AI's Secretary General, and summoned him to appear before an investigative magistrate of the High Court in Lomé for a "possible indictment for contempt, incitement to revolt, dissemination of false news and conspiracy against the state.". At the end of 1999, Togo agreed to invite an international commission of inquiry to investigate the reported killings.

In November 2000, the Dean of the examining judges ordered that all proceedings against Pierre Sané and four other human rights defenders be discontinued until further notice. However, according to AI, it still remains unclear whether the charges have been dropped.

In February 2001, the Togolese Interior Minister General Walla alleged that AI had received a USD 500,000 payment from Togolese opposition leader Gilchrist Olympio in return for writing a report that was critical of the human rights situation in the country.

INTERNATIONAL COMMISSION OF INQUIRY FOR TOGO

Under the auspices of the United Nations and the Organization of African Unity, at the request of the government of Togo, an International Inquiry Commission was established on 7 June 2000 to look into the Amnesty International allegations, following a consideration of this question in the Sub-Commission on the Promotion and Protection of Human Rights. International experts from Chad, Mauritania and Brazil constituted the Commission and carried out investigations in Togo and neighbouring countries in November and December 2000. The Commission's report was released on 22 February 2001. The Commission held that the allegations by AI that hundreds of persons had been victims of extrajudicial killings "must be taken into consideration". The Commission concluded that "executions were aimed especially at political activists linked to opposition parties" and recommended the nomination of a UN Special Rapporteur on Togo charged with monitoring respect for human rights in the country.

In March 2001, testifying before the UN Commission on Human Rights, the Togolese Prime Minister Kodjo stated that the "grave and unfounded" allegations "aimed to tarnish Togo's image and to speed up the change over in favour of the opposition". The Prime Minister announced the establishment of a national commission of inquiry, composed of four senior magistrates to investigate allegations concerning the 1998 extrajudicial executions.

HUMAN RIGHTS DEFENDERS

Since the 1999 publication of the AI report on Togo, members of Togolese human rights organisations have been harassed. On 31 July 2000, Maître Kofimessa Devotsou, director of the *Ligue Togolaise pour les Droits de l'Homme* (LTDH), was questioned by the Minister of the Interior and threatened that he could be accused of defamation after the publication of a critical report by the LTDH on the human rights situation. The interrogation took place in the presence of four independent journalists who were also criticised by the Minister for having published articles on the LTDH report. In November 2000, the Dean of Examining Judges ordered the dropping of charges of "false accusation and defamation" against Togolese human right defenders, especially members of the *Association Togolaise pour la défense et la promotion des droits de l'homme* (ATPDH) arrested in relation to AI's May 1999 report.

FREEDOM OF THE PRESS

At the beginning of 2000, a new bill regulating the press was passed, introducing criminal libel as an offence carrying a penalty of imprisonment. On 23 May 2001, Lucien Messan, editorial director of the weekly *Le Combat du peuple* was arrested when he presented himself to the police to answer a summons. He was informed that a complaint had been lodged against him by the Interior Minister for "falsehood and the use of falsehood". The journalist was immediately transferred to Lomé civil prison. He was accused of having affixed his signature at the bottom of a communiqué from the Togolese Private Press Publishers (ATEPP). The communiqué denounced statements by the Togolese prime Minister according to whom "publication directors were unanimous in affirming that there have never been hundreds of deaths in Togo". The ATEPP accused the government of "seeking to use the private press". The Fourth Criminal Chamber of the Lomé Court of First Instance sentenced Messan, among the most prominent figures within the Togolese private press, to a prison term of eighteen months, six months of which were suspended. In August 2000 Lucien Messan lodged a complaint against the Interior Minister for "abuse of power" following repeated seizures of copies of *Le Combat du Peuple* by the police.

THE UNIVERSITY CRISIS

Academic freedom has been highly restricted at the country's sole university. Opposition students groups are not tolerated and attempts to silence

students continued throughout 2000. The authorities arrested leading members of the student council of the University of Benin (CEUB) and in January 2000 an international arrest warrant was issued against the CEUB leader on grounds of spreading false information, although the charges were dropped one week later. The Union of Togolese lecturers has written to the Rector-Chancellor of the University to complain against the expulsion of student leaders. Teachers' salaries and students' stipends are rarely paid on time. In May 2001, students and lecturers at the University of Benin boycotted classes to protest against the non-payment of allowances. President Eyadéma met with the protesters and promised the payment of a one-month grant. Security forces have reportedly dispersed student demonstrations throughout the year and lecturers have denounced the presence of security forces in the university campus.

THE JUDICIARY

The Constitution embodies the principle of the separation of powers. Article 113 of the Constitution establishes the judiciary as an independent authority: "Judges are only subject, in the exercise of their functions, to the Rule of Law." According to Article 115, the President of the Republic is the guarantor of judicial independence. He is assisted to that effect by the Judicial Council. However, in practice, the executive power interferes with judicial matters.

The legal system is primarily based on French law, and as such it distinguishes between administrative and civil and criminal jurisdiction. Title VIII ("*Du Pouvoir Judiciaire*") of the Constitution provides for the organisation of the judiciary. Organic Law 96-11 enacted on 21 August 1996 deals with the status and regulation of the judiciary.

THE COURT SYSTEM

The Constitution provides for a Supreme Court (*Cour Suprême*), a High Court of Justice (*Haute Cour de la Justice*) and a Constitutional Court (*Cour Constitutionnelle*). Under Title VII of the Constitution, a *Cour des Comptes* is established in order to control matters related to the finances of the State.

Located in Lomé, the Supreme Court is the highest jurisdiction in the country, with two chambers, one for judicial (*chambre judiciaire*) matters and

one dealing with administrative (*chambre administrative*) issues. Organic Law 97-05 of 6 March 1997 provides that the Supreme Court is chaired by a judge appointed upon the proposal of the Judicial Council (*Conseil Supérieur de la Magistrature*). According to Article 9 of this law, judges cannot be pursued, arrested, detained or tried for opinions expressed in their judgement. Charges can be initiated against the Supreme Court judges only following authorisation by the Judicial Council.

The High Court of Justice is the only competent jurisdiction to deal with cases against the head of state and crimes of high treason. The High Court is composed of the President, the Presidents of the chambers of the Supreme Court and four legislators, elected by the National Assembly. The High Court, under Article 128 of the Constitution, has jurisdiction over crimes committed by members of the Supreme Court.

The Constitutional Court has jurisdiction over matters arising under the Constitution or involving its interpretation or the fundamental rights provisions of the Constitution. Its decisions are binding on all administrative and public authorities and there is no possibility of appeal against them. There exists only one functioning Court of Appeal in Togo, as the second one is moribund. There also exists a Military Tribunal for crimes committed by security forces. Trials before the Military Tribunal are not public. The Constitution, under Article 132, provides also for an Economic and Social Council (*Conseil Economic et Social*), that gives advisory opinions on legislation concerning economic and social issues.

COURT ADMINISTRATION

Judges are nominated by decree of the President of the Republic, with the approval of the Judicial Council (*Conseil Supérieur de la Magistrature*) following a proposal by the Minister of Justice. According to Organic Law 97-04 of 6 March 1997, the Judicial Court is composed of three judges of the Supreme Court, four judges of the Courts of Appeal, a member of the National Assembly and a person chosen by the President based on his or her experience. The Council is headed by the President of the Supreme Court. All the members are appointed for 4 years and their terms may be renewed only once. Under Article 117, the Judicial Council is the disciplinary body for judges.

Most members of the Judicial Council are supporters of President Eyadéma. Judges who belong to the Professional Association of Togo Magistrates (APMT), which is said to support the President, reportedly

receive the most prestigious assignments, while judges who advocate an independent judiciary and belong to the National Association of Magistrates (ANM), have been marginalized.

RESOURCES

The judiciary is severely understaffed and the judicial system does not ensure defendants the right to a fair and expeditious trial. There are approximately 100 judges in Togo and hundreds of cases are pending before each judge. Some detainees wait years to be tried. Other factors aggravating the failure of the judiciary include poor training and low remuneration. Judges are not paid on time. Consequently, delays in the judicial process are frequent and corruption, which is very common, encourages impunity.

The independence and impartiality of the judiciary is not guaranteed in practice. The few judges who have complained about political interference in the judicial system have not risked doing so publicly.

CASES

Maître Doe Bruce Adama [lawyer]: On 23 May 2001, the lawyer of Lucien Messan (see *Freedom of Expression*), while trying to defend his client, was assaulted by a police officer at the office of the Public Prosecutor.

Maître Kofimessa Devotsou and Maître Gahoun Hegbor [lawyers]: On 13 August 2001, the Director of the National Security Office refused to receive the two lawyers who were defending three persons arbitrarily detained *en garde à vue* from 9 to 24 August 2001.

Maître Yawovi Agbouyibo [lawyer]: On 3 August 2001, Maître Agbouyibo, former President of the Bar Association, was sentenced to six months imprisonment by the Correctional Chamber of the First Instance Tribunal of Lomé for defaming the Prime Minister, Messan Agbeyobé Kodjo. The Court issued a custody warrant against him before the audience, in what was considered to be a rather unusual process. A group of 53 lawyers was formed to assist in his defence. During the first days of his imprisonment, none of his lawyers has been permitted to visit Maître Agbouyibo. In 1998, Maître Agbouyibo, in his capacity as the President of the opposition political party (*Comité d'Action pour le Renouveau*) CAR, had denounced the human rights violations committed and impunity enjoyed

by certain groups associated with the Prime Minister in the region of Sendome. Once the parliamentary immunity of the lawyer was lifted in 2001, the Prime Minister asked the Public Prosecutor to file a complaint against Maître Agboyibo, which may disqualify him from participating in the next parliamentary elections.

TRINIDAD AND TOBAGO

The judiciary is largely independent. However, judicial independence is threatened through public attacks and non-provision of resources by the executive. These hindrances to the dispensation of justice are exacerbated by a security force that ignores the rule of law in the exercise of its duties. The government severely weakened the domestic application of international human rights protections by withdrawing from two key instruments: the American Convention on Human Rights, and the Optional Protocol of the International Covenant on Civil and Political Rights.

Trinidad and Tobago is a sovereign democratic state founded on the rule of law, a principle expressly stated in the Preamble to the Constitution. The country achieved full independence from the United Kingdom in 1962 and became a Republic in 1976 when its Independence Constitution, was replaced with a republican Constitution. The present Constitution declares itself to be the supreme law of the land, and any other law that is inconsistent with it is void to the extent of the inconsistency. At its heart, the Constitution secures a separation of powers among the executive, the legislature and the judiciary.

Executive authority is vested in the President who, subject to Constitutional restrictions, may exercise power either directly or through subordinate officers. Although elected by all members of the bicameral Parliament, regardless of political affiliation, this political officer must act in accordance with the advice of the Cabinet. The Cabinet consists of the Prime Minister, who is the head of government, the Attorney General and other ministers of the Government as appointed by the Prime Minister from the members of Parliament.

Legislative power in Trinidad and Tobago resides in a bicameral Parliament, which is composed of the President, an upper house called the Senate and a lower house called the House of Representatives. The Senate consists of 31 appointed members and the House of Representatives consists of 36 members elected every five years under a regime of universal adult suffrage.

Politically, racial divisions and race-based political allegiances play an important socio-political role among the island's 1.3 million inhabitants, 40 percent of whom are of African decent and 40.3 percent of East Indian decent. The most prominent political parties in Trinidad and Tobago are the United National Congress, (hereinafter UNC), the People's National Movement, (hereinafter PNM), and the National Alliance for Reconstruction, (hereinafter NAR). On December 11, 2000, voters returned the ruling UNC party, under Prime Minister Basdeo Panday, to power with 19 seats in the 36-member Parliament. The main opposition PNM party won 16 seats, while the NAR won a single seat in Tobago.

HUMAN RIGHTS BACKGROUND

With conspicuous exceptions, the Government generally respected the human rights of its citizens and allowed the legal and judicial systems to provide redress with regard to individual instances of abuse. Nonetheless, police and prison guard abuse of prisoners, the use of lethal force by police in unjustifiable circumstances and long delays in trials remain significant problems. Here, the government has consistently failed to investigate promptly and prosecute security officials responsible for incidents of brutality, including numerous killings and negligent deaths of those held in custody. Conditions in prisons were extremely poor, amounting in many instances to cruel, inhuman and degrading treatment in contravention of international standards. For example, some 1,300 inmates are confined in one prison which was built for 175 prisoners, where cells lack ventilation, sanitation is poor, the food is unpalatable, access to healthcare is restricted and infectious diseases are rampant.

DEATH PENALTY

During 2000, Trinidad and Tobago held the dubious global distinction of executing and holding the highest number of prisoners on death row, per capita. The death penalty is frequently imposed after proceedings during which defendants are not capable of securing legal protections guaranteed by domestically mandated and internationally ratified rights instruments. Indeed, the Government has made efforts to accelerate executions by speeding up the domestic legal process in capital cases and by enforcing strict time limits on applications for redress under international law. To effectuate the implementation of capital punishment, the Government has also severely weakened

human rights protections available to the general population and those on death row by withdrawing from two key international human rights instruments: the American Convention on Human Rights (American Convention), and the Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR).

On 26 May 1999, Trinidad and Tobago withdrew from the American Convention, thereby precluding the Inter-American Court on Human Rights from considering whether, in the death penalty cases, the state violated various human rights provisions of the American Convention. It is of particular concern that as a pretext to their withdrawal, the Government stated that "[t]he denunciation, (of the American Convention), was the result of the total dissatisfaction and frustration felt by Trinidad and Tobago with the performance of the Inter-American Commission on Human Rights and the way in which the Commission... allowed itself to become the tool of those who seek the abolition of the death penalty...." The Government also took the unprecedented step of withdrawing from the ICCPR Optional Protocol, effective June 27, 2000, apparently also in relation to concerns over its perceived constraints on the application of capital punishment. This second withdrawal from a previously ratified international human rights instrument denied prisoners under sentence of death from petitioning the United Nations Human Rights Commission, the expert body that monitored state implementation of the Optimal Protocol, for relief.

In opting out of the Optimal Protocol and the American Convention, Trinidad and Tobago effectively deprived its citizenry, especially those most in need of human rights protections, the rights guaranteed to them under the aforesaid internationally ratified instruments. Indeed, in its attempt to exclude those under sentence of death from said protections, Trinidad and Tobago is undertaking a course that borders on arbitrarily imposed capital punishment.

THE JUDICIARY

Judicial authority is subdivided between a higher judiciary, the Supreme Court of Judicature, and a lower judiciary, the Magistracy, both of which exercise original jurisdiction in civil and criminal matters. Appeals from first instance Magistracy and Supreme Court of Judicature decisions lie with the Court of Appeal, while appeals from the Court of Appeal proceed from Trinidad and Tobago to the Judicial Committee of the Privy Council in the United Kingdom. The Privy Council is the highest appellant authority.

Through provisions concerning judicial appointments and security of tenure, the Constitution clearly evidences an intention to safeguard the judicial system against outside executive and legislative influences. Within this system of organization, a Chief Justice for Trinidad and Tobago is appointed by the President after consultation with the Prime Minister and the leader of the main opposition party. Further, rank and file Justices are appointed by the President acting on the advice of the Judicial and Legal Service Commission, (hereinafter the Commission), whose advice he or she is bound to accept. The Commission is an independent body established by the Constitution and composed of the Chief Justice as chairman, the Chairman of the Public Service Commission and three other members that include one retired or sitting Justice of the Commonwealth and two other persons with legal qualifications. Once appointed, a Justice may only be removed for inability to perform the functions of his or her office or for misbehaviour. However, such dismissals may only occur after adjudication by the Privy Council. Finally, the Constitution protects judicial independence by securing tenure until age 65 and by safeguarding judicial salaries and conditions of service through a prohibition on their alteration to the disadvantage of judicial members.

CONFLICTS BETWEEN THE GOVERNMENT AND THE JUDICIARY

In practice, the Trinidadian judiciary fiercely safeguards its independence and attempts to give full effect to the constitutional rights of accused persons in both civil and criminal proceedings. Unfortunately, judicial vigilance often leads the courts into direct conflict with authoritarian executive and legislative tendencies. By way of example, at an opening address of the 1999 Law Term, Chief Justice Michael de la Bastide accused the Attorney General, Ramesh L. Maharaj, of seeking to reduce judicial independence through an effort to control funds disbursed for judicial travel expenses. This conflict was situated within a larger debate concerning the proposed creation of a judicial Chancellor's office that, under the direction of the Attorney General, would perform a judicial administrative function. Here, the Chancellor was to gain his or her powers, the most important of which was the authority to set the trial lists, at the expense of the Chief Justice's office. Chief Justice Bastide perceived the initiative as an attack on judicial independence through a stratagem to emasculate the Chief Justice's powers without abolishing his office. Receiving the support of all but one of the Trinidadian judiciary, this conflict continued through two Commissions established to mediate the dispute. In February 2001, when welcoming a new Judge to the bench, Justice Wendell Kangaloo warned that "when a Head of State hints at signs of creeping dictatorship, alarm bells should ring out loudly to the population."

The political ramifications emanating from the judicial independence conflict became all the more serious in March 2001 when Attorney General Maharaj threatened legislation to fire judges for not delivering judgements with sufficient dispatch, stating that "if a judicial officer cannot give a judgement within a given time frame he must be considered incompetent and the Constitution should provide for his removal, as the justice system must not accommodate incompetent and inefficient judicial officers". Further undermining public confidence in Trinidadian judicial institutions, the strongest warning for the judiciary to bow at the feet of the executive was delivered by Prime Minister Panday, when he assured UNC supporters that his government would defend itself "with full force" against judicial meddling in governmental affairs. This concerted effort by the government to erode judicial independence and de-legitimise and stigmatise the judiciary seems to stem from allegations by the UNC that the judiciary is biased in its treatment of the Indian-supported political party. Unfortunately, in calling into question the legitimacy of the judiciary's work, the Trinidadian executive has effectively pitted authoritarian political party and racial group interests against the activities of an independent adjudicative system, which hinders the latter's ability to render substantive justice.

Trinidadian courts have recently benefited from government-sponsored infrastructural improvements, and this effort has been encouraged by international state donors having invested substantial resources in various judicial reform projects throughout the nation. Here, assistance has been provided to improve technological and human resource capacities in delivering more effective justice. During 2001, improvements in resource allocations to the judicial system were recognised by Chief Justice Bastide when, at the opening of Law Term, he spoke of an improvement in funding. However, he went on to warn that the situation remained far from ideal. Indeed, despite improvements in the judicial system, over the past three years increasing alarm has been raised over the failure of the Government to administer properly the criminal justice system. From the supervision of the police to the punishment of criminal offenders and the administration of prisons, the Government has repeatedly failed to meet its international obligations to protect the human rights of its citizenry. As a result, crime is soaring, citizens live in fear and police impunity has become the norm. Standards for fair trial have been undermined by the failure of the government to institute an effective system of witness protection, to provide legal aid, to exclude coerced confessions from court evidence and, in many instances, to ensure that suspects are informed of their right to counsel.

TUNISIA

Despite the existence of constitutional and legal provisions guaranteeing the independence of the judiciary, the executive continues to exercise improper interference in the judicial domain. A number of political trials have reportedly been conducted without regard to the legal rights of defence and due legal process. Human right defenders, including lawyers have been subjected to harassment and intimidation.

Tunisia is a republic with a strong presidential system. According to the Constitution, the executive power is held by the President, who is elected every five years by universal and direct suffrage. The President appoints the Prime Minister, the Cabinet and the 24 governors. President Zine El-Abidine Ben Ali and his Constitutional Democratic Rally (RCD) have led the government, including the legislature, since 1987. The last legislative and presidential elections in October 1999 reaffirmed this dominance. President Ben Ali was re-elected for a third 5-year term with 99.44 percent of the vote. The ruling RCD party won 148 seats out of the 184 seats of the National Assembly (The Chamber of Deputies). In the last election, opposition presidential candidates were allowed to run for the first time pursuant to an amendment of the Constitution and Electoral Code in July 1999. The October 1998 changes in the Electoral Code reserved 20 per cent of the seats of the Chamber of Deputies for opposition parties. Currently, five opposition parties hold 34 of 184 seats of the Chamber. Despite some progress in liberalising the electoral process, problems remained, especially with regard to protection of the secrecy of the ballot and the accuracy of vote totals.

HUMAN RIGHTS BACKGROUND

Tunisia has ratified and published in its official gazette most of the major human right instruments, thereby giving them the force of law domestically. Among the ratified instruments are the Convention Against Torture, Inhuman and Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political

Rights and the International Covenant on Economic, Social and Cultural Rights. Tunisia has recognised the competence of the Committee Against Torture under article 22 of the CAT to receive and process individual communications.

Despite its ratification of international human rights instruments and its creation of human rights bodies in various ministries to address and resolve human rights violations, serious human rights abuses were committed during the period under review. These include, inter alia, repression, arbitrary arrest and detention of political opponents and their families, curtailing of freedom of opinion, expression and assembly, and torture and ill-treatment.

TORTURE AND ILL-TREATMENT

Despite the existence of legal safeguards, torture and ill-treatment continued to be widely used by police to extract confessions and by prison guards to punish detainees. In its observations on the second periodic report of Tunisia, the Committee against Torture (CAT) noted the widespread practice of torture and other cruel and degrading treatment perpetrated by security forces and the police, which in certain cases resulted in death in custody. In order to address the various recommendations of the CAT, the Government enacted amendments to the Penal Code. These include the adoption of the CAT definition of torture; the issuance of instructions to police to inform detainees of their rights, including the right of a defendant to demand a medical examination while in detention; the shortening of the maximum allowable period of pre-arraignment incommunicado from ten to six days; and increase of the maximum penalty from five to eight years for those convicted of committing acts of torture. However the new provisions have largely remained unenforced. Despite the reduction of incommunicado detention, torture continued, in part due to the climate of impunity fostered by a judiciary that ignored evidence of torture and routinely convicted defendants on the basis of coerced confessions. Official claims of institutional safeguards against torture are belied by the refusal of judges to follow up on complaints of torture or to order appropriate medical examination. (See *Attacks on Justice 1999*).

FREEDOM OF OPINION AND EXPRESSION

Numerous incidents have been reported of harassment, intimidation and punishment of individuals, including journalists, human rights activists and political activists who express dissenting opinions. Despite commitments made by the President to reform the Press Code in late 1999, the rights

relating to the effective enjoyment of freedom of expression and opinion were abridged with frequency. The UN Special Rapporteur on Freedom of Expression and Opinion noted that while, on the one hand, the State supports the idea of promoting and guaranteeing human rights, on the other hand, it tampers with human rights under the pretext of maintaining stability and order in society. The Special Rapporteur observed that despite its apparent diversity, reflected by the publication of some 180 national periodicals in Arabic, French or both languages, and eight specialised political publications, the press in Tunisia is characterised by uniformity of tone and unfailingly presents national news in a positive light. The present Press Code (promulgated by the Act of 28 April 1975 and amended twice, in 1988 and 1993) is prohibitive in that it helps to maintain censorship and self-censorship within the editorial offices of Tunisian newspapers.

HUMAN RIGHTS DEFENDERS

The government continued to subject human rights defenders and activists to harassment and intimidation. Many defenders have been prosecuted or threatened with prosecution, subjected to ill-treatment or had their telephone and fax lines cut. In a press release dated 7 December 2000, the UN Secretary-General's Special Representative on Human Rights Defenders called upon the Government to end the harassment of human rights defenders in the country. The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression urged the Tunisian government to put an end to the alleged intimidation and harassment of persons seeking to exercise their right to freedom of opinion and expression, in particular human rights defenders, political opponents, trade unionists, lawyers and journalists, and to bring those responsible for such harassment to justice.

The activities of non-governmental organisations (NGOs) in Tunisia are regulated by the Associations Act of 7 November 1959, which has been the subject of two amendments, one of which opens the way to judicial appeals against decisions of the Minister of the Interior in respect of the establishment and dissolution of an association. The 1959 Act grants excessive powers to the Minister of the Interior to approve or refuse the registration of societies and lays down harsh penalties for any person found guilty of membership in an illegally established association.

It is almost impossible to set up new independent associations. Such requests are generally rejected by the Minister of the Interior on the grounds they are not in conformity with the Associations Act. The Special Rapporteur has noted that the 7,000 NGOs mentioned by the authorities largely represent

associations established by or close to the government. The offices and activities of independent NGOs, including the Tunisian Human Rights League, the Tunisian Association of Democratic Women and the Tunisian section of Amnesty International are reportedly under constant police surveillance. The press releases of these NGOs are virtually never published in the national press. Similarly, the leaders and members of the associations are harassed in an attempt to get them to abandon their activities (see section on *Cases*). The confiscation of correspondence, the tapping of telephone conversations and the interception of faxes constitute important impediments to the exercise of everyday activities by these NGOs.

In December 2000, Moncef Marzoki, a doctor and spokesman for the National Council for Freedom in Tunisia (CNLT), was sentenced to one year's imprisonment for his human rights activities. He had been charged for spreading false information liable to disturb public order contrary to article 49 of the Press Code and maintaining an unauthorised association contrary to article 30 of the Associations Act. The first charge was related to a paper presented by Dr. Marzoki at a conference on Human Rights Defenders in Rabat in October 2000, in which he criticised the human rights record of the Tunisian government as well as the lack of independence of the judiciary. The second charge concerned CNLT, which was formed by Dr. Marzoki in 1998 and which was denied registration by the Minister of Interior. Both the trial of Dr. Marzoki and Nejjib Hosni, a human rights lawyer and leading member of CNLT (see section on *Cases*), and the circumstances surrounding the trial were fraught with violations of the right to freedom of expression, the right to a fair trial and the right to freedom of association.. The manner of the two trials was unfair, with the independence and impartiality of the trial judge in question, a failure to examine witnesses and restrictions placed upon the legal representatives.

The Tunisian Human Rights League (LTDH), at its fifth general assembly held October 27 -30, 2000, elected to its board a majority of outspoken human rights activists, with Mukhtar Trifi, a lawyer and human rights activist, being chosen as president. The new board was expected to lead the organisation to a more robust approach in its activities. Three weeks after the LTDH election, a law suit demanding its nullification was filed by four LTDH members who claimed irregularities in the preparation of the election. Both the plaintiffs and Governmental authorities asserted that the Government had played no role in bringing the case. The plaintiffs won an interim injunction expelling the new steering committee from the LTDH offices, barring it from taking any actions in the name of LTDH, and replacing it with a court-appointed administrator. Despite the injunction, the LTDH

steering committee has continued to issue communications and has attempted to conduct business, stating that its local sections have urged it to continue working while the case is on appeal. These activities have prompted further legal actions against the League's president and first vice-president, as well as large-scale police deployments to prevent the steering committee and other LTDH bodies from gathering. The four plaintiffs, who are known to be sympathetic to the Government, all ran as candidates in the League elections. Their lawsuit claims that procedural irregularities violated the LTDH's own internal rules and the plaintiffs' rights both as citizens and as members of an entity that is governed by the Act on Associations. Many of those irregularities had been apparent and had been debated inside the League long before the election took place. However, the plaintiffs went to court only after they ran as candidates and lost. The vast majority of the League's members who have expressed themselves on the dispute reject the plaintiffs view. All four former members of the LTDH have signed a petition in support of the League demanding an end to efforts to block its functioning so that it might freely resume its activities. On 21 June 2001, the Appeal Court in Tunis pronounced its verdict in the case against the LTDH confirming the sentence given on 12 February 2001 by a lower court, which ordered that the results of the League's general assembly in October 2000 be annulled and the 25-member board elected at the time be dissolved. In a seemingly contradictory decision, the authorities ordered that this same board assume responsibility for organising a new assembly.

THE JUDICIARY

Article 65 of the Tunisian Constitution enshrines the principle of independence of the judiciary, providing that the judiciary is to be independent and that magistrates in the exercise of their functions are not to be subjected to any authority other than the law. The Act of 1967 establishes the statutes of the judiciary and ordains them to render justice impartially, without consideration of persons or interests. Numerous laws have subsequently aimed at strengthening this principle and consolidating the rights of defence.

Despite all these legal guarantees, the executive branch continued to strongly influence the judiciary and undermine its independence. The judicial branch was said to constitute effectively a part of the Ministry of Justice, with the executive branch appointing, providing tenure to, and transferring judges and the President serving as head of the Supreme Council of Judges. Judges therefore are amenable to influence. The UN Special Rapporteur on Freedom

of Opinion and Expression noted that many political trials have reportedly taken place with no regard for the rights of defence and due legal process. The Special Rapporteur heard allegations that the judiciary is not entirely untouched by influence exerted by the executive branch.

COURT STRUCTURE

The judicial system in Tunisia is composed of ordinary courts, an administrative court and military courts. The ordinary courts include Magistrate Courts, Courts of First Instance and Courts of Appeal. The Court of Cassation, which sits in Tunis, is the highest court. It considers arguments only on points of law, not factual contentions. The administrative court system is incomplete, in the sense that there is only one Administrative Tribunal and no appellate level.

There is also a Constitutional Council, which, unlike in many civil law countries, does not function as a court. This is a consultative body in charge of examining draft legislation submitted by the President of the Republic. The Council has no power to review the constitutionality of laws after their enactment.

Parallel to the civil system are the Military Tribunals, within the Ministry of Defence, which are competent to try military personnel and civilians accused of national security crimes. The verdicts of these courts may be appealed before the Court of Cassation. A military tribunal consists of one civilian judge and four military judges.

APPOINTMENTS, PROMOTION AND TRANSFER

The Higher Council of the Judiciary, a body headed by the President, and composed of appointed and elected judges, supervises the appointment, promotion, transfer and discipline of judges. However, the President is also the head of the Council. This situation places undue pressure on the work and independence of judges who render decisions in politically sensitive cases. The Council is also strongly dominated by the Ministry of Justice, which acts as its secretariat. Judges fear the possibility of transfer or discipline if they issue judgements conflicting with the interests of the executive.

LAWYERS

The Tunisian Bar has existed for over 100 years and is generally seen as having played a historically significant role in the struggle for independence. The first President of Tunisia, the late Habib Bougiba, was himself a lawyer who had used the Bar to intervene in the political process to defend human rights and pursue issues of public importance. The principle of intervention from the Bar remained in Tunisia after independence, when politicians, trade unionists or other groups under pressure or attack would turn to the Bar for protection. However, in 1991 Tunisian authorities began targeting lawyers who defended Islamists and using the press as means of attacking them. In recent years, the target has become human rights lawyers. Thus, Tunisian lawyers are frequently obstructed from carrying out their professional duties. The task of lawyers specialising in the defence of human rights has been made increasingly difficult by the restrictions imposed on their activities in the defence of their clients. For example, lawyers have faced difficulty in obtaining copies of judicial documents and gaining access to clients during visits to prisons.

CASES

Anouar Kousri [lawyer]: Mr. Kousri is a vice-president of Tunisian Human Rights League (LTDH) and a human rights lawyer. For the past five years he has been the subject of harassment and pressure from the police (see the seventh, eighth, ninth and tenth issues of *Attacks on Justice*). Since March 2001, he has been kept under constant surveillance by the security services. This predicament came as a consequence of Mr. Kousri's involvement as a defence lawyer in the case of young man who died in police custody in September 2000 as a result of torture. The harassment of Mr. Kousri has been extended to his friends, relatives and clients.

Radhia Nasraoui [lawyer]: Ms. Nasraoui is a distinguished lawyer who represents numerous clients in sensitive human rights cases. She has suffered repeated harassment, including the ransacking of her office, restrictions on her freedom of movement, pressures placed upon her clients and the attempted abduction of her daughter. In July 1999, following a trial that was described as a "parody of justice" by lawyers and international observers but which was upheld by the Court of Appeal, Ms. Nasraoui was given a suspended sentence of six months' imprisonment (see *Attacks on Justice 1999*). On 14 May 2001, she was subjected to harassment by the security service and her documents confiscated when she returned from abroad.

Nejib Hosni [lawyer]: Mr. Hosni, a prominent Tunisian human rights lawyer and member of the National Council for Freedom in Tunisia (CNLT) board of directors, has faced intense persecution since July 2000, when he issued a public statement criticising the Government's restrictions on civil liberties. Mr. Hosni had previously spent two-and-a-half years in prison on trumped up charges of forgery, and was released in late 1996. Since then, the authorities have arbitrarily disconnected his office and home telephone and fax and confiscated his passport. He has been prevented from resuming his legal practice, despite the fact that the Tunisian Bar Association, the sole competent institution in this matter, has insisted that he never should have been suspended. On that basis he joined other lawyers in entering a plea before a court on November 24, 2000 in the case of several political detainees on a hunger strike. On 18 December 2000, the District Court of Kef sentenced him to fifteen days imprisonment for "non-compliance with a judicial order" by asserting his right to practice his profession. Since then Mr. Hosni has been charged twice with breaching the judicial order banning him from practising his profession. It seems that the authorities intend to prosecute him for all the trials in which he appeared since he started to practise again in April 2000. On 12 May 2001, Mr. Hosni was released from the prison after having been granted a presidential pardon. The release of Mr. Hosni came as a result of strong national and international solidarity campaigns.

Mukhtar Trifi [lawyer]: Mr. Trifi is the president of Fédération Internationale des Ligues des Droits de l'Homme (FIDH), and member of Amnesty International in Tunisia. As defence counsel in several politically sensitive cases, Mr. Trifi has been subject to continuous harassment, especially since the fifth congress of the LTDH at the end of October 2000. The forms of harassment suffered include the severing of phone lines, close surveillance, intimidation of his clients, legal proceedings and defamatory press campaigns.

Mokhtar Yahyaoui [judge]: Judge Yahyaoui is the president of the Court of First Instance in Tunis. He was suspended from his post by the Ministry of Justice and his financial remuneration was cut on 14 July 2001. It was apparent that these arbitrary proceedings came in response to judge Yahyaoui's letter, dated 6 July 2001, addressed to the President of the Republic, denouncing the lack of independence of the judiciary and the harassment of judges. The arbitrary sanctions against judge Yahyaoui were lifted on 1 August 2001.

TURKEY

The 1982 Constitution establishes Turkey as a republic with a parliamentary form of government. According to Article 2, Turkey is a democratic, secular and social State governed by the rule of law. The President is the head-of-State and shares executive powers with the Council of Ministers, consisting of the Prime Minister and other ministers. The President is elected by the Grand National Assembly (GNA) for seven years and may not be re-elected. National elections are held every five years through a system of proportional representation. The GNA consists of 550 members and carries out legislative functions.

Ahmed Necdet Sezer, the former President of the Constitutional Court, is President of the Republic. A three-party coalition consisting of the Democratic Left Party (DSP), the Motherland Party (ANAP) and the Nationalist Action Party (MHP) formed a majority government under Prime Minister Bulent Ecevit after the April 1999 elections. The Islamist Virtue Party, the major opposition party that had 102 members in the Parliament, was closed by the Constitutional Court on 22 July 2001, on the grounds that the party had engaged in activities against the secular principles of the Republic.

CONSTITUTIONAL AMENDMENTS

The 1982 Constitution was drafted by an assembly appointed by the military government which had taken power in the 1980 *coup d'etat*. The Constitution was endorsed by popular referendum in a process flawed by suppression of informed debate. Constitutional reform was widely discussed throughout 2000-2001. A number of leading authorities, including the President, the head of the judiciary, and the Parliament forwarded a series of proposed constitutional amendments in 2001. On 3 October 2001 the Parliament adopted constitutional amendments directed at 34 articles of the Constitution. Many legal authorities have criticised these amendments as cosmetic and lacking in substance. Human rights issues to which constitutional reform might be directed, such as the nebulous conception of secularism, the death penalty, torture, restrictions on freedom of expression and closure of political parties remained inadequately addressed.

THE MILITARY

The military establishment continued to interfere in political life. A secret military document, popularly known as the “memorandum” (*andic*), was disclosed by Nazli Ilicak, a journalist and a Member of Parliament, in her column in the *Yeni Safak* daily on 21 October 2000. This document, entitled *Strong Action Plan*, had been prepared at the directive of the Office of the Chief General in 21 April 1998, and was subsequently published by approval of Cevik Bir, the then-President of the Chief Staff. *Strong Action Plan* contained instructions by the military to major daily newspapers and their chief columnists to initiate a smear campaign against certain journalists, politicians, and human rights activists and organisations in order to discredit them publicly by associating them with the Kurdish Workers' Party (PKK). The list of targeted people included Akin Birdal, a lawyer and ex-chairman of the Human Rights Association, journalists Mehmet Ali Brand, Cengiz Candar, Mahir Kaynak, Yalcin Kucuk and Mahir Sayin, and the political parties Virtue Party and HADEP. As an alleged consequence of the ensuing media campaign, journalists such as Cengiz Candar and Mehmet Ali Birand lost their columns in their newspapers, and an assassination attempt was carried out against Akin Birdal (see *Cases*). The Office of the Chief Staff affirmed the existence of that document in a press statement of 3 November 2000, claiming that the program proposed in the document had not in fact been implemented. Subsequently, Nazli Ilicak, Akin Birdal, Hasan Celal Guzel (former Education Minister and leader of the Rebirth Party), Sanar Yurdatapan (a human rights defender) and Mazlum-Der filed complaints in November 2000 against the former General Staff Cevik Bir on grounds of abuse of authority.

HUMAN RIGHTS BACKGROUND

Human rights violations continued with frequency throughout 2000. Courts convicted persons for expressing non-violent opinions and political parties were abolished for challenging the official ideology of the state.

Human rights organizations were attacked or closed down, with some members prosecuted, detained, tortured, imprisoned, or subjected to death threats. Eleven members of the Turkish Human Rights Association (HRA) were murdered in late 2000, allegedly by assailants connected to the security forces. The Diyarbakir and Van branches of the HRA and the Malatya branch of the Association of Human Rights and Solidarity for Oppressed People (Mazlum-Der) were closed in late 2000. Several members

and volunteers of the Human Rights Foundation of Turkey (HRFT) faced trials in 2000.

The practice of torture was widespread, with a number of such incidents occurring against children. Although the Constitution and Penal Code provide for heavy penalties against torturers and although Turkey is party to both the UN and European Conventions against Torture, officials have yet to take effective measures to combat torture. During the course of its investigations, the Parliamentary Human Rights Commission discovered numerous torture devices in police departments and prisons and found forensic reports to be inadequate. Between December 2000 and March 2001 more than 160 people were reported to have been tortured.

Judicial impunity for torturers is a major obstacle to the prevention of torture. Prosecutors often refuse to accept allegations of torture, and courts are reluctant to convict member of the security forces even when the evidence is substantial, such as when complaints are corroborated by medical reports. Most victims are therefore dissuaded from filing complaints. The 1999 Law on the Prosecution of Civil servants and Other Administrative Officials has served to increase the impunity afforded to torturers by granting the authority to initiate prosecutions to local governors and requiring prosecutors to transfer case files to the governors. Permission for prosecution in regions under a state of emergency was rarely given, and according to the Law on the Obligations and Competencies of the Police, police officers subject to an investigation or prosecution are not placed in pre-trial detention and are not required to be present at trial. Some officers have remained on duty after a conviction for torture or ill-treatment.

Police officers often pressure detainees to conceal their injuries from medical personnel and sometimes destroy medical certificates and prepare false medical reports. In one notorious case, Dr. Nur Birgen issued false reports on a group of tortured detainees in July 1995 and, after being convicted for "negligence in performing her duties", was on 7 December 2000 sentenced to three months' imprisonment. The Istanbul Medical Association banned Dr. Birgen from the medical profession for six months. Despite these verdicts, the Ministry of Justice appointed her chairman of the Third Expertise Council at the Forensic Institute.

During 2000-2001, a new system of small-group isolation and solitary confinement in so-called F-Type prisons was initiated by the state under a supposed "prison reform" project. This type of isolated cellular system is becoming the standard regime for all prisoners throughout the country. Since October 2000, hundreds of prisoners have participated in hunger strikes in

protest at the new system, and tens of prisoners have died of hunger or have been killed by security forces during intervention by the latter to stop the hunger strikes. Despite the increasing number of torture and abuse cases in F-Type prisons and various medical studies underscoring the negative effect of solitary confinement on the physical and mental health of prisoners, the current government is continuing its isolation prison regime project.

The “susurluk” accident was followed by the disclosure of serious links between some armed opposition groups and security forces. Hizbullah is a right-wing organization used by the government in the Southeast region for extra-judicial killings and attacks against suspected sympathizers of the Kurdish Worker’s Party (PKK) since the early 1990s. After denying the existence of the organisation, the authorities eventually initiated armed operations against it on 17 July 2000, resulting in some 65 deaths and the killing of the group’s leader, Huseyin Velioglu. The “Susurluk” accident, was a scandal erupted on November 3, 1996 when a Mercedes, speeding through the night, collided with the truck near the town of Susurluk. Travelling in the luxury vehicle were Istanbul deputy police chief Huseyin Kocadag, Abdullah Catli, a former right-wing militant sought on murder and drug charges, his lover, a former beauty queen, and Sedat Bucak, a Kurdish tribal chief who had set up a private militia to fight the PKK. Bucak was the only survivor of the crash.

Freedom of expression, despite its Constitutional protection under Articles 25 and 26, was widely violated throughout the year. The Penal Code contains severe punishments for certain forms of expression, such as incitement (Article 312), criticism of military service (155) and insulting the President and the organs of the State (158-59 of the Penal Code, and Article 8 of the Anti-Terror Law). The right to demonstrate has been restricted by new amendments to the Meeting and Demonstration Law. Several television and radio channels have been permanently or temporarily closed down and a number of newspapers, books and pamphlets have been confiscated. Sweeping terms such as national security, public order, general peace, public morals and public health, have been interpreted arbitrarily in order to prosecute many authors, journalists and human rights activists for their criticism of the Government’s policies. The Law on Associations, which includes heavy restrictions and requirements, has been employed as a tool to close down civil organizations. During the first six months of 2001, some 161 persons faced trials for expressing non-violent ideas (see *Unfair Trials* for examples).

Freedom of religion was frequently abridged. The Constitution protects freedom of belief, freedom of worship, and dissemination of religious ideas, and prohibits discrimination on religious grounds. Although non-Muslim minorities are relatively independent in their religious affairs and may establish private religious educational institutions and select their own religious leaders, Muslims do not enjoy such autonomy. The state organizes all the religious affairs, including religious education of Muslims through its Directorate of Religious Affairs (DRA). The establishment of private religious schools by Muslims is not permitted. Instead, religious courses are mandatory in the curricula of the public schools and "*Imam-Hatip*" schools, public religious schools that teach a mainstream Sunni form of Islam. In 1997, the Board of Higher Education banned religious dress in universities and hundreds of female students graduated in 1997 were denied their degrees, awards and diplomas because of their religious dress. The prohibitions was expanded to all aspects of the public sphere, causing the expulsion of thousands of female students, teachers, professors, doctors, nurses, lawyers, scientist, engineers from their schools and jobs. The number of expelled university students is estimated to be around 30,000 and hundreds of female state employees have lost their jobs and social security rights without compensation.

STATE OF EMERGENCY

The armed conflict between the government and the Kurdish Worker's Party (PKK), which seeks a separate homeland in the southeast of the country, has been in effect in Turkey for almost two decades. As a result of this armed conflict, some 3,000 settlements have been evacuated or burned, up to three million people have been internally displaced and tens of thousands have been killed. The arrest of Abdullah Ocalan, the leader of the PKK, and the official announcement by the PKK that it would abandon its armed activities has led to a diminution of much of the armed clashes in the southeastern provinces. Despite these positive developments, the state of emergency implemented some 20 years ago has remained in effect in six provinces.

Although the Constitution allows for the suspension of certain rights under the state of emergency, the right to life and to freedom of religion, conscience, thought and opinion remain non-derogable. However, Article 148 of the Constitution provides that the constitutionality of decrees issued during a state of emergency may not be challenged before a Constitutional Court, rendering judicial protection of these rights untenable. Regional governors of provinces under the state of emergency have been given authority to limit freedom of expression, press and assembly, confiscate publications, carry out

warrantless searches, evacuate villages and remove people from the province who are considered to be a threat to public order, including judges and lawyers. Thirdly, there is no judicial review of such actions, and right to compensation is limited.

The Anti-Terror Law implemented in the state of emergency regions removes the decision to prosecute members of the security forces from the Public Prosecutor to local administrative councils. These councils are composed of civil servants under the influence of the regional or provincial governor, who is also the head of the security forces. As a result, impunity remains a major problem in the southeastern provinces.

THE JUDICIARY

According to Article 138 of the Constitution, "judges shall be independent in the discharge of their duties." However, in practice judges and public prosecutors face restrictions, influence, pressure, threats and interference in the exercise of their professional duties, preventing them from acting impartially in accordance with their assessment of the facts and their understanding of the law.

STRUCTURE OF THE COURTS

The judicial system is composed of general law courts (criminal, civil and administrative), military courts, a Constitutional Court and State Security Courts. According to Article 148 of the Constitution, the Constitutional Court examines the constitutionality of laws, decrees having the force of law and parliamentary procedural rules.

The constitutional system does not allow individuals to petition the Court on issues of constitutionality. The 1967 Constitution had allowed all political parties represented in Parliament and those receiving 10 per cent of the total valid votes in the prior election, the High Council of Judges, Public Prosecutors, the Judiciary, Council of State, Military Courts and the universities to apply for annulment of action to the Constitutional Court. The present Constitution limited this critical right only to the President of the Republic, Parliamentary groups of the party in power and of the main opposition party and a minimum of one fifth of the total number of members of the Parliament

If a court is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case

until the Constitutional Court decides on this issue. If the Constitutional Court dismisses the case on its merits, "no allegation of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after the publication in the Official Gazette". Decrees issued under a state of emergency, martial law or in time of war may not be challenged in the Constitutional Courts.

MILITARY COURTS

Military Courts of First Instance hear cases involving military law and members of the armed forces. The Military High Court of Appeals reviews these decision and judgments. The High Military Administrative Court of Appeals is the first and last instance for the judicial supervision of disputes arising from administrative acts involving military personnel or relating to military service. There are also 11 offences for which civilians may be tried in a military court, including cases in which civilians are alleged to have impugned the honour of the armed forces or undermined compliance with the draft.

STATE SECURITY COURTS

State Security Courts (SSCs) are special courts established in accordance with Article 143 of the Constitution. They are concerned solely with the adjudication of political and serious criminal cases deemed threatening to the security of the state. Most of these offences relate to the use of violence, drug smuggling, membership in illegal organizations or espousing or disseminating prohibited ideas.

SSCs sit in eight cities across the country. They are composed of a president, two regular and two substitute members, a public prosecutor and a number of deputy public prosecutors appointed for a renewable term of four years. Decisions of the SSCs may be appealed to the High Court of Appeals, through a department dealing exclusively with crimes against State security.

Having been first established in 1973, SSCs were abolished in 1976 and reinstated subsequent to the 1982 military coup. In general, SSCs constitute a distinct judicial regime that offers fewer protections for those deprived of their liberty due to political reasons, than that in force for non-political cases. This discrimination violates the principle of equality before law, and international norms for a fair trial.

Prior to 1999, SSC panels consisted of two civilian judges and one mili-

tary judge. Since the presence of a military officer is contrary to the fundamental requirement of an independent and impartial tribunal, that structure had, since the court's inception, been a target for sustained criticism from both internal and international bodies. Both the European Commission on Human Rights and the European Court of Human Rights found in many cases that the presence of a military judge on the SSC panel violated a defendant's right to an independent and impartial tribunal. Among the reasons cited are that military judges, even while sitting on a SSC, remain under the supervision of their military superiors and subject to military discipline, and that decisions pertaining to their appointment are taken by the administrative authorities and the army. In addition, the independence of the court was threatened by the Turkish military's central role in both law enforcement and politics.

Article 143 of the Constitution was amended on 18 June 1999 to provide that all members of the judicial panel be civilian. Nevertheless, important deficiencies remain:

- The pre-trial detention period without charge is four days in SSC, as opposed to 48 hours for individuals charged with ordinary offences. The period may be extended to seven days outside of a State of Emergency Region and to 10 days within such a region.
- A detained person in respect of whom an extension of police custody is sought is not brought before the judge who examines the request.
- The decision as to whether to extend the detention period in SSC cases is taken without substantial scrutiny of the police request for the extension, as the judge's decision is made solely upon the basis of the report requesting extension.
- Unlike detainees accused of ordinary crimes, those suspected of offences within the jurisdiction of the SSCs do not have the right to have a lawyer present during the entirety of their interrogation.
- While the families of ordinary detainees must be informed of the detention of their family member, SSC detainees are exempted from this right.
- The investigation of any torture allegation made by a detainee falling within the jurisdiction of a SSC is conducted by the public prosecutor of the respective Heavy Penal Court. As a result, the trial of a detainee may frequently proceed in the SSC system on the basis of an allegedly coerced testimony and a sentence of guilt may be handed down before a decision is taken in the Heavy Penal Court concerning the alleged torture.

APPOINTMENT, PROMOTION AND DISCIPLINE

Article 159 of the Turkish Constitution establishes the High Council of Judges and Public Prosecutors (High Council), a body of executive and judicial personnel that oversees the judiciary. The High Council is responsible for the appointment of all judges and public prosecutors. It is also authorised to transfer, promote and discipline judges and prosecutors. In addition to the High Council, it should be noted that the President of the Republic has the authority to appoint judges.

The Minister of Justice is the President of the High Council and his under-secretary is an *ex-officio* member. The President of the Republic appoints three members to the High Council from a list nominated by the High Court of Appeals from its ranks and two members from a list nominated by the Council of State. All appointments are for renewable four-year terms.

Some of the major deficiencies regarding the independence of the judiciary include:

- The dependence and partial structure of the High Council: The membership structure of the High Council places the judiciary under political influence. Members are representatives of the judges and prosecutors, appointed by the President of the Republic instead of elected by the judges and prosecutors themselves. The presence of the Minister of Justice and his under-secretary renders the High Council, a purported judicial organ, effectively dependent upon the Minister of Justice. In addition, the High Council does not maintain its own secretariat but is entirely dependent upon a personnel directorate and inspection board of the Ministry of Justice for administration.
- Interference, pressure and threats against judges: The High Council's decisions relating to personnel are susceptible to partiality and prejudice due to the potential influence of the Ministry of Justice. The High Council may 'transfer' judges and public prosecutors, against their will, to work in a less attractive region of Turkey on the grounds that the judge or prosecutor is not 'performing adequately'. Judges and prosecutors, whose decisions do not conform to official policy, are very often deemed to be "performing inadequately" and hence are transferred (see Cases). Transferring of judges to other regions for political reasons is a clear violation of Principle 2 of the UN Basic Principles on the Independence of the Judiciary.
- Ineffective and partial review of disciplinary decisions against judges: Under the Constitution, there is no appeal to a judicial body against a

decision of the High Council. Instead, any objection must be raised before an eleven-person panel composed of the seven original Council members and four additional members. Therefore, judges and prosecutors are unable to appeal decisions of the Council to a fully independent appellate body.

- Restrictions on freedom of expression and association of judges: Judges and public prosecutors in Turkey have no right to organise and form associations that would represent their collective interests, express their opinions and take positions in an appropriate manner on matters pertaining to their functions and to the administration of justice. Should a judge criticise the state of the judiciary and call for any legal reform, he or she risks investigation and possible prosecution. For example, as a result of his comments on lack of independence among the Turkish judiciary, Mete Gokturk, a prosecutor within the Istanbul SSC, was accused of “insulting the judiciary” in contravention of Article 159 of the Turkish Penal Code. He was tried and a prison term of up to 12 years was sought. Mr. Gokturk was acquitted, yet the High Council imposed a disciplinary punishment in the form of a block on any future promotion. Mr. Gokturk unsuccessfully petitioned for a review of this decision by the 11-member panel.

Unfair trials

Fifteen intellectuals who published a book containing banned material have been on trial, after the High Court of Appeals struck down an SSC decision to acquit them on 15 February 2001. The case subsequently was brought before the Military Court of the General Staff. Fifteen of the 23 intellectuals and artists were accused of “driving people away from wanting to conduct their military service” under Article 15 of the Turkish Penal Code (TPC), for signing a book entitled “Freedom to Thought 2000”. The book contains a banned publication and 60 articles. During a hearing at the Ankara Military Court of the Chief Office of the General Staff on June 29, 2001, the defendants, Lale Mansur, Salim Uslu and Yilmaz Ensaroglu, refused to make a defence on the ground that the Military Court could not perform an independent and fair trial and that such a prosecution would be contrary to the Constitution and Article 6/1 of the ECHR Convention.

In tens of cases brought before the courts, judges were under heavy pressure from the National Security Council (NSC) to uphold the ban on the use of Islamic headscarves in universities and state premises. The military’s briefings to the judiciary were widely reported in the press. Judges and prose-

cutors who did not obey these briefings and directives were prosecuted and transferred to less attractive regions and their professional ranks were lowered (see Cases). After persistent pressure by the National Security Council (NSC), female Muslim students were not only expelled from universities and denied their educational rights, but hundreds were also tried and received substantial prison sentences for entering the university building. Some students even faced the death penalty on charges of attempting to change the constitutional order by force, although their actions consisted only in conducting non-violent demonstrations against the ban. Since there is no law that prohibits the wearing of Islamic headscarves, but only by-laws and regulations, courts have issued contradictory opinions in cases brought to the court by students or state employees. While the majority of the courts uphold the ban, some courts have considered the ban a "violation of the plaintiff's constitutional right to education." The texts of certain judicial opinions that justify the ban are near or exact copies of one another, raising doubts as to whether the courts are acting independently.

LAWYERS

The guarantee of a fair trial depends in significant part on the ability of lawyers to provide effective legal representation on behalf of their clients. However, lawyers have at times been subject to harassment, intimidation, and violence aimed at undermining their performance of legitimate professional duties:

- Many detainees remain ignorant of their right to legal representation. Although the laws require that an individual be immediately informed of rights upon apprehension, in practice, the information sheet is often not provided to detainees. For cases within the SSCs' jurisdiction, the authorities are under no obligation to inform detainees of their rights and therefore no information sheet is made available.
- Detainees are often pressured by security forces to prevent them from requesting legal counsel. Detainees are routinely psychologically and physically mistreated by members of security forces. The 2000 Parliamentary Human Rights Commission confirmed that detainees were often forced to waive their right to legal counsel. At the Erzurum's Sehit Fatih Bodur Police Centre, for instance, the Commission found that 269 out of 270 detainees were recorded as "not having requested a lawyer" in the preceding 12 months.

- Free counsel is not provided equally to all detainees. According to Turkish Law, if detainees of ordinary crimes cannot afford a lawyer, the Bar Association must provide free counsel. However, detainees and defendants in SSCs are excluded from this right.
- In practice, access to a lawyer may only be allowed at a relatively late stage of the police detention, often just prior to the taking of a formal statement. In SSC cases, even if the detainee is aware of his or her right to legal representation and is able to afford the services of a lawyer, he or she may be detained incommunicado without access to legal counsel. The Penal Code gives the detainee access to a lawyer only upon extension of the custody period by order of a judge.
- In SSC cases, it is common for lawyers to be denied access to detainees' files during the period of extended pre-trial detention. By the time the lawyer receives the files, the case will already have come to court.
- Lawyers are often reluctant to visit their clients for fear of harassment. At times, security forces deny that the lawyer's client is in the detention centre. Meetings are always held in the presence of the police and usually last for no longer than 10 minutes.
- The ability of lawyers to conduct an effective defence is restricted by the fact that SSCs routinely limit the period of time in which trial preparation may be undertaken. For example, even in a trial involving several defendants, the defence may find themselves limited to 15 days preparation. If they fail to meet this deadline they may forfeit the right to put forward a defence.
- Defence lawyers are unable to examine witnesses themselves. Instead, they may only suggest possible questions to the judge. The judge may decline to ask the question at all, or else ask it in such a way as to negate its effectiveness in establishing the defence's case.
- Unlike the prosecutors, who summarize their own arguments using their own words, defence lawyers are barred from dictating their defence argument directly into the record. Instead judges summarize their statements.
- Turkish law allows judges to exclude the defendant and the lawyer if the peace of the courtroom will be disturbed, and the judge need not give any reasons for doing so.
- Female Muslim lawyers are forbidden from wearing Islamic headscarves in courts. According to international standards and the Turkish Constitution, fundamental rights such as freedom of religion may be

restricted only in exceptional circumstances. The restriction on the religious rights of female lawyers is based solely upon regulations by the Bar Association. Lawyers who wear headscarves are denied the right of attending the trial and may become subject to disciplinary penalties by the Disciplinary Board of the Turkish Bar Association and banned permanently or temporarily from the legal profession. There are more than 200 lawyers affected by this situation in Istanbul alone.

- Lawyers, especially in SSC cases, may face prosecution for statements made in good faith in the course of defending their clients.
- Lawyers who repeatedly conduct defences before the SSC are sometimes considered to share the political views of their clients and may be called "terrorist lawyers" by the police, the public prosecutors and the courts. Lawyers who publicly comment on the human rights practices of Turkey or the Kurdish situation tend to be regarded, in some official circles, as enemies of the state. In the most severe forms of harassment, lawyers may be deprived of their liberty for prolonged periods of time and even may be subjected to physical and emotional abuse and torture. There are also frequent instances of disrespectful or threatening treatment of lawyers by members of the security forces, including unnecessary searches, verbal abuse and interception of telephone calls.

CASES

Gulizar Tuncer and Fatma Karakaya [lawyers]: These two female lawyers were among 19 defendants (18 of whom were women) accused of "insulting security forces" for speeches they made on 10-11 June 2000, in a conference titled "No to Rape and Sexual Harassment under Detention." In her defence, Ms. Tuncer asserted that "the conference was legal and conducted with an official permission. If telling of torture that had occurred is regarded a crime, then there is nothing we can do." According to Ms. Karakaya, during the interrogations defendants were not asked for statements at all and the indictment rested solely upon their speeches at the conference.

Noyan Ozkan [President of Izmir Bar Association]: Mr. Ozkan and Mr. Eren Guvener, the editor of *Milliyet* daily, were sentenced to one month imprisonment and a fine for "making comments about a pending case." Mr. Ozkan had written an article in which he criticized a former imprisonment sentence given against Dr. Huseyin Yildiran, a professor at Ege University. While the case was pending in the Appellate Court, Mr. Ozkan

wrote an article criticising the lower court's decision as contravening freedom of expression. Mr. Ozkan and Mr. Eren's penalties were subsequently commuted to fines.

Eren Keskin [lawyer]: The trial against Ms. Keskin, a lawyer and President of the Istanbul branch of the Human Rights Association, and Mr. Erdal Tas, editor of the closed newspaper *Yeni Gundem*, began in 15 June, 2001. They were accused of "insulting the army" because of Ms. Keskin's description published in the newspaper *Yeni Gundem* of sexual torture which the Peace Mothers had reported. "Mothers of Peace", a peace initiative group, had gone to Northern Iraq in an attempt to halt the armed conflict between YNK and PKK. They were tortured and sexually abused when they came back to Turkey in early October 2000. Ms. Keskin asserted in her defence that in his report on a torture case in Silopi the editor's intent had not been to insult the Turkish army. The trial was postponed until 16 August, 2001. Ms. Keskin had been previously tried and imprisoned for her human rights activities in 1995.

Ahmet Zeki Okcuoglu [lawyer]: Mr. Okcuoglu was sentenced to one year and 4 months' imprisonment on 18 June, 2001, by a State Security Court, for his article concerning the Kurdish problem published in the third volume of *Serbести* periodical. The SSC ordered the closure of the periodical 30 days. Mr. Okcuoglu had faced several prior prosecutions for his books and articles and spent ten months in prison, from June 1997 to April 1998. In *Okcuoglu v. Turkey*, ECHR had found that the freedom of expression of Mr. Okcuoglu has been violated by the Turkish State.

Akin Birdal [lawyer]: Mr. Birdal, a lawyer, prominent human rights activist, and former President of the Turkish Human Rights Association (HRA), was imprisoned from 3 June 1999 until 25 September 1999 for "inciting people to hatred and enmity on the basis of class, race or regional difference". His offence was to call for a peaceful approach to the Kurdish issue and to use the phrase "the Kurdish people" in speeches he made at public meetings in September 1995 and September 1996. He was temporarily released in 25 September 1999 on health grounds. His release was widely viewed as an attempt to avoid official embarrassment during the Istanbul OSCE Summit and the EU Helsinki Summit in 1999. Mr. Birdal was re-imprisoned on 28 March 2000, despite a medical report warning that his injuries resulting from an assassination attempt in 1998 posed a risk to his life. He was released on 23 September 2000.

Huseyin Evin, Ismet Gul Kireckaya, Bulent Ecevit Nadas, Zeynep Sedef Ozdogan, Mehmet Bayraktar, Turkan Aslan, Ismail Guler,

Bahattin Ozdemir, Ercan Ozdemir [members of Izmir Bar Association]:

These lawyers were subject to different forms of harassment by the police and prison security forces on different occasions while meeting with their clients in prisons or attending courts for trials. Such harassment included arbitrary body searches, verbal insults and degrading treatment, arbitrary seizure of documents and evidence by force, and limiting the duration of meetings with clients.

HARASSMENT AGAINST JUDGES, PROSECUTORS, AND LAWYERS IN ISLAMIC HEADSCARF CASES

Selami Demirkol and Seher Bayrak [judges]: A disciplinary interrogation was taken against Mr. Selami Demirkol, a justice in the Istanbul 6th Administrative Court, because of his opinion rendered in favour of a student in a headscarf case. Mr. Demirkol's majority opinion, in which the court decided that there was no legal basis to forbid a student from attending university classes with religious attire, was found to be contrary to the official policy of the state. Therefore, the case file was taken away from him and he was threatened with transfer. Ms. Seher Bayrak, another judge at the same court, who joined Mr. Demirkol's opinion, was transferred to Edirne Administrative Court.

Sabri Unal and Mehmet Ali Ceran [judges]: Mr. Unal, a Chief Justice of Bursa Administrative Court, was transferred to Aydin Administrative Court as a disciplinary punishment for his judgment in a headscarf case, where he gave an opinion in favor of the religious freedom of the students. His professional rank was lowered from Chief Justice position to that of an ordinary judge. Mr. Ceran, a member judge of the same court, was transferred to Gaziantep city for joining Justice Unal's opinion.

Hasan Onal, [Chief Justice] Sitki Keles, Recep Tas, Resul Comoglu, Cafer Ergin, Nermin Kurt and Fatih Terzi [judges]: These judges, who were members of Samsun Administrative Court, were transferred to other cities subsequent to their decision in favor of the religious freedom of the plaintiff in a headscarf case. The religious attire of their wives, and their religious observances in their private lives, such as attending the mosque for Friday prayers and during the month of Ramadan, were mentioned among the reasons for initiating disciplinary procedures against them.

Ali Kazan and Abdurrahman Beser [judges]: Mr. Ali Kazan was the Chief Justice of the Edirne Administrative Court. Subsequent to his opinion in favor of the freedom of religion of the female students in a headscarf case

he was transferred to Trabzon city. Mr. Beser, who joined justice Kazan's opinion, was also transferred to another city.

Ahmet Guler [judge]: Mr. Guler, a judge at the Istanbul 8th Tax Court, was sent to the High Council for a disciplinary interrogation and his social and private life were questioned on the grounds that "his wife wears non-contemporary religious attire," and that "he used to listen to religious songs and radio channels."

Resat Petek, Hakki Koylu, Hasan Turan Yilmaz [public prosecutors]: A disciplinary investigation was opened by the Ministry of Justice against Mr. Resat Petek, the Chief Prosecutor of Yozgat, after he had taken legal action against the president of Erciyes University and the dean of Yozgat School of Art and Science regarding the expulsion of a student at that school because of her religious headscarf. He requested his retirement after his professional rank was degraded to that of an ordinary public prosecutor and he was transferred to another city following the investigation. Mr. Hakki Koylu, Bursa Chief Prosecutor, and Hasan Turan Yilmaz, Diyarbakir Chief Prosecutor, faced similar investigations for prosecuting university officials for violating the religious freedoms and educational rights of female university students, and subsequently were transferred to different cities and their professional ranks reduced.

Salih Dogucu, Arife Gokkaya, Turgay Ozdemir, Necip Kibar, Kamil Ugur Yarali, Mehmet Bulent Deniz, Ibrahim Ozturk, Yuksel Uyan, Gulten Sonmez, Aydin Durmus, Cihat Madran, Atilla Dede, Seref Dursun, Necati Ceylan, Gurkan Bicen, Zafer Sar [16 Lawyers in Marmara University case]: On 17 September 1999, these lawyers were prevented from conducting university registration on behalf of clients denied registration due to their religious attire. The lawyers were insulted and moved out of the campus by police force and were not allowed to represent their clients. Furthermore, the Uskudar Prosecution Office launched an investigation against the lawyers under permission of the Ministry of Justice on grounds of confronting the police forces. All of them were acquitted except Mr. Salih Dogucu and Ms. Arife Gokkaya who were convicted of violating Article 266/2 of the Turkish Penal Code and sentenced to terms of imprisonment, later reduced to pecuniary punishment.

Osman Karahan [lawyer]: In 4.10.1999, Mr. Karahan was beaten by police officers at Marmara University's Goztepe campus while present to provide legal assistance to his clients, female students denied access to university because of their Islamic attire. Mr. Karahan was prosecuted, accused of conducting a "demonstration" in a public place, thereby violating the

Meeting and Demonstration Law. After his trial at Uskudar Court No.2, he was acquitted by the court on the grounds that the university campus was not considered a "public place."

Atila Dede [lawyer]: Mr. Dede was severely beaten by security forces at Hasanpasa Police Station in Istanbul, where he had gone to offer legal assistance to his student clients. A medical report from Haydarpasa Numune Hospital indicated that he was unable to work for three days. When Mr. Dede reported the incident to the Kadikoy Prosecutor's Office and demanded an official investigation, Hasanpasa security forces accused him of "insulting the security forces". Eventually, Mr. Dede was put on trial on 14 June 2001 at Criminal Court No. 2 and sentenced to two months imprisonment and pecuniary punishment. The penalties were subsequently lifted due to the arbitrary behaviour and excessive use of power of the security forces.

Aydin Durmus and Kamil Ugur Yarali [lawyers]: These lawyers were prosecuted on charges of participating in a demonstration on 12 December 1999 against the prohibition of Islamic attire in universities. The lawyers had reportedly come after the demonstration to give legal assistance to clients who had been arrested by police forces, yet the lawyers themselves were also accused of violating the Meeting and Demonstration Law and put on trial with the other defendants. Fifty-two out of 53 of the defendants, including the lawyers, were acquitted by the Uskudar Criminal Court No.3 on 28 March 2001.

VENEZUELA

The judiciary remained in transition, with a process of reform under way. Appointments to the highest levels of the judiciary have been irregular and ninety per cent of the judges in Venezuela lack security of tenure. The changes introduced under the new Constitution with regard to the military judiciary have not been properly implemented. The legislative and the executive have decreased the budgetary allocation to the judiciary in contravention of the Constitution. In Portuguesa state, lawyers and prosecutors received death threats from a police “extermination squad” allegedly responsible for grave human rights violations.

BACKGROUND

The 1999 Constitution establishes that the Republic of Venezuela is a federal state and that its government is and always shall be representative, democratic, responsible and subject to change. Article 136 provides for the separation of powers including an “electoral” power and the “Citizen” branch of power, which is exercised by the Ombudsman, the Public Prosecutor, and the Internal-Affairs Office. The President, who is elected for a renewable six-year term, exercises executive power. National Legislative power is vested in a 165-seat National Assembly (*Asamblea Nacional*), whose members are elected for a five-year term. The administration of justice is reserved to a court system, which is endowed with functional, financial and administrative independence. Article 256 of the Constitution proscribes the right to association for judges.

In order to “re-legitimise” the authorities in the aftermath of the entry into force of the 1999 Constitution (see *Attacks on Justice 2000*), general elections were held on 30 July 2000. (The elections were to have taken place on 28 May 2000, but were postponed for technical reasons.) With heavy participation in the process, voters re-elected President Hugo Chávez Frías, with 59 per cent of the vote. His competitors, Francisco Arias Cárdenas and Claudio Fermín, received 38 per cent and 3 per cent respectively. President Chávez’s supporters won a majority (92 seats) in Congress, although not the two-thirds majority required to pass most important pending legislation. His supporters also won half the governorships.

The Government sought to gain *de facto* control of organised labour. In December 2000, voters participated in elections for municipal and regional councils and voted on a questionable referendum on labour matters. The public “workers referendum” was to consider the “overhaul of union leadership” and the “suspension” of union leaders. The International Confederation of Free Trade Unions and the International Labour Organisation (ILO) considered the referendum to constitute a violation of freedom of association and an inappropriate government interference in organised labour issues. However, the Supreme Tribunal ruled in favour of moving on with the referendum. In the context of a poor turnout (23 per cent), approximately 65 per cent of those citizens who voted approved the question. However, in October 2001, the Government’s effort to get control of the Venezuela Workers’ Federation failed, when its candidate appeared to come second in a disordered and controversial directorate election.

President Chávez also has continued to challenge the media and the Catholic Church and tensions have arisen with neighbouring countries. President Chávez remains fairly popular, although poll ratings have recently been sliding, with economic troubles prompted by the decline in the price of oil, the main source of income of Venezuela. The electoral alliance that President Chávez forged in 1998 has collapsed, as its second largest member, the Movement to Socialism (MAS), has moved to the opposition. His Fifth Republic Movement is also divided. Furthermore, the army is increasingly restive, and, in the aftermath of the 11 September attacks, the United States seems to have expanded its scrutiny of President Chávez’s peculiar foreign policy.

HUMAN RIGHTS BACKGROUND

During the period under review, reports emerged of disappearances and extrajudicial executions by security forces during rescue operations following the 1999 floods. A number of cases of torture and ill treatment were also alleged. Hundreds of persons fleeing political violence in Colombia were denied impartial hearings to determine whether they met the requirements for refugee status. Although there were some legal reforms that improved overcrowding in the prisons, prison conditions continued to be poor.

In April 2001, the United Nations Human Rights Committee (HRC) considered the third periodic report of Venezuela. The HRC expressed its satisfaction at the fact that the new Venezuelan Constitution gives international human rights instruments a status equal to that of the Constitution itself.

However, it expressed concern at reports of disappearances, extrajudicial executions, torture and excessive use of force by the police and other security forces. The HRC also criticised conditions in prisons and other places of detention, treatment of persons seeking asylum or refuge (especially those from Colombia), reports of trafficking and violence against women, the interference by authorities in trade-union activities and threats to the independence of the judiciary (see below).

IMPUNITY

By the end of 2000, only 40 of 300 cases of human rights abuses registered by national NGOs had been resolved as a consequence of judicial proceedings, and no judgement had been carried out with respect to some 200 cases of torture reported since 1995. In March 2000, a friendly settlement was reached between the Government and relatives of 41 persons killed by security forces in November 1992 in the Retén de Catia. This case had been presented before the Inter-American Commission of Human Rights. In April 2000, Congress approved a controversial law providing amnesty to persons who had been prosecuted, persecuted and sentenced for committing political offences from 1960 to 1992. This measure served to favour President Chávez's supporters during the 1992 coup attempt. However, the law applies only to those acts that did not constitute human rights violations.

THE JUDICIARY

The Government discontinued the judicial emergency proclaimed in 1999 in order to reform the judicial system (see *Attacks on Justice 2000*). This process had largely failed to restore the public's trust in the judiciary and improvement in the administration of justice. Approximately 300 judges have been suspended or dismissed at various levels and replaced by alternates. The Commission of Judicial Emergency, pursuant to its mandate from the Constitutional Assembly (the body that drafted the Constitution), dismantled the bodies in charge of the judiciary, with problematic results. Although the judicial emergency ended, significant attempts to reform the judicial system continued, with the purpose of facilitating the implementation of the constitutional changes

Despite the Government's pledge to take measures necessary to ensure the independence of the judiciary, the Government and the judiciary in fact acted to facilitate the executive's capacity to intervene in the judicial branch. The

Constitutional Assembly established the Commission of Functioning and Restructuring of the Judicial Branch (*Comisión de Funcionamiento y Reestructuración del Poder Judicial*) with this purpose. This Commission had wide powers regarding suspension and dismissal of judges following a recommendation by the National Inspector of Tribunals. The Executive Directorate of the Judiciary assumed these powers once it was established in August 2000.

In its review of the periodic report of Venezuela, the Human Rights Committee declared that it was "particularly concerned at the situation of the judiciary in Venezuela, which is still undergoing reform. An extended reform process threatens the independence of the judiciary, given the possibility that judges could be removed as a result of the performance of their duties, an infringement of article 2, paragraph 3, and article 14 of the Covenant. Another cause for concern is the lack of information on the effects of the reform process to date and the absence of a date for that process to come to an end". The Committee added that "the reform of the judiciary must not continue. The State party should furnish information on the number of judges removed during the process, the reasons for their removal, and the procedure followed". The Committee's concern about the independence of the judiciary extended to the information, delivered by the delegation, that "article 275 of the Constitution empowers the National Ethics Council (*Consejo Moral Republicano*) comprising the Ombudsman, the Attorney-General and the Comptroller-General to issue warnings to judges, even those of the Supreme Court, and impose sanctions if those warnings are not heeded".

STRUCTURE

The judicial system is headed by the Supreme Tribunal (*Tribunal Supremo de Justicia*), which is composed of six chambers. One chamber considers constitutional issues and has the power to declare federal or state laws invalid on the grounds of unconstitutionality, and to adjudicate conflicts of competence between the constitutional branches. The judiciary is also constituted of an Appeals Courts, first instance tribunals and municipal courts.

The Constitutional Chamber of the Supreme Tribunal Chamber, in its ruling on an *amparo* petition, decided to postpone the general elections scheduled for May 2000. The Constitutional Chamber expressed reservations that the electoral counting system could fail to reflect the popular will. Due to this decision, the elections were held on 30 July 2000. The Constitutional Chamber also took substantial and controversial steps towards clarifying the parameters of its own powers. The Constitutional Chamber held that any

citizen could file a petition, which would have as its purpose to receive interpretation of several articles of the Constitution. The petitioner would have to demonstrate an individual interest in respect of an active case.

ADMINISTRATION

According to article 267 of the Constitution, the Supreme Tribunal is responsible for the administration of the judicial branch, including the elaboration and execution of its budget and oversight of the courts. These functions are exercised by the Supreme Tribunal through a body responsible to it, the recently created Executive Directorate of the Judiciary (*Dirección Ejecutiva de la Magistratura*). In September 2000, the former Council of the Judiciary was dissolved and its functions were passed to the Supreme Tribunal.

The compilation of statistics, for instance concerning judicial workloads, has been hampered by the existence of parallel judicial administrations during the “transitional” period. The Executive Directorate of the Judiciary only has statistics that correspond to the last trimester of the year 2000, and only five of the 24 judicial divisions into which the country is divided provided statistical information. Eighty per cent of the tribunals did not submit reports on their activities during the period of “judicial emergency”.

APPOINTMENT OF SUPREME TRIBUNAL JUSTICES

The appointment of the highest authorities within the judiciary has been irregular and unconstitutional, posing serious problems in respect of the independence of the judiciary.

According to article 264 of the Constitution, the 20 members of the Supreme Tribunal are appointed for a non-renewable 12-year period. A Nominations Committee, the “citizen power”, and the Congress are to play a role in the selection procedure. Although the referendum that approved the new Constitution took place in mid-December 1999, the new Constitution only came into force at the end of the month. The Constitutional Assembly took advantage of this state of limbo and continued to appoint judges, contravening procedures that it had approved along with the main authorities within the judiciary, including the members of the Supreme Tribunal.

In November 2000 Congress, repeating the actions of the Constitutional Assembly, waived the constitutional procedure for the appointment of Supreme Tribunal Justices by blocking the role of the civil society (Citizen Power) and designating itself the “representatives” of the citizen power. The

intentions of the Congress became clearer when members of the executive stated that to attain appointment to a high judicial post, the concerned individual should be identified with the "process" i.e. be part of the President's movement. This procedure constituted a gross attack on the independence of the judiciary. The Supreme Tribunal upheld this circumvention of the Constitution, referring to the existence of the "transitional" period. The Tribunal also eased the criteria and requirements for the appointment of Supreme Tribunal justices. The Tribunal held that the appointment of justices should correspond with their performance during the time they exercised that post, without taking into account the other criteria provided in the Constitution (Ruling No 1561-12,122.00). Thus, there was not only an inappropriate interference on the judiciary from the legislative, but the judiciary accepted and endorsed as legitimate such interference. Although the appointments were carried out through special procedures ostensibly resulting from the exigencies of the "transitional period", the legislature did not limit the term of such appointments pending the approval of the new legal framework of the judiciary. On the contrary, the mandates of these justices were to last the constitutional 12-year term.

JUDICIAL CAREER

According to article 255 of the Constitution, the entry and promotion of judges to the judicial career as well as the evaluation of judicial officers, is to be carried out by the Supreme Tribunal through the Executive Directorate of the Judiciary. However, there is as yet no implementing legislation, and currently the Rules of Evaluation and Contests to Enter and Stay in the Judiciary, established on 13 March 2000 by the Commission of Functioning and Restructuring of the Judiciary, are in force. Since August 2000 they have been applied by the Executive Directorate of the Judiciary.

During the period under review, controversial dismissals and appointments within the judiciary continued. Up to now no reliable statistics are available concerning this process. It seems that many provisional judges continued to carry out a large portion of the work of the judiciary, without foreseeable measures to tackle the problem. The Executive Directorate of the Judiciary recognised that by September 2001 approximately 90 per cent of the judges were not working on a permanent basis.

Contests were held to fill the vacancies in the judicial branch beginning in November 2000. In Monagas state, two judges appointed were said to be relatives of the director of the local office of internal Affairs and another two appointed judges reportedly were relatives of the President of the state

legislature. There have also been irregularities in the appointment of military justice officers. In August 2001, the Supreme Tribunal decided to suspend the contests to appoint military judges based on allegations that serious irregularities and conflicts of interests arose during the selection procedure.

Regarding the dismissal, suspension and appointment of judges, the performance of the Executive Directorate of the Judiciary, operating since August 2000, and its predecessors (the Commission of Judicial Emergency, and the Commission of Functioning and Restructuring of the Judiciary) have been problematic. The extended reform process has affected the independence of the judiciary by undermining the security of tenure of judges. Furthermore, there is no reliable available information on the effects of the reform process to date, and no deadline for this process has been established.

RESOURCES

Article 254 of the Constitution provides for the financial independence of the judiciary, and requires that the budget for the judicial branch be not less than two per cent of the national budget. However, the judiciary's budget corresponds to approximately a 0,75 per cent of the ordinary budget. The executive has failed to respect the provisions of the Organic Law of the Judiciary, according to which the budget proposal elaborated by the judicial branch should be passed to Congress without changes. In October 2000, the Executive Directorate of the Judiciary revealed that the Executive had modified the judiciary's budget before submitting it to Congress. Finally Congress only allocated a 40 percent of the sum initially asked by the judicial branch.

The administration within the judiciary has also been worrying. In January 2001, the Executive Directorate of the Judiciary pointed out that resources initially directed to improving the infrastructure for the courts were allocated to other projects due to the delay in carrying out the necessary administrative procedures.

Regarding the judicial reform process with international aid, the 2001 report of the Internal Affairs Office stated that the Project of Infrastructure Support of the Judiciary (PIAPJ) lacked adequate planning and presented undue delays. The Venezuelan Government was to have invested an equivalent amount to match the US\$ 30 million loan by the World Bank allocated in 1994. The Venezuelan resources of the project were supposed to be directed toward building new locations for tribunals throughout the country. However, this portion of the resources has not yet been allocated, as a result of which the infrastructure has weakened further. Despite the deficient administration

of the resources given by the World Bank (only 65 per cent of the project has been executed) and the two-year delay in the implementation of the PIAPJ, the World Bank is considering prolongation of the credit for an additional year and provision of an additional US\$ 20 million dollars. On a positive note, the Modernisation Project of the Supreme Tribunal, also with support from the World Bank, was developed according to the planned timetable and is expected to reduce workload problems.

WORKLOAD OF PUBLIC DEFENDERS

According to the Autonomous System of Public Defence (SDP), ordinary public defenders each handle between 100 and 300 cases, which clearly shows that such a function, essential for the fulfilment of the right to a fair trial, is not being carried out properly. During the period under review, the number of public defenders increased from 366 to 517 at the national level. While this modest increase is positive, according to the SDP, some additional 1,050 public defenders are required. Moreover, the procedure for selecting these defenders is not transparent and no law exists to regulate their appointment. The shortfall is reported to be even more severe in the public defence system for juvenile offenders.

MILITARY JUSTICE

Although the 1999 Constitution (Article 29) provides for a limited military jurisdiction in compliance with international standards, during the period under review there were new cases of civilians and of military personnel accused of committing common crimes being tried before military courts. In December 2000, three individuals were arrested for allegedly possessing propaganda material from Colombian armed opposition groups in Táchira state. The three men were released, but judicial proceeding continued in military courts.

In January 2001, Mr. Pablo Aure was arrested in Carabobo state, after having sent a letter to a national newspaper in which he criticised the armed forces. A prosecution under the military judiciary ensued. Although he was released following substantial pressure from other State-officers and the public, the proceedings continued. The Attorney General's Office challenged the military court's jurisdiction over this case, and concluded that due to the civilian character of the accused, the case should have been passed to the civilian judiciary. As *Attacks on Justice* went to press, a Supreme Chamber's

ruling on the legality of the detention and the violation of the right to expression was pending.

Also in January 2001, the military judiciary assumed jurisdiction over Lieutenant Alejandro Sicat, who was accused of human rights violations that caused the death of a soldier. The case was handled by the military judiciary even though its jurisdiction was challenged during the process and, according to the law, once a dispute has arisen regarding jurisdictional competency, the proceedings should be suspended. Lieut. Sicat was judged and sentenced by the military court without the jurisdictional conflict having been resolved. The Attorney General has requested the invalidation of the trial and the 16-year sentence imposed on Lieut. Sicat.

THE COUNTER-REFORM OF THE CODE OF CRIMINAL PROCEDURE

During the period under review, the Code of Criminal Procedure was frequently criticised as being inadequate for countering crime and as a source of impunity. According to PROVEA and the Attorney General, this was an inadequate response to the legitimate concerns posed by the criminality that Venezuela suffers.

A new reform to the Code was presented, which attempted to harden some measures relating to detentions in flagrancy and to providing longer terms for prosecutors to carry out investigations. The reforms also eliminated jury trials, as they were said to be cumbersome and it was impossible to provide security for the jurors. According to some specialists, the reform, instead of strengthening the Public Ministry, has propitiated its inefficiency and undermined some of the defendant's guarantees. One positive aspect of the reform is that the new provisions broaden the guarantees and rights of victims.

In a related development, efforts were under way to re-establish non-judicial mechanisms for detaining suspected criminals. The Minister of National Security proposed a law intended to revive the repealed "law of vagabonds and criminals" (*ley de maleantes y vagos*), and at the time *Attacks on Justice* went to press, a similar bill was being proposed by a member of the legislature of Miranda state. Adoption of such legislation would constitute a serious setback, as this law had in the past been used to detain persons without any evidence whatsoever.

THREATS AGAINST THE JUDICIARY, LAWYERS AND PROSECUTORS IN PORTUGUESA STATE

During the period under review, an “extermination group”, made up of police officers of the Portuguesa State Police, was exposed, following several extrajudicial executions that took place in this state. In May 2001, prosecutors inspected the headquarters of the state police. The search prompted the opening of 62 cases on more than 100 extrajudicial executions involving 19 police officers. The investigation also determined that the police officers who were detained left the police detention centre with the authorisation of the director of the state police and proceeded to kill one of the witness against them. During the investigation, the extermination group circulated pamphlets containing death threats against lawyers, politicians and 12 alleged delinquents, 11 of whom had been already murdered. The Attorney General asked for protection for forty witnesses, victims and prosecutors, some of whom had previously been threatened. In September 2001, searches carried out on the premises of the state police of Portuguesa uncovered numerous irregularities, including that four of the six detained police officers were not in their cells. Despite these extraordinary irregularities, the Portuguesa State Police Commander continues to be on duty and no disciplinary or administrative measures have been taken in the case.

CASES

Rene Molina [National Inspector of Tribunals]: Mr. René Molina was appointed as National Inspector of Tribunals. In his position, he was mandated to assure the removal of judges who were not fulfilling their duties. In July 2000, the President of the National Legislative Commission (the interim legislative body that existed during the period after the new Constitution was approved and before the new Congress was elected) denounced him publicly for abusing his powers and for producing a new “judicial tribe”. After a strong debate, Mr. Molina had to resign.

Pablo Aure [Lawyer]: In January 2000, Mr. Aure was arrested in Carabobo state, after having sent a letter to a national newspaper in which he criticised the armed forces. A trial started within the military judiciary against Mr. Aure. Although Mr. Aure was released, the proceedings continued. The Attorney General’s Office challenged the military court’s jurisdiction over this case, and concluded that due to the civilian character of the accused, the case should have been passed to the civilian judiciary.

THE FEDERAL REPUBLIC OF YUGOSLAVIA

The period covered by this report saw dramatic political changes in the Federal Republic of Yugoslavia. President Slobodan Milosevic was ousted by a peaceful popular uprising after 13 years in power. Although he was at first not willing to accept the results of the September 24 elections, Milosevic was ultimately forced by popular pressure to step down. The newly elected President Kostunica established an interim government. He reinstated diplomatic relations with several western countries and his neighbours. The FRY was admitted to the UN and the OSCE. Reforms of the judiciary are underway in the Republics of Serbia and Montenegro. The UN is transferring greater power to the people of Kosovo and the province is on its way to greater self-rule.

The Federal Republic of Yugoslavia (FRY) is a constitutional republic that comprises the Republics of Serbia and the Republic of Montenegro and the two autonomous provinces Vojvodina and Kosovo. Serbia and Montenegro proclaimed the establishment of the FRY on 11 April 1992 and claimed to be the sole successor to the former Socialist Federal Republic of Yugoslavia.

On 27 April 1992, the Constitution of the FRY came into force. According to Articles 96 and 97 of the Constitution, the President of the Federal Republic is the head of state and cannot be from the same republic as the Prime Minister, who is the head of the government.

The Federal Assembly (*Savezna Skupstina*) consists of the Chamber of Citizens (*Vece Gradjana*) and the Chamber of Republics (*Vece Republika*). Deputies to the Chamber of Citizens represent the citizens of the Federal Republic, while deputies to the Chamber of Republics represent the member republic from which they were elected.

The period covered by this report saw dramatic changes in the FRY. Serbia's opposition united for the first time on 10 January 2000 with 16 anti-Milosevic parties calling for early elections and joint street protests.

On 6 July 2000 the Constitution was amended by the Milosevic-dominated federal parliament in order to allow Milosevic to seek two new four year

terms of office through popular ballot. Previously, the president of Yugoslavia was elected by the legislature for only one term. The other amendment provided that the upper house of the legislature would be directly elected. The power to organise the elections was shifted from the two states Serbia and Montenegro to the Federal Government.

Milosevic announced the holding of federal and legislative elections on 24 September 2000. The political establishment of Montenegro boycotted the elections, complaining that its role in the federation had been diminished by the constitutional changes. In August 2000 15 Serbian opposition parties nominated the Democratic Opposition of Serbia (DOS) candidate Vojislav Kostunica, the leader of the Democratic Party of Serbia, as their joint candidate for the September elections. On 21 September 2000, boxes of completed ballot slips were discovered, which suggested attempts by the ruling regime to rig the vote.

The results of the voting on 24 September 2000 were unclear, with widely divergent outcomes reported by different sources. The turnout was at around 75 per cent, but due to the call to boycott the elections by the government of Montenegro, only 25 per cent of the registered voters of Montenegro participated. The Centre for Free Elections and Democracy gave the results as 58 per cent for Kostunica and 33 per cent for Milosevic. However, the Federal Election Committee, which was controlled by the government, announced that Milosevic had won 40.23 per cent and Kostunica had won 48.22 per cent. This result meant that a second round of voting would be necessary because none of the candidates had reached the 50 per cent necessary to avoid a runoff. Kostunica immediately rejected participating in a second round of voting and called the elections fraudulent. The OSCE commented in a preliminary statement on 24 September 2000 that "the elections (...) were fundamentally flawed."

While Milosevic insisted on a second round of voting, pressure on him to accept defeat grew. The Serb Orthodox Church declared Kostunica President on 28 September 2000 and the military chief, Gen. Nebojsa Paskovic, declared that the military would not intervene. On 29 September 2000 Vojislav Seselj, leader of the Serbian Radical Party, a coalition party in the former government, offered his support to the opposition. The opposition called a general strike on 2 October 2000 to force Milosevic to accept his defeat. The protesters included over 20,000 miners and technicians from Serbia's two largest coal mines, students in all major cities, who walked out of classes, and workers from all over the country, who joined the strike. On 4 October 2000 the Constitutional Court of Yugoslavia, which was allegedly

politically manipulated, annulled the election results and declared that Milosevic was to complete his term until June 2001.

After Milosevic had failed to comply with an ultimatum issued by the opposition to step down by 3 p.m. on 5 October 2000, supporters of the opposition stormed the parliament building, took over the state television station and official news agency Tanjug and started negotiations with the security forces. The same evening Tanjug announced that Kostunica was the elected president. This news was welcomed by world leaders immediately. In a television address on 6 October 2000 Milosevic finally admitted defeat and congratulated Kostunica.

On 7 October 2000 Kostunica was formally sworn in as president. On 16 October 2000 the DOS and Milosevic's Socialist Serbia (SPS) agreed on the formation of a transitional government which included the four main political parties and groupings. The new transitional Cabinet of the FRY was sworn in on 4 November 2000. The new Prime Minister of the FRY is Zoran Zizic of the Socialist People's Party of Montenegro.

On 24 May 1999, the International Criminal Tribunal for the former Yugoslavia (ICTY) indicted Milosevic and four other senior officials and officers for war crimes and crimes against humanity committed by Yugoslav and Serbian troops under their command in Kosovo in early 1999. The Government of the FRY under Kostunica at first arrested Milosevic in a national corruption investigation, but later under the pressure of the international community, including donor countries, adopted a bill on cooperation with the ICTY. Although the Constitutional Court of the FRY had declared the bill unconstitutional, the Government of the FRY on 28 June 2001 finally respected the international obligations of the country and handed Milosevic over to the ICTY. The International Commission of Jurists (ICJ) issued a Press Release on the same day describing the handing over as a legal watershed. The ICJ stated that this "... marks the first time that the international community will hold a former head of state to account for war crimes and crimes against humanity. It sends an unequivocal signal that impunity for these gross violations of international law will not be tolerated, irrespective of the office of the perpetrator." The ICJ also commented that the obligation under international law is absolute and that "(c)oncerns that the government side-stepped the objections of the Constitutional Court in transferring Milosevic to the Hague are misplaced."

REPUBLIC OF SERBIA

The National Assembly of Serbia was dissolved awaiting early parliamentary elections. Elections for the legislature (National Assembly) of the Republic of Serbia were held on 23 December 2000. The Democratic Opposition of Serbia (DOS), an alliance of 18 parties and headed by Kostunica polled 64 per cent and thereby won 176 of the 250 seats in the Assembly of Serbia. The SPS (former party of Milosevic) polled only 14 per cent and thereby won only 37 seats. The OSCE commented that "(t)he election was conducted largely in line with accepted international standards for democratic elections." The only matter of concern was the situation in Kosovo because some 900,000 Kosovar Albanians were wiped from the voting register. The DOS formed a new government in Serbia in February 2001.

REPUBLIC OF MONTENEGRO

The President of the Republic of Montenegro is Milo Djukanovic, who was elected in 1997 and heads a reform coalition that has been governing Montenegro since the 1998 parliamentary elections. The Constitution of 1992 grants equal status to the Republic of Montenegro and the Republic of Serbia. In reality, Serbia has dominated Montenegro politically and there has been a growing movement for independence. Serbia did not recognise the 1997 presidential elections and the 1998 parliamentary elections in Montenegro and excluded representatives of Montenegro's elected majority party from federal decision-making bodies in 1998. Since then, Montenegro has not recognised the authority of the Federal Assembly or associated institutions.

Montenegro has its own currency, central bank, customs and diplomatic service, thereby enjoying a certain degree of *de facto* independence.

The amendment of the Constitution of the Federal Republic of Yugoslavia on 6 July 2000 violated the required legal procedures. The illegitimate changes reduced the role of the Republic of Montenegro even further and led to the boycott of the upcoming federal, presidential and legislative election. When Kostunica won the elections, the opinion of the international community, which had previously supported the democratic changes in Montenegro, changed and support for Montenegro's drive for independence cooled.

The relationship between Serbia and Montenegro did not change considerably after the victory of President Kostunica. The ruling coalition became increasingly strained between those favouring compromise with Serbia and those striving for independence.

On 22 April 2001 legislative elections were held in Montenegro. President Djukanovic was seeking a clear majority for his pro-independence Democratic Party of Socialists (DPS) in order to mount a referendum later in the year to split from Serbia. However, the DPS-SDP "Victory belongs to Montenegro" coalition did not win a decisive majority. The coalition polled 42.04 per cent of the vote, while the pro-Yugoslav coalition of Predrag Bulatovic and his Socialist People's Party (SNP) gained 40.56 per cent of the vote. In relative terms, the DPS-SDP coalition "Victory of Montenegro" won the election, but failed, however, to get an absolute majority of votes. The pro-independence parties consisting of the DPS, SDP, Liberal Alliance and the Albanian Parties represented in parliament, altogether concentrate 44 out of 77 seats in parliament. On 28 May 2001 the DPS signed a cooperation agreement with the Liberal Alliance, whereby the latter would support a DPS-SDP minority government. On 29 May 2001 President Djukanovic named the current Prime Minister, Filip Vujanovic, to head the new Government. Vujanovic had served in the post since February 1998.

The transfer of Milosevic to the UN International Criminal Tribunal for Former Yugoslavia (ICTY) has put a further strain in the relationship between the two Republics, because the representatives of Montenegro on the federal level opposed this move. However, it is not the ruling coalition on the republican level in Montenegro that opposed the cooperation with the ICTY. Due to the boycott of the federal elections by the political establishment of Montenegro in September 2000, the then (and now) opposition led by the SNP, who participated in the federal elections, won 19 out of 20 seats in the Chamber of Republics of the Yugoslav government. Thus, the SNP, which is a an opposition party on the republican level, is a strong component of the federal government holding the seat of the Prime Minister.

Kosovo

The province of Kosovo, in the south of Serbia, with a mainly ethnic Albanian population, was given almost complete autonomy by the 1974 Constitution of the former Yugoslavia. In 1989 President Milosevic of Serbia reduced Kosovo to an administrative region of Serbia and the Albanian language and cultural institutions were suppressed. The Kosovo self government was dissolved by Serbia in 1991 after ethnic Albanian leaders had proclaimed an independent "Republic of Kosovo".

In 1996 the Kosovo Liberation Army (KLA) emerged to fight for independence. An armed conflict between the Serbs and the Kosovo Albanians

erupted in January 1999. The ethnic cleansing by Serb and Yugoslav forces that followed between January and June 1999 forced thousands of ethnic Albanians to flee. When no peace deal could be brokered in February 1999 at an international meeting in Rambouillet, NATO on 24 March 1999, began a campaign of daily air-strikes against military targets in the FRY, followed by an EU oil embargo, beginning on 30 April 1999. The NATO military campaign lasted until early June 1999.

UN Security Resolution 1244 established the UN Interim Administration Mission in Kosovo (UNMIK), whose mandate is to organise a civil administration, coordinate humanitarian assistance, promote democratisation and institution-building and restore the economy. On 10 June 1999, NATO deployed a peacekeeping force, K-FOR, in the province as the Yugoslav military withdrew from Kosovo in accordance with the Military Technical Agreement.

During the period covered by the report, Kosovo remained under the administration of UNMIK. In protest against the killing of Serb civilians by radical Kosovar Albanians, Serb leaders withdrew from the UNMIK on 4 June 2000 but returned later that month.

On 28 October 2000, the first democratic elections for 30 municipal assemblies were held in Kosovo in an effort to enhance local self-government. The Democratic League of Kosovo (LDK), headed by Ibrahim Rugova, polled 58 per cent of the vote. According to the OSCE, which ran the elections, the Democratic Party of Kosovo (PDK) polled 27 per cent and the Alliance for the Future of Kosovo (AAK) won just 8 per cent. In the end, the LDK gained control over 21 municipalities and the PDK over six. Since the PDK and the AAK are both parties that are headed by former KLA fighters, the result demonstrated minority for the nationalist hard-line parties. The overall participation by political parties and by voters was high, but the elections were generally boycotted by the Serb population, due to security concerns on their part. The election observers stated that the elections were held in accordance with international democratic standards and met the criteria for credible elections. The elected municipal assemblies commenced work in November 2000. Bernard Kouchner appointed members of three municipal assemblies with a Serb majority and they took their seats in December 2000.

On 27 November 2000 Bernard Kouchner announced his resignation as head of UNMIK. The Danish Defence Minister Hans Haekkerup succeeded him on 15 January 2001.

HUMAN RIGHTS BACKGROUND

REPUBLIC OF SERBIA

The human rights situation throughout the Federal Republic of Yugoslavia during the first seven months of the year 2000 was dominated by Milosevic's attempts to stay in power. Opposition politicians and opponents of the regime suffered harassment and prosecution. Vuk Draskovic, the leader of the Serbian Renewal Movement (SPO), was shot at on 16 June 2000. He claimed the assassination attempt was committed by Serbia's state security. The *Otpor* (Resistance), an opposition movement composed mainly of students and young persons, suffered a raid on its headquarters in Belgrade on 4 September 2000 as a consequence of their support for the opposition in their campaign for the upcoming elections. Opposition activists and members of *Otpor* were beaten by the Serb police on several occasions. Independent television and radio stations throughout the country that were controlled by the opposition were closed down or had their signals disrupted by the Yugoslav authorities. Authorities hindered the work of human rights defenders. In May 2000, financial inspectors accompanied by police investigated several NGOs under the pretence of looking at their finances, while in fact they were interrogating the activists and confiscating documents that did not deal with financial matters.

REPUBLIC OF MONTENEGRO

In the period before the election of President Kostunica, journalists, politicians and political opponents were prosecuted for openly criticising the Serbian regime. The military forces that in theory come under the control of both republics were controlled *de facto* by Serbia. Serbia imposed sanctions on Montenegro and the military forces stationed in Montenegro committed human rights violations on the citizens of Montenegro. For its part, the Government of Montenegro generally respects the human rights of its citizens. Nevertheless, there are reports of some arbitrary arrests and detentions by the Montenegrin police and Units of the Yugoslav Army. Furthermore, restrictions on freedom of speech and freedom of the press by federal and republic authorities in some areas were reported.

Kosovo

The human rights situation in Kosovo throughout the period covered by

this report continued to be poor. It was marked by numerous violent incidents against the ethnic minorities of the province. The Serbs, Roma and Muslim Slavs were the most affected minority groups. Nevertheless, ethnic Albanians also continued to be the victims of attacks in areas with a significant Serb population, such as the Serb-dominated north of the divided city of Mitrovica. Many incidents of attacks on Albanians were politically motivated and committed by former KLA members on Albanians belonging to the moderate Democratic League of Kosovo (LDK). Mitrovica has been the scene of many violent clashes between Serbs, ethnic Albanians and the KFOR peacekeepers which attempted to keep them apart. The KFOR peacekeeping forces had to be reinforced several times.

INTERNATIONAL HUMAN RIGHTS MECHANISMS

International obligations

The FRY is party to the International Covenant on Civil and Political Rights and its Optional Protocol, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Elimination of All Forms of Racial Discrimination.

COMMISSION ON HUMAN RIGHTS

On 30 March 2001, President Kostunica was the first Yugoslavian President in nine years to appear before the Commission on Human Rights (CHR). He acknowledged the shortcomings of the previous government with regard to the independence of the judiciary and pledged to undertake reform of the judiciary immediately.

The 56th Commission on Human Rights in its Resolution 2000/26, adopted in April 2000, noted that "the situation in the Federal Republic of Yugoslavia (Serbia and Montenegro) remains a source of grave concern" and condemned "the continued repression of the independent media, political opposition and non-governmental organisations". Furthermore the CHR urged the FRY in more than one paragraph of that resolution to cooperate fully with the International Criminal Tribunal for the Former Yugoslavia (ICTY).

In resolution 2001/12, the 57th CHR welcomed “the political change undertaken by the democratically elected Government of the Federal Republic of Yugoslavia, which shows the clear decision of the people to choose democracy, respect for human rights and fundamental freedoms and integration into the international community over dictatorship and isolation.”

Special Rapporteur

The mandate of Jiri Dienstbier, the Special Rapporteur on the situation of human rights in Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia, was renewed for another year by ECOSOC on 28 July 2000. The 57th CHR in resolution 2001/12 requested the appointment of a special representative with the mandate to examine the situation of human rights in Bosnia and Herzegovina and the FRY, thereby removing Croatia from the mandate.

In his report to the 57th CHR the Special Rapporteur stated that:

Freedom of movement within and between Serbia and Montenegro (excluding Kosovo) has improved and cases of violation of the right to personal security, unlawful detention, allegations of ill-treatment in custody, lack of due process and threats to freedom of expression, conscience and assembly appear to have declined, although serious cases continue to arise. (...) Nonetheless, deeply troubling human rights problems remain across the Federal Republic of Yugoslavia, many the result of the still-uncorrected abuses of the Milosevic years(...). In Serbia (excluding Kosovo) the cases of many individuals arrested and subject to trial for political views during the Milosevic years remain unresolved, and hundreds of Kosovar Albanian political prisoners and thousands of Serbs who resisted service or deserted the security forces remain in prison or under threat of prosecution. (...) and the administration of justice remains mired in its dysfunctional, politicised past.

With regard to Kosovo Mr. Dienstbier noted in his report, that:

In Kosovo ... the functioning of the judiciary and prison systems remains far below acceptable international standards. ... As before, the Special Rapporteur expresses deep concern over the difficulty UNMIK has had in establishing a judiciary that functions in accordance with international standards governing fair trial. Most problematic have been trials involving ethnic

minorities, particularly Serbs, where bias on the part of Kosovo Albanian judges and prosecutors has been evident, and trial procedures poor. UNMIK efforts to address the problem of bias – hiring international judges and prosecutors to handle proceedings involving Serb defendants – has foundered, as few international legal professionals have been recruited or are willing to remain for more than six months. In addition, UNMIK still has not adopted regulations incorporating basic due process protections into the applicable law in Kosovo. No *habeas corpus* right – the ability to challenge the lawfulness of arrest and continued detention – is currently available ...

European Union

Prior to the presidential, federal and legislative elections of 24 September 2000 the EU promised financial and trade concessions in case of Milosevic's defeat during the elections. On 9 October 2000 the EU lifted the oil embargo, flight ban and several financial and travel restrictions.

Membership in the UN, the OSCE and the Council of Europe

On 27 October the FRY applied for membership in the United Nations. The membership was formally restored on 1 November 2000, eight years after the General Assembly of the UN had decided that Serbia and Montenegro could not automatically retain the membership of former Yugoslavia. On 27 November 2000 the FRY was also admitted into the OSCE. The FRY has also entered into accession discussions with the Council of Europe.

THE JUDICIARY

The federal Constitution regulates the jurisdiction and the composition of the Federal Constitutional Court and the Federal Court. The constitutions and laws of the respective republics govern the remaining part of the judiciary system.

At the federal level, a Federal Court and Federal Constitutional Court exist to which certain Supreme Court decisions may be appealed. In other cases the Supreme Courts decisions are final. The Federal Constitutional Court rules on the constitutionality of laws and regulations and on the

conformity of the Constitutions of the member republics with the Constitution of the Federal Republic of Yugoslavia. The court system at republic level consists of municipal, district and supreme courts. The republics are responsible for enforcing the decisions of the Federal Constitutional Court. A military court system also exists.

REPUBLIC OF SERBIA

The Courts of general jurisdiction in Serbia are the Municipal Courts (138), the District Courts (30) and one Supreme Court composed of 74 judges. There are also 16 Commercial Courts and one High Commercial Court.

Serbian judiciary under Milosevic

The judiciary under the Milosevic regime was far from independent. The executive had extensive control over the judiciary and blocked any legislative reform. Although the Constitution of the Republic of Serbia declared that the judiciary was independent in practice its judiciary was highly prone to political influence.

The campaign of intimidation against the Association of Judges of Serbia (the "Association") demonstrates the obstacles confronted by judges seeking to create an independent judiciary. The Association was founded by Serbian judges in 1997 as a voluntary professional non-party and non-political association to improve the judicial system and the independence of the courts. The Association was denied its request to join the register of associations of citizens by the administrative authorities, and consequently was not able to obtain the status of a legal person. This denial was confirmed by a decision of the Supreme Court of Serbia of 17 February 1999 that in effect banned the work of the Association. Nevertheless, the Association continued its activities, such as drawing attention to the financial dependence of judges and the political pressure to which they were subject.

The former President of the Supreme Court of Serbia, Mr. Balso Govedarica, threatened members of the Association of Judges of Serbia with removal from office in October 1999 unless they revoked their membership in the Association. All judges were asked to declare their membership or non-membership in the Association at staff meetings, and those who admitted their membership were immediately dismissed. Over 40 proceedings for dismissal of judges and presidents of courts were instituted. The National

Assembly of Serbia dismissed the President and two members of the Governing Board of the Association of Judges of Serbia without any legal procedure on 21 December 1999. These included: **Slobodan Vucetic**, judge of the Constitutional Court of Serbia, **Zoran Ivosevic**, judge of the Supreme Court, and **Bozo Prelevic**, judge of the Fifth Municipal Court in Belgrade. On 12 July 2000, the National Assembly dismissed 20 judges in the same manner, among them all remaining judges that were members of the Association. The direct reason allegedly being an open letter analysing the situation of the judiciary and condemning the influence of the executive over the judiciary written by 13 judges who were members of the Association on 17 June 2000. However, it is more likely that the dismissals were prompted by the judges' participation in the Association and the regime's efforts to ensure the loyalty of the judiciary in the election period

These measures were in violation of international norms pertaining to the independence of the judiciary, and more specifically of Principles 8 and 9 of the 1985 UN Basic Principles of the Independence of the Judiciary. These Principles guarantee, *inter alia*, the freedom of expression and the freedom of association of judges.

Among the judges dismissed in July 2000 were: **Leposova Karamarkovic**, judge of the Supreme Court of Serbia from 1991 - July 2000 (now President of the Serbian Supreme Court), **Vida Petrovic Skero**, judge of the District Court of Belgrade from 1995 - July 2000 (now President of the Belgrade District Court) and **Radmilla Dragicevic-Dicic**, judge of the District Court of Belgrade from 1994 - July 2000 (now Deputy President of the Belgrade District Court). They are now Board members of the Association of Independent Judges of Serbia, which is currently reconstituting itself.

In a report submitted at a conference before the OSCE Office for Democratic Institutions and Human Rights the judges gave a detailed account of the shortcomings of the judiciary of Serbia under Milosevic. The report states that "(p)olitically significant cases or those in which the interest of individuals from the governing parties was involved were assigned to already chosen suitable judges" to guarantee the "right" outcome of a trial. The report further describes how "(f)requently, suitable judges were temporarily transferred to other courts, even to other towns, where they would deliver "correct" decisions under the instruction of the executive. In the past few years, high government officials would publicly declare an individual guilty even though no criminal proceedings had been initiated. The presumption of innocence was not respected. Furthermore, the executive would obstruct or

constrain the enforcement of legitimate decisions delivered by a court.” The report also described how the executive controlled the financial autonomy of judges by keeping their salaries beneath a minimum standard. The court budget was part of the state budget and hence under complete control of the executive. The financial status of the judges encouraged corruption in the Serb judiciary. The ruling parties were involved in the corruption by granting loans and promotions to obedient judges. Another means of controlling the suitability of the judges was the process of the election and dismissal of judges. The judges were elected on political grounds. The dismissal of judges was in theory governed by the Courts Act. In reality this act was not implemented. The report summarises that “(a) the end it came to the point where not one judge who was not loyal could be elected; moreover if the judge was disloyal he/she could be dismissed.”

Necessary steps for a reform of the judiciary - Improvements and shortcomings since the election of Kostunica

After 13 years under the regime of Milosevic, where the rule of law was generally not respected, it is not realistic to expect the instant reform of the judiciary of the Republic of Serbia. However, certain normative and personnel changes are pressing and immediate. Measures should be taken in this regard.

The OSCE, which has a Mission in the Federal Republic of Yugoslavia, is mandated, *inter alia*, to support the reform of the justice system. The OSCE held a workshop on 9 April 2001 to facilitate and promote the legal reform process by engaging in a dialogue with relevant Ministries, judges and prosecutors, as well as domestic NGOs and international organisations, with the objective of defining common goals.

Overall, workshop participants expressed the view that the judiciary is weak and de-moralised and hence ill-equipped to face the numerous challenges ahead, such as possible war crimes trials, corruption cases, complex cases of organised crime, restitution and compensation cases and new issues such as internet criminality. A legal framework providing for the full independence of the judiciary must be established as a precondition for addressing these issues.

One of the main problems remains the extremely low income of the judges and the resulting danger of corruption in the judicial system. The judicial budget remains part of the state budget and therefore the judges are still captive to decisions made at the political level. The salary of judges was increased by 30 % in December 2000 to a monthly income of 170.- DM

(5,000 dinars) for a Municipal Court Judge, 200.- DM (6,000 dinars) for a Belgrade District Court judge and 270.- DM (8,000 dinars) for a Supreme Court judge. This salary range is beneath the price of a minimal consumer basket, valued at 320.- DM (9,600 dinars) in November 2000. The shortage of funds is not only reflected in the low salaries; there is also a severe shortage with regard to the technical equipment of the judicial personnel and the physical working conditions. A lack in computers, fax, dictaphones and other vital equipment is acute.

Other issues that need to be tackled are the procedures for appointment and dismissal of judges, the way in which cases are assigned to individual judges, and the budgetary autonomy of the judiciary. The drafting of a law regarding these issues was underway by the Serbian Ministry of Justice at the time of writing.

Another main problem is the personnel composition of the judiciary. Several observers noticed the obedient mind-set of many judges as a long-standing problem. Some judges, who in the past abused laws and judicial authority and are currently handling cases which have political implications, have a tendency to please the new authorities, even at the expense of fair trials. There will have to be training of judges and judicial personnel, notably in the area of human rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The prosecutors also suffered from political influence and the influence of the police on the conduct of investigations. The role of the investigative judge is also currently under scrutiny with voices calling for a more enhanced role of the prosecutor in the investigation. The procedure of appointment of prosecutors will have to be reviewed. Furthermore, prosecutors also lack sophisticated investigation equipment and have low salaries.

REPUBLIC OF MONTENEGRO

The Government of the Republic of Montenegro respects the constitutional provisions for an independent judiciary in practice.

With regard to the reform of the judiciary, the Republic of Montenegro is further advanced than the Republic of Serbia. However, the reform process is also not instantaneous and Montenegro currently faces problems distinct from those confronting Serbia and Kosovo.

There remain lengthy pre-trial periods and inefficiencies in the judiciary. There are procedural and institutional shortcomings, stemming from a variety

of factors, that result in the “denial of justice”. As in Serbia, Montenegro had to choose between two options: whether to replace all the judges from the old regime or to keep most of them. Montenegro opted for the latter choice, but in order to assist the “old” judges in their application of contemporary legislation, judges are being trained in democracy and human rights. The OSCE is playing a very active role in this field and in the reform of the judiciary of Montenegro.

With the assistance of the OSCE, the adoption of several pieces of legislation is presently under consideration, *inter alia*, the Law on Courts, the new draft law on Petty Crimes (Misdemeanours), and the Law on Public Prosecutors. Preparations to reform the law on execution of criminal sanctions are also ongoing.

The Court structure

The organisation and jurisdiction of the courts of Montenegro are regulated by the Law on the Courts, passed in 1995, which provides for the separation of powers and the independence of the judiciary.

The court system of the Republic of Montenegro is divided into Basic Courts (15), Higher Courts (2), Commercial Courts and the Supreme Court. The jurisdiction of each of these Courts corresponds to its Serbian equivalent.

The new Law on Courts

The draft of the new Law on Courts had been finalised at the time of writing and some last opinions by a pool of experts, including among others the Council of Europe, ODIHR/OSCE and ABA/CEELI, had been forwarded to the Ministry of Justice for consideration and implementation into the draft. The law was expected to be presented to the parliament in the fall of 2001.

The main goal of the new law is to establish a more independent judiciary and to enable the beginning of fair trials within a reasonable time. The reforms envisaged include the introduction of an Appeal Court and Administrative Court (1st level and appeal courts), thereby improving the existing organisation of the courts. The Appeal Court would be the Court of Second Instance for criminal cases and commercial cases, while the Administrative Court would only deal with administrative cases. Another important change in the law is the independent budgeting of courts and the implementation of European standards, such as the right to a fair trial.

Working conditions for judges and lawyers

Due to the poor economic situation in general, judges, lawyers and prosecutors face problems similar to those of their counterparts in Serbia. Low salaries, poor technical equipment and often no computers or access to the internet reflect the general situation of the society in Montenegro.

Kosovo

According to UN Security Council Resolution 1244 (1999), UNMIK was to be composed of four pillars. The United Nations High Commissioner for Refugees (UNHCR) was the lead agency for humanitarian assistance. Since the emergency stage in Kosovo came to an end, this pillar had been phased out by the end of June 2000. The United Nations (UN) leads the civil administration, the Organisation for Security and Cooperation in Europe (OSCE) leads the democratisation and institution-building and the European Union (EU) covers reconstruction and economic development. The UN Security Council also set up the international military force KFOR (Kosovo Force).

The Special Representative of the UN Secretary-General (SRSG), Mr. Hans Haekkerup, is the head of UNMIK and the highest international civilian official in Kosovo. His role is to coordinate the work of the remaining three pillars and to assist the development of the political process designed to determine Kosovo's future status.

UNMIK completed setting up the Joint Interim Administrative Structure (JIAS) in February 2000 to achieve greater inclusion of Kosovars in the civil administration. The JIAS is headed by the Office of the SRSG. The highest-level consultative body of JIAS is the Kosovo Transitional Council (KTC), with 36 members reflecting the pluralistic ethnic and political range of Kosovo's society. The Interim Advisory Council (IAC) is the executive board of the JIAS and also serves as an advisory cabinet for the SRSG. It makes recommendations for amendments to the applicable law and regulations, and proposes policy guidelines for the 20 administrative departments. Each of the 20 administrative departments are led by two Co-Heads, one Kosovar and one UNMIK international staff. They provide social and administrative services. There is a similar structure at the local level, where 30 municipal councils were elected on 28 October 2000.

According to UN Security Council Resolution 1244 (1999) all legislative and executive powers, including the administration of the judiciary, are vested in UNMIK. The laws of the Federal Republic of Yugoslavia and the Republic of Serbia are respected by UNMIK as long as they do not conflict

with internationally recognised human rights standards or regulations issued by the Special Representative.

The JIAS Administrative Department of Justice (DOJ) has been established and is responsible for the overall management of the judicial system. The Special Representative has the authority to appoint or dismiss any person in the interim administration, including the judiciary, and can issue regulations that will be in force until repealed by UNMIK or by the Kosovo Transitional Council.

Applicable Law in Kosovo

UNMIK Regulation No. 1999/1 of 10 June 1999 provides that the laws in force in Kosovo prior to 24 March 1999 should continue to apply in the province, insofar as they did not contravene internationally recognised human rights standards. This regulation was, however, amended by Regulations 1999/24 and 1999/25 that state that the applicable law in Kosovo will be those regulations promulgated by the Special Representative, including subsidiary rules, and the law in force in Kosovo on 22 March 1989. The reason behind these amendments is a sensitivity in applying Serbian criminal law which was used for the revocation of the autonomous status of Kosovo and the repression of the Kosovo Albanians.

Federal law is applicable in any situation where neither UNMIK regulations nor the law in force in Kosovo on 22 March 1989 can be applied. In criminal trials the defendant will have the benefit of the most favourable provisions of the laws in force in Kosovo between 22 March 1989 and the date of issuance of a new regulation. Legal actions taken under UNMIK Regulation 1999/1 will remain valid.

Judicial system in Kosovo

The judiciary in Kosovo failed to function after the end of the conflict, as almost all the Kosovo Serb judicial officials had left and the Kosovo Albanian judicial personnel did not return to Kosovo. Before the conflict the Kosovo judiciary consisted mainly of Serbian judges and prosecutors. During the Serb regime, 30 out of 756 judges and prosecutors were Kosovo Albanians.

The law applicable in Kosovo provides for an independent judiciary, but due to years of ethnic conflict and oppression by the regime of Milosevic true judicial independence has not been achieved yet. Some judges and prosecu-

tors were the victims of pressure, in particular in cases involving ethnic disputes.

One of the main tasks after the war in 1999 was the reestablishment of the court system in Kosovo. The Supreme Court of Kosovo, which had been abolished in 1991, was re-established under the auspices of UNMIK. In the meantime 65 judicial organs have been re-established. UNMIK set up five district courts, 18 municipal courts, the Commercial Court, 13 offices of the Public Prosecutor, a number of misdemeanour courts, the Appeals Instance for Misdemeanours Courts and the district attorney offices.

Three decrees were issued with regard to the judicial system in Kosovo: one that established a Joint Advisory Council for judicial appointment, one that appointed the members of this council and one that appointed four prosecutors, two investigating judges and a three-judge panel approved by the Judicial Panel.

Regulation NO. 2000/38 of 30 June 2000 established the Ombudsperson Institution in Kosovo. On 12 July 2000 Bernard Kouchner appointed Mr. Marek Antoni Nowicki for this position. Section 3 of regulation NO. 2000/38 states that "The Ombudsperson shall have jurisdiction to receive and investigate complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution. The Ombudsperson shall give particular priority to allegations of especially severe or systematic violations and those founded on discrimination." This independent body began operating free of charge on 22 November 2000. Unfortunately, KFOR is not included in the bodies whose actions can be criticised.

The OSCE and the Council of Europe and other partners also established the Kosovo Judicial Institute (KIJL) to strengthen the independence of the judiciary and rule of law in Kosovo. This is a training institute for Kosovo judges and prosecutors. Training in international human rights law and other subjects relevant for the development of the new judiciary is provided by Kosovo and international experts. The KIJL is currently part of the OSCE Rule of Law Division, but the OSCE envisages handing the KIJL over to the local Kosovo administration and establishing a permanent and independent institute which will provide continuing legal education to current and future members of the Kosovo judiciary.

The Department of Human Rights and Rule of Law has developed the Legal System Monitoring Section (LSMS), an independent programme that monitors the functioning of the legal system in Kosovo. The LSMS releases

periodic reports accessing different areas of the legal system of Kosovo. These reports have included issues such as, *inter alia*, the material needs of the emergency judicial system, the expiration of detention periods for current detainees, the treatment of minorities by the judicial system and access to effective counsel.

In its most recent report entitled "Kosovo: A Review Of The Criminal Justice System" the LSMS noted that "the Kosovo criminal justice system still falls short of international standards, despite recent improvements." The report lists as UNMIK successes the establishment of a functioning judicial system in less than a year, the appointment of international judges and prosecutors to avoid bias, guidance provided by UNMIK to courts on applicable law including international human rights standards, and translation and interpretation support services.

However, the report also listed several shortcomings of the current system. With regard to the applicable law it notes that the various sources of law create confusion as to which law to apply and how to apply the law, which results in inconsistent approaches by courts and authorities. Furthermore, some provisions of the applicable law may conflict with human rights standards. With regard to the impartiality of courts, the report documents bias by the courts against Kosovo Serb defendants. Another main issue is detention of individuals in violation of international standards. There reportedly exists no legal framework to challenge illegal detentions.

State of the judiciary in Kosovo

In an update to his report to the 57th session of the CHR the Special Rapporteur on the situation of human rights in Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia noted that

One reason the violence (in Kosovo) persists unchecked is the continuing struggle UNMIK is having to establish the rule of law. The judiciary remains plagued by poorly trained judges - often biased or subject to intimidation - and ineffectual administration. For example, the judiciary has still not been able to redress the unfairness of trials of Serbs charged with war crimes. ... In the face of clear bias on the part of Albanian judges and prosecutors and intense pressure from United Nations and international human rights organs, UNMIK finally adopted a regulation authorising panels of majority-international judges and an international prosecutor in cases involving

minorities. Unfortunately, however, the regulation has been applied arbitrarily and its application has been inexplicably denied in a number of controversial cases Longstanding efforts to bring judicial norms in Kosovo into conformity with international human rights standards have still not borne fruit. Serious problems remain with long pre-trial detention periods and the lack of *habeas corpus* right - the mechanism for challenging the legality of detention.

UNMIK constitutional framework

On 14 May 2001 UNMIK unveiled a constitutional framework for provisional self-government in Kosovo and announced elections to a legislative assembly for 17 November 2001. This assembly will have powers in health, education, and environment, but ultimate executive authority will remain with the head of UNMIK, Hans Haekkerup. He will have the power to dissolve parliament. UNMIK will also keep control over taxes and the budget of the province, the judiciary, and the Kosovo Protection Corp (the civilian successor of the KLA). It is envisaged that the legislative assembly will have 120 seats, 100 seats elected directly, ten reserved for the Serb minority and ten for the other ethnic groups (including Ashkali Roma, Egyptian Roma, Turkish, Bosniac and Gorani). The assembly will elect a President of the region, who will have a representative role and will in turn appoint a Prime Minister. The Prime Minister will then be in charge of nominating a Government. The Government will not comprise the ministry of defence, nor the ministry of foreign affairs.

Since Kosovo became a UN protectorate in 1999 this is the greatest step so far to transfer power from the international body to the people of Kosovo. It is the latest in a series of provisions set up by UN Resolution 1244 to provide autonomy for the province. Hans Haekkerup is reportedly of the opinion that the taking care of day-to-day problems by the citizens themselves will contribute to reducing violence in the province.

CASES

The judges that were dismissed by the National Assembly of Serbia on 12 July 2000 because of their activities in the Association of Judges of Serbia are: **Leposava Karamarkovic**, Supreme Court; **Jelisaveta Vasilic**, Superior Commercial Court; **Radmila Dragicevic-Dicic**, **Miroslav Todorovic**, **Ivan**

Bajazit, Dusan Slijepcevic, Neda Antonic, Goran Cavlina, Ravijojla Kastratovic and Vida Petrovic-Skero of the Belgrade District Court; **Gordana Mihajlovic, Mirjana Pavlovic, and Sanja Lekic** of the Second Municipal Court in Belgrade; **Vlasta Jankovic**, Fifth Municipal Court in Belgrade; President of the Municipal Court in Novi Sad **Djuro Pilipovic**; **Djordje Rankovic** and **Bosko Papovic** of the District Court in Pozarevac; and **Jovan Stanojevic**, District Public Prosecutor in Pozarevac.

Bosko Papovic [investigative judge of the Pozarevac District Court]: He was assigned the case involving charges against two Otpor members Momcilo Veljkovic, Radojko Lukovic and legal practitioner Nebojsa Sokolovic who were accused of attempted murder and assistance in attempted murder of Milosevic's son Marko Milosevic. He dismissed the charges due to lack of evidence but was ordered to bring charges against them. He resigned in protest and was formally relieved of duty by the Serbian Parliament.

Husnija Bitici [ethnic Albanian lawyer and member of the Belgrade Bar Association]: Mr. Bitici and his wife were threatened and seriously injured on 17 March 2000 by four masked men who entered their Belgrade apartment. Mr. Bitici was representing Kosovar Albanian prisoners that were held in detention in Serbia at the time this attack occurred, and this was allegedly the reason for the attack. On 3 May 2000 the UN Special Rapporteur on the Independence of the Judiciary sent a communication regarding Mr. Bitici. This incident is similar to the abduction of lawyer **Teke Bokshi** in December 1999 (see last year's edition of Attacks on Justice), who was also representing Kosovar detainees in Serbia.

Nebosja Simeunovic [investigative judge of the Belgrade District Court]: He went missing on 7 November 2000 and his body was found on 3 December 2000 on the right bank of the river Danube. The cause of his death has not yet been established; there are many speculations, ranging from suicide to murder by State Security Agents. Simeunovic had dealt with delicate investigations for the regime. The cases he was assigned included the investigation of political murders. The last case he was assigned was the investigation of the strike of 11 "Kolubara" miners. He had to establish beyond reasonable doubt that they committed sabotage and misused their right to strike. Furthermore, he had to establish that the two prominent DOS leaders, Nebosja Covic and Boris Tadic, assisted in committing that offence. When he refused to take the case he told friends that he received constant threats. He did not give anymore details fearing for the safety of his friends.

ZAMBIA

Despite moves by officials to interfere with the judiciary in politically related cases, the country's judges and lawyers generally strive to remain independent. However, poor administration of the judiciary, limited resources and lack of judicial personnel has led to severe backlog in Zambian courts. There has been a political clamp-down on perceived dissidents in advance of elections scheduled for the end of 2001. The authorities seem unwilling to prosecute those who commit human rights abuses.

BACKGROUND

Zambia gained independence from Britain on 24 October 1964 and Kenneth Kaunda became the first President of the Republic. On 2 August 1991, the adoption of a new Constitution introduced a multi-party system, thereby ending the monopoly of Kaunda's United National Independence Party (UNIP). The first multi-party elections in November 1991 resulted in the victory of the Movement for Multi-Party Democracy (MMD) and the election of President Frederick Chiluba, a former trade unionist.

The present Constitution, dates from June 1996. While similar to the 1991 Constitution, it contains amended provisions regarding the qualifications of presidential candidates and grants the President and the National Assembly increased powers in respect of their relationship with the judiciary. The May 1996 amendment 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 his parents are Zambian by birth or descent". This amendment had the direct effect of excluding former President Kaunda, whose parents were Malawian, from standing in the presidential elections. The UNIP boycotted the November 1996 elections that confirmed the government of MMD and President Chiluba.

Executive power is vested in the President, who is elected directly by universal suffrage for a term of five years and may be re-elected only once. The President is the Head of State and the Commander-in-Chief. The President appoints the Ministers of his Cabinet from among the members of the National Assembly, and they are collectively answerable to the National Assembly. The President has the power to declare a state of emergency and to dissolve the National Assembly. Article 45 of the Constitution provides for

the office of the Vice-President, who is appointed from among the members of the National Assembly and performs such functions as are assigned to him by the President of the Republic.

Legislative power is vested in the Parliament, which consists of the President and the National Assembly. The National Assembly is composed of 150 members elected by universal, direct suffrage, with not more than eight members nominated by the President, and the Speaker, nominated by the members of the National Assembly. Traditional chiefs are not qualified to be elected as members of the Parliament. Legislation passed by the National Assembly must be assented to by the President in order to become law. Members of the Parliament form parliamentary committees with the mandate to consider specific matters or bills. The Constitution also provides for a House of Chiefs, an advisory body composed of 27 chiefs from the various provinces.

The country is divided into nine provinces, including the capital of Lusaka, each of which is administered by a centrally appointed Provincial Secretary and a partially elected Provincial Council. The provinces are subdivided into 55 districts, each administered by a centrally appointed Governor and a partially elected District Council.

Presidential and parliamentary elections are to be held on 27 December 2001. At the beginning of 2001 President Chiluba had seemed eager to amend the Constitution in order to seek a third term, but on 8 May 2001, following pressure from the opposition, international donors and even by members of his own cabinet, Chiluba announced that he would not stand for an unconstitutional third term in office. In the meantime, more than 20 dissident members of the ruling MMD party including the country's Vice-President and eight ministers have been expelled from the Parliament.

In May 2001, an impeachment petition was filed against President Chiluba before the House Speaker of the National Assembly. The petitioners, mostly MMD parliamentarians, obtained 65 signatures, enough to compel the Speaker to convene parliament to hear charges of gross misconduct against President Chiluba, who had come under intense criticism for corruption in his government. On 30 May 2001, the Parliament postponed the debate on the impeachment motion.

HUMAN RIGHTS ISSUES

The human rights situation in Zambia deteriorated, with the government

taking steps to silence political opposition. The independent media came under attack and human rights NGOs and political parties were threatened with deregistration. The absence of adequate enforcement mechanisms and a lack of political will has led to a general culture of impunity for those who commit human rights abuses.

Human rights mechanisms

Zambia is a party to the International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to the ICCPR, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child. Zambia is also a member of the African Union (formerly Organisation of African Unity). Zambia has not submitted a single report under the African Charter on Human and People's Rights, although its first report was due in 1988. Zambian scholars have stressed that despite the fact that the country has ratified various international instruments, the police forces and other public officials had not been informed or received training in respect of their application..

The Constitution provides for an autonomous Human Rights Commission. It has been reported that the Zambian Permanent Human Rights Commission, established in May 1997, remained active only on non-contentious issues. It continued to issue statements about human rights abuses, notably employment grievances and prison conditions, but avoided criticism of the Government. Of the 960 complaints handled since inception, 797 of the cases were labour related..

Freedom of expression and freedom of assembly

Under Zambia's Public Order Act, any group of citizens wishing to hold a public demonstration must notify the police seven days before the demonstration. However, the police have tended to abuse the law and have arbitrarily determined whether a gathering could or could not take place. Opposition parties, NGOs and other civil society groups were regularly denied permission to assemble or had their meetings cancelled on public security grounds.

On 24 January 2000, following pressure from the Ministry of Information, the privately owned Radio Phoenix announced it was discontinuing a live

phone-in program sponsored by a human rights NGO. On 19 August 2001, the government announced that Radio Phoenix had been suspended due to its failure to renew the licence under which it operates. Human rights activists fear that the decision to suspend the radio station is part of a wider campaign to silence the independent media prior to the elections scheduled for the end of 2001.

Attacks on Zambian journalists appear to constitute reprisals for critical press coverage of President Chiluba and other top-ranking officials of the ruling MMD. Several journalists have been charged with criminal defamation of the Head of State under Article 69 of Zambia's Penal Code that prescribes up to three years in jail for "any person who with intent to bring the President into hatred, ridicule or contempt, publishes any defamatory or insulting matter". The most serious attack on the independent press was the prosecution of eleven journalists from the Lusaka daily *The Post* on charges of espionage for publishing a March 1999 report alleging that Zambia's army could not withstand an attack from Angola. On 18 August 2000, all of the journalists were acquitted with the exception of editor Fred M'membe. On 21 December 2000, the Lusaka High Court finally acquitted M'membe in a ruling criticising the government's abuse of the 1969 State Security Act, under which the journalists were prosecuted. However, on 17 August 2001, he was again arrested and charged with criminal libel over comments made about President Chiluba. The newspaper had published an editorial and stories in which two politicians accused the President of diverting four USD millions which was meant to buy maize through a Canadian company in 1997. The journalist spent eight hours in custody before a magistrate ruled that the arrest and charges were illegal. On 21 August 2001, Fred M'membe surrendered to the police to face charges of defaming President Chiluba, as the government announced that the President could no longer ignore the accusations of impropriety and had decided to clear his name in court. Editor M'membe along with reporter Bivan Saluseki and former Labour Minister Edith Nawakwi, who was quoted in the article, were accused of subjecting Chiluba to hatred, ridicule or contempt.

Arbitrary arrest, detention and prison conditions

Criminal suspects are often arrested on the basis of scant evidence and police stations frequently become "debt collection centres", as police officers acting upon unofficial complaints detain debtors without charge. The Magistrates and Judges Association identified congestion in prisons as an extremely serious problem. Prison conditions remain harsh, and, according to

official statistics, prisons designed to hold 6,000 prisoners held over 12,000 persons.

In 1999, the High Court issued a decision banning corporal punishment in the country. The court system undertook efforts to ensure that the ban was upheld and the Chief Administrator of the High Court publicly reminded magistrates of their obligation to uphold the ban. A meeting with prison officers was held in order to re-reinforce the ban. During the year 2000, the Chief Administrator of the High Court, prevented a magistrate from implementing a corporal punishment sentence.

Impunity

Police officers responsible for deaths in custody were rarely prosecuted and courts tend to give lenient sentences to those charged with similar offences. In May 2000, the government announced its intention to create a national forensic laboratory to provide the police with resources for professional investigations. A governmental Commission of Inquiry, established in 1998 to investigate the alleged torture during detention of suspects in a 1997 coup attempt, completed its work in June 2000. It should be noted that the Head of the Commission of Inquiry was High Court Judge Japhet Banda, who had himself sentenced to death fifty-nine of those accused on the basis of confessions allegedly rendered under torture. According to the report submitted to President Chiluba, the torture inflicted on some of the 1997 failed *coup d'état* suspects was so severe that it permanently destroyed and impaired both the dignity and capabilities of the victims, potentially prompting them to give incriminating statements that could implicate innocent people, including themselves. The Commission recommended that the government immediately bring to justice the named police and other security personnel who were involved in the torture of coup suspects.

The death penalty

Throughout 2000 there was continuing debate over the issue of the death penalty. More than 230 prisoners are under sentence of death, some of whom have been on death row for over 25 years. There have been no executions since 1997. In a case before the High Court of Zambia during the period under review, the death penalty is being challenged on the grounds that it is unconstitutional. The appeal is made by Benjamin Banda and Cephas Kufa Miti who were found guilty of aggravated robbery and sentenced to death on 13 October 1999. On 14 December 2000, the case had a first hearing in the

High Court. The State was not ready to respond on the argument on that occasion, and the case was adjourned. On May 2001, the Attorney-General responded that Zambia had deliberately chosen not to accede to international treaties abolishing the death penalty, and therefore, it was permissible according to the Constitution. He described the petition as “premature “ and “incompetent”. The Court had not yet come to a judgement, but it was expected that the matter will go to the Supreme Court of Zambia on appeal.

THE JUDICIARY

The Zambian legal system is based primarily on common law traditions. Most laws have been codified over the past decades and are published under the “Laws of Zambia”. Where Zambian law is silent, the current law of England and Wales is applicable. Similarly, decisions of common law courts are influential in Zambian courts.

Part VI of the 1996 Constitution organises the judiciary. The latter consists of the Supreme Court, the High Court, the Industrial Relations Court, subordinate courts, local courts and any other courts as may be prescribed by an Act of Parliament. In the discharge of their judicial functions, the judges of the courts are independent, impartial and subject only to the Constitution and the law. Judges conduct themselves in accordance with a code of conduct promulgated by the Parliament. Article 91 para.3 stipulates that “the judiciary shall be autonomous and shall be administered in accordance with the provisions of an Act of Parliament”.

COURT STRUCTURE

The Supreme Court of Zambia is established under Article 92 of the Constitution and by the Supreme Court Act, Chapter 52 of the Laws of Zambia. It is the final court of appeal for civil and criminal matters 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. Currently, the Supreme Court is composed of nine judges, one of them being attached to the International Criminal Tribunal for Former Yugoslavia and the other doubling as Chairperson of the Human Rights Commission. 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 were no objective appointment criteria. The Constitution allows the President to dispense with the requirement that a judicial candidate have the specified prior experience. The office of the Chief Justice is organised under Articles 92 and 93 of the Constitution. The Chief Justice is appointed by the President subject to ratification by the National Assembly. The Chief Justice is in charge of drafting the rules with respect to practice, direction and procedure of the Supreme Court.

The High Court is established by Article 94 of the Constitution and by the High Court Act, Chapter 50 of the Laws of Zambia. The High Court, split into such divisions as are determined by the Parliament, enjoys unlimited and original jurisdiction to hear and determine any civil and criminal proceedings, except for proceedings falling within the jurisdiction of the Industrial Relations Court (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, which is composed of 20 other judges appointed by the President on the advice of the Judicial Service Commission (JSC) and ratification by the national Assembly.

Act No. 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, while the other members are appointed by the Minister of Labour. All the members must be persons with knowledge and experience in labour affairs. The 1990 Act provides for the right of appeal against verdicts of the Industrial Relations Court, but may only be invoked after the Minister of Labour makes the appropriate declaration by statutory instrument.

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. Subordinate courts are presided over by a single magistrate who is either a qualified lawyer or a lay person. In every district of the Republic, there is a Magistrates 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 super-imposition of

offices carried out by the same person caused delays both at the Magistrates Court and High Court levels. It was proposed by a number of magistrates and lawyers to separate these functions and appoint different persons to them. Subordinate courts are empowered to adjudicate on appeals from the local courts. An aggrieved party has the right to appeal against the decision of a subordinate court to a superior court.

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 determining the courts' jurisdiction. Their jurisdiction encompasses 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 enjoy a wide latitude in invoking customary law. The judgements are often not in accordance with the Penal Code and it is reported that they tend to discriminate against women. Whenever a local court is seized with a civil or criminal matter where a party wishes to be legally represented by a lawyer, the case should be transferred to a subordinate court.

The application of customary law by local court justices remained problematic. In a recent study on the Local Courts in Zambia, when the justices were asked to define customary law, "most of them equated law with marriage and rituals". However, in urban areas, Local Courts have become institutions for quick resolution of community disputes. The justices conduct the proceedings in local languages. The Local Courts Act gives the Minister of Legal Affairs the power to establish a Local Court by granting a court warrant. The Minister may revoke the warrant at any time and can determine the place and sittings of the Local Court. The Act provides for a Local Court Officer charged with supervising the work of the justices. The Local Court Officer may call a case record for inspection, may review the case, hear the witnesses and set aside the judgement. Since the subordinate court is the legitimate appellate court for Local Courts decisions, the supervisory role of the Local Court Officer is unconstitutional. These provisions allowing a fusion of administrative and judicial powers, which are a colonial legacy, clearly violate the principle of separation of powers. Local Courts tend also to broadly interpret contempt of court. Some cases have arisen in which a person who replies to the questions in English or refuses to sit on the floor when ordered has been charged with contempt of court.

According to the Zambian Ministry of Legal Affairs, there are 65

Magisterial Districts involving approximately 150 Magistrates, and 440 Local Courts with 900 Local Court Justices. According to the Chief Administrator of the Courts, there are currently only 23 magistrates in Zambia to cover the 72 magistrate positions across the country.

The Constitution provides also for the office of the Attorney-General. The Attorney-General is appointed by the President of the Republic under ratification by the National Assembly. The Attorney-General is the principal legal adviser to the Government and may only be removed from office by the President. She or he is not subject to the direction or control of any other person or authority in the discharge of her/his duties. The Attorney-General is also charged with representing the government in all civil proceedings.

Public Prosecution

Article 56 of the Constitution provides for the establishment of the office of the 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 undertaken by any other authority at any stage before the judgement is delivered. The DPP is appointed by the President and may be removed from office only for incompetence or inability to perform his functions or misbehaviour. The provisions concerning the DPP are under Part IV of the Constitution, which organises the executive and not the judiciary.

Extra-judicial bodies: the Commission for Investigation

Under Article 90 of the Constitution, the Commission for Investigation has the power to investigate and report to the President of the Republic on complaints related to administrative actions of governmental agencies. The Commission has no power to review any judicial decisions. It conducts investigations in private and usually works in an informal way. The Commission has the power to examine witnesses and to acquire access to all related documents. The role of the Investigator-General (Ombudsman) is to determine whether there has been any misuse of power by the governmental bodies. The Investigator-General in the report to the President may recommend the type of remedial action that should be implemented in each case.

Reforms

On 1 April 2000, a Commercial List was established in order to shorten the length of commercial litigation proceedings and to create a court which specialises in commercial law. The Commercial List is headed by Judge Mambilima, who is also Acting Judge of the Supreme Court, and includes three other judges. The Ministry of Legal Affairs has suggested that there may also be the need to establish further specialised courts in which power is vested in the Chief Justice.

During the period under review, the Magistrates and Judges Association made an effort to expedite the process of court appearances by establishing a fast-track court that could quickly hear minor, uncomplicated cases.

APPOINTMENT AND SECURITY OF TENURE

The Judicial Service Commission

Under Article 123 of the Constitution, the Judicial Service Commission (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". All magistrates are appointed by the JSC acting in the name of the President. The JSC appoints the local court justices, local court advisers and as many local courts officers as it sees fit. The JSC is composed of the Chief Justice as Chairman, 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. In addition to the judges, any number of part-time High Court commissioners may be appointed to supplement the work of the High Court judges.

The Commissioners however may also be legal practitioners, an arrangement which may undermine the impartiality and the independence of the judiciary. Furthermore, appointments have been extended to full-time commissioners, who served a "probation" period before being appointed as High Court judges.

Disciplinary procedures

According to Article 98 of the Constitution, Supreme Court and High Court judges "shall vacate that office on attaining the age of sixty-five years."

However, the President on the advice of the Judicial Service Commission may allow a judge to continue in office in order to conclude his or her duties or extend the appointment for a maximum of a further seven years. All judges of the Supreme Court and of the High Court as well as the Chairman and the Deputy Chairman may only be removed from office for inability to perform their functions of office, whether arising from infirmity of body or mind, incompetence or misbehaviour. If the President considers that the question of removing a judge should be investigated, he or she shall appoint a tribunal composed of a Chairman and not less than two other members who hold or have held high judicial office. The tribunal will inquire into the matter and will advise the President on whether the judge should be removed from office. If the tribunal advises the President that the judge should be removed for inability, incompetence or misbehaviour, the President shall follow the opinion of the tribunal and remove the judge from office.

Resources: the judiciary in practice

The judicial budget depends on the allocation of resources made, on parliamentary approval, by the Ministry of Finance to all government institutions. However, it has been reported that in practice the salaries of the Supreme Court and High Court judges are determined by the President of the Republic, instead of by the Parliament. During the impeachment petition in respect of which President Chiluba was the respondent, the judges of the Supreme and the High Court allegedly received large salary awards twice within a period of nine months. This was viewed as an attempt by the executive to influence the judiciary and undermine its independence. Moreover, 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. Broad rules of procedure give wide latitude to prosecutors and defence attorneys to request adjournments. It is reported that approximately 2000 detainees are awaiting trial in Zambian prisons. In some cases, defendants have been waiting trial for four years. The High Court Commissioner may release detainees if police fail to bring the case to trial, although that did not occur in any case during 2001.

Conditions of service in the Lower Courts are reportedly just as poor as generally in the civil service. In several cases, justices have complained of distressing working conditions and very low salaries which were never paid on time. Often, copies of the Laws of Zambia in use by the courts are outdated. Consequently, due to poor funding, the judiciary has failed to attract and retain professional staff.

Against this background, judges have difficulty fulfilling their duties. Nonetheless, many Zambian judges are striving to act independently. On 23 May 2001, the Lusaka High Court derailed an attempt by the ruling MMD to sack dissident legislators, who had been opposed to President Chiluba's bid for a third term in office. The expelled members of the Parliament contested the matter in the High Court, arguing that their expulsion contravened a court injunction that barred the party from taking any disciplinary action against them. In his ruling, High Court judge Tamula Kakusa declared that the 21 legislators were still members of the MMD party. He added that objections raised by the government's lawyers were based on "flimsy grounds, lacked merit and were feeble afterthoughts" that deserved to be dismissed with costs to follow later. The MMD appealed the decision and the case was transferred to the Supreme Court.

On 6 August 2001, a tribunal that had been established in June 2001 to investigate allegations of abuse of office through misuse of public funds involving three Zambian cabinet ministers found two ministers guilty. The tribunal recommended that the Home Affairs Minister and the Supply Minister should be fired from their positions for diverting two billion Kwacha (about 555,500 USD) to unauthorised use. The ministers asked for the case to be reviewed. Nevertheless, it should be noted that the petitioners in that case claimed "that the tribunal has not conducted itself in a proper and professional manner".

LAWYERS

As of May 2001, there were 462 lawyers in private practice registered with the Law Association of Zambia, the legal professional body. Legal education is undertaken either at the University of Zambia or abroad.

Professional education is provided at the Zambian Institute of Advanced Legal Education. There are approximately 40 lawyers who work for the government as legal advisers. There are also 23 lawyers who appear on behalf of the government as state advocates in the High Court.

The professional conduct of lawyers in Zambia is organised under the Legal Practitioners Act. The Act provides for penal sanctions in case of misconduct. Zambian lawyers are also governed by other professional codes of ethics, such as the Commonwealth and the International Bar Association codes of conduct. Moreover, judicial officers on the High Bench are subject to the Ministerial Code of Conduct. All Zambian public officers, including lawyers and judges, are bound by the Anti-Corruption Commission Act.

It has been reported that there is a shortage of lawyers in Zambia. The pay rates in several neighbouring countries are higher and qualified Zambian lawyers find it easier to practice law in those countries.

Independent experts have also noticed that it takes several years for the Zambian Law reports to be printed and they are not widely available. Many lawyers are forced to rely on out-of-date copies of English legal textbooks for use in the High Court.

Legal Aid

Normally, the governmental Department of Legal Aid provides for representation for indigent defendants. In February 2001, there were 10 Legal Aid lawyers covering the whole of the country. These lawyers are responsible for defending all the cases in the High Court. Each of the Legal Aid lawyers covers up to 50 cases. More than 40 Legal Aid lawyers are estimated to be required in order to provide adequate representation to all defendants requiring free assistance. The Legal Aid lawyers are civil servants, directly employed by the government, and get paid for taking cases where legal aid is required. Upon finishing a case, many of them return to other areas of governmental legal work. It seems that working in the Legal Aid Department is considered a low status appointment. The Legal Aid Act 2001 provides for private lawyers to be paid on a case-by-case basis for undertaking criminal cases.

During the period under review, the Law Association of Zambia rejected a proposal by the Government to amend the Legal Practitioners Act to provide for *pro bono* work as a precondition for the Bar Association to issue practising certificates. The Law Association contended that *pro bono* work has always been voluntary and that the Law Association is currently running a Legal Aid Scheme with the aid of the Norwegian government to provide for the legal representation of those who could not otherwise afford counsel. The Law Association is also seeking to introduce a professional requirement for all lawyers to undertake at least five cases every year for no fee or for a substantially reduced fee. The proposal is that four cases, civil or criminal, should be undertaken for a fee of 400,000 Kwacha (less than 100 USD) and a fifth for no fee at all.

The Government has also attempted to amend the State Proceedings Act aimed at removing the discretion of courts to grant stays of executions or similar interim measures in cases involving acts or omissions by public officers. The Law Association of Zambia objected to that amendment and, although

the Act was initially passed by the Parliament, it was not signed by the President following strong opposition.

CASES

Sachica Sitwala [lawyer, member of the Law Association of Zambia]: On 6 February 2000, Mr. Sitwala was arrested in Mongu while attending to 177 clients, men and women, some with babies on their backs, whose market structures were destroyed by the police. The lawyer was arrested with the 177 clients because the police considered the gathering an unlawful assembly on account of their number. Mr. Sitwala and the 177 clients were detained in an overcrowded prison and were heavily guarded by armed police officers. The President of the Law Association of Zambia, Christopher Lubasi Mundia, and the Vice Chairperson, Mrs. Nellie Mutti, travelled to Mongu in the western province of Zambia 600 miles from Lusaka, and successfully defended the lawyer and the 177 clients. The police conceded during the trial that the lawyer and the clients had behaved peacefully and that they proceeded to their arrest because they were worried about their number and not about their conduct.

Christopher Lubasi Mundia [lawyer, Chairman of the Law Association of Zambia]: On 12 April 2001, Mr. Mundia notified the police in writing that in accordance with the Public Order Act, the Law Association of Zambia along with several civil society groups was to hold a public rally to debate the issue of President Chiluba's third term. The aim of the rally was to sensitise the public to reject the third-term bid for the President, as this was not provided for in the *Zambian Constitution*. The public rally was scheduled for 21 April 2001 from 10.00 to 17.00. On 18 April 2001, at 08.20a.m., the Commanding officer of the Lusaka division phoned the Chairman threatening him that "the police would not allow the meeting to go ahead and that the gathering would be crushed forcefully with the might at the disposal of the police". Mr. Mundia took the threat seriously and the rally was cancelled. In accordance with the Public Order Act provisions, an appeal was made to the Ministry of Home Affairs in writing, but the Minister failed to reply. The Law Association of Zambia and the involved NGOs filed a petition to the High Court, which ruled in their favour, as the police behaviour was not in accordance with the law. Furthermore, the telephone threats constituted a form of harassment in violation of Article 3 of the *Zambian Constitution* guaranteeing freedom of speech.

ZIMBABWE

Zimbabwe was in deep political and economic crisis following the onset of a violent campaign in 2000 led by “war veterans” to crush the political opposition and seize commercial farms. Significant post-independence achievements in racial reconciliation, economic growth and development of state institutions have already been severely eroded. The continuing non-enforcement of court orders has led to the dismissal of the authority of the courts and the encouragement of general lawlessness. Following months of sustained personal attacks by the Government, its supporters and the press, Chief Justice Gubbay agreed to retire early from his judicial post. Judges and lawyers remained under persistent intimidation by the executive, signalling a further deterioration in the rule of law of Zimbabwe.

Zimbabwe gained independence in 1980 following a war against the white minority regime led by Ian Smith. That regime had declared unilateral independence from Britain in 1965 in what was then Southern Rhodesia. In the early 1980s there was armed conflict in the south and west of the country between the two main parties, the ruling Zimbabwe African National Union (ZANU), dominated by people of Shona origin, led by Robert Mugabe, and the Zimbabwe African People’s Union (ZAPU), dominated by the country’s largest minority group, the Ndebele, led by Joshua Nkomo. During the course of this war, Government forces and in particular the Fifth Brigade committed serious atrocities. An estimated 20,000 civilians were killed. Hostilities ceased in 1987 after a Unity Accord between ZANU and ZAPU, which resulted in the merger of the two parties. Since then, political power has been dominated by the Zimbabwe African National Union-Patriotic Front (ZANU-PF), both under the leadership of President Mugabe.

ZANU-PF won the 1990 and the 1995 elections. Thereafter, until 1999 there was no significant opposition party to challenge the dominance of ZANU-PF. However, in the June 2000 parliamentary elections, the newly emergent Movement for Democratic Change (MDC) succeeded in winning 57 out of 120 seats, thus having enough votes to block any constitutional amendments. Although the MDC has been criticised by the ruling ZANU-PF

as mainly protecting the interests of white farmers, the election results demonstrate that it is a party with vast support from a large part of the black Zimbabwe population, as whites constitute less than one per cent of the population. In the run-up to the June 2000 elections, elements within the Government had allegedly initiated a violent campaign to suppress all political opposition. Violent persecution of political opposition has continued ahead of the scheduled 2002 presidential election. Throughout the 1980s, the Government had proclaimed its intention to pass legislation to make Zimbabwe a single-party state. Although it dropped this plan in 1990, it continued to take measures to ensure that the country was a *de facto* one-party state.

The Constitution of Zimbabwe, known as the Lancaster Constitution, was agreed to in London as a schedule to the Zimbabwe Constitution Order 1979 and has since been amended several times. The Lancaster Constitution provided for a bicameral Parliament, a Prime Minister as the Head of Government and a ceremonial President. Subsequent constitutional amendments resulted in the abolition of the office of the Prime Minister, the establishment of a President with executive powers, a unicameral Parliament and a Declaration of Rights allowing for derogation from certain provisions under specified grounds, such as during a state of emergency.

The President is now the Head of State, Head of Government and Commander in Chief of the armed forces. The President is elected by voters registered on the voters roll and holds office for a period of six years, after which he may be re-elected for a further period of office. The President has the power to dissolve the Parliament. The Constitution provides for two vice-presidents at a time, appointed by the President, whose responsibilities include assisting the President in discharging official functions. The Cabinet of Ministers is appointed by the President. The Ministers, as well as the Vice-Presidents are accountable both to the President and to Parliament.

Legislative power is vested in a 150-member Parliament, elected for a five-year term. One hundred and twenty members are elected by universal suffrage, ten are chiefs elected by all tribal chiefs, 12 are appointed by the President and eight are provincial governors. A two-thirds parliamentary majority is required to amend the Constitution.

On 21 May 1999, following pressure from within civil society, President Mugabe appointed a Commission of Inquiry, according to the Commission of Inquiry Act, to draft a new Constitution for Zimbabwe. The draft Constitution would have, *inter alia*, provided for the office of a Prime Minister, but at the same time would have broadened the presidential powers. After receiving the

Commission's report, the President, acting on his own, added additional clauses to the draft, including a provision in Section 57, allowing for the acquisition of commercial farmland without compensation, unless the United Kingdom Government paid for it. The proposed draft Constitution, known as Amendment 14, was rejected in a February 2000 referendum. The Mugabe Government reacted bitterly and blamed the white majority, particularly the white farmers for the referendum's defeat. In fact, the draft constitution failed because of the overwhelming opposition of black voters in rural areas.

THE CRISIS: FARM INVASIONS, THE WAR VETERANS AND ECONOMIC HARDSHIP

Towards the end of the 1990s, Zimbabwe experienced grave economic hardship, stemming primarily from economic mismanagement and massive corruption. In 1998, food riots took place and the popularity of ZANU-PF diminished rapidly. A promise of compensation to the Liberation struggle war veterans was made, along with a parallel announcement that the government would acquire 1,500 white-owned commercial farms without full compensation. Meanwhile, the inequitable distribution of land remained a pressing and unresolved issue, in a country where 32 per cent of the arable land belongs to white farmers comprising less than one percent of the population. During the 1980s and 1990s, the Zimbabwe government acquired farms, paying fair prices to white sellers, but little effort was made to resettle the acquired land. Similarly, the Commercial Farmers Union (an organisation which represents the interests of the commercial farmers in Zimbabwe), while formally acknowledging the need for land reform, seemed to be acting mostly to protect the short-term interests of its members. In September 1998, the Land Donors Conference took place bringing together all concerned parties. An agreement was reached on a two-year program to resolve the issue. The implementation of the agreement was not achieved. The "fast-track" resettlement program, the Government's latest effort to provide for compulsory acquisition of farms, began in early 2000, when the government's popularity had reached an all-time low.

Within days of the 2000 referendum rejecting the Constitution, the land issue exploded and invasions of farms occurred throughout the country. At least 28 farm workers and nine commercial farmers have been murdered since March 2000. The first land occupations were not, as claimed by the Government, a spontaneous protest by land-hungry people. They were planned, organised and executed reportedly by groups of ZANU-PF supporters, self-named "war veterans". The "war veterans" group appears to be

constituted not only of those who participated in the liberation war, but also younger, typically unemployed ZANU-PF supporters, as well as members of the state security services. It should be noted that many are too young to have fought in the liberation war. The invaders have terrorised, beaten, intimidated and killed farm workers of the white farmers.

Against this background, the commercial farming sector, a mainstay of the economy, has been badly affected. Ongoing intimidation by the squatters continues to disrupt agricultural activity. Due to the loss of agricultural production, Zimbabwe will have to import tons of maize in order to meet its annual domestic requirement. The Government's military operations since 1998 in the Democratic Republic of Congo have allegedly worsened the situation. The United States Congress has recently adopted legislation threatening targeted sanctions unless Zimbabwe ends attacks on the opposition and protects the media and the judiciary. The European Union is considering similar measures. The Zimbabwe government was considering declaring a state of emergency if the threat of imposing conditions went ahead.

On 6 September 2001, during a meeting of the Commonwealth foreign ministers in Nigeria, Mugabe endorsed a land plan to end seizures of white-owned farms in exchange for funds to implement a fair and just land reform programme. Britain and other countries agreed to compensate white farmers for land taken from them as part of the accord. The international community agreed to engage constructively with the UNDP and the government of Zimbabwe in pursuing an effective and sustainable land reform programme. The deal also committed Zimbabwe to broader political reforms, including guaranteeing freedom of expression and pledging to take firm action against violence and intimidation. On 18 September 2001, Zanu-PF unanimously endorsed the land deal. The Commercial Farmers Union and the MDC also welcomed the agreement, but they stressed that it would only be of importance if implemented by the President himself. The farmers have dropped the legal challenges to the transfer, which they say would allow the President to proceed in a manner acceptable to international donors, on whom the government depends to pay out compensation. At the time of this writing, the deal seemed to be unravelling, with new waves of attacks reported against farmers.

HUMAN RIGHTS BACKGROUND

The Constitution of Zimbabwe stipulates that it is the duty of every person to respect and abide by the Constitution and the Laws of Zimbabwe.

Chapter III of the Constitution contains the Declaration of Rights, which sets out what “fundamental rights and freedoms of the individual” are to be protected, subject to certain limitations. These limitations, laid down in the Constitution, stipulate that the enjoyment of those rights and freedoms do not prejudice the public interest or the rights and freedoms of other persons. The Constitution protects, *inter alia*, the rights to life, freedom from slavery and forced labour, freedom from inhuman treatment, and freedom of conscience, expression, assembly, association and movement.

Zimbabwe is a party to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child. Zimbabwe is not party to the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment and Punishment.

On 6 March 2001, the United Nations High Commissioner for Human Rights, Mary Robinson said that she had written again to President Robert Mugabe drawing his attention to international concern over respect for the right to life, security of the person, freedom of expression and freedom of opinion and association in Zimbabwe. The High Commissioner also referred to deep concerns relating to the independence of the judiciary. She made a particular appeal to the President to “use his best endeavours for the well-being of the Chief Justice and other judges and magistrates”.

Violations of property rights

More than a year after the farms invasions, approximately 1,800 properties had been negatively affected. The “war veterans” have not been prosecuted for violence perpetrated against farmers and their workers, widespread theft of cattle and other goods, or destruction of property. Moreover, President Mugabe has declared the invasions “peaceful demonstrations” and ordered the police not to take action against them. In contrast, the police has been quick to press charges against white farmers who try to move the occupiers off their farms. For example, on 11 August 2001, 21 white farmers were arrested and held without bail on charges of causing public violence for allegedly attacking black settlers in the area of Chinhoi. On 20 August 2001, Zimbabwe’s High Court granted bail to the 21 farmers under strict restrictions, including the surrender of passports to the police.

President Mugabe announced that his Government would not pay for the land, but compensation will be made for permanent improvements, such as road, dams and barns. On 16 August 2001, Mugabe announced that the army would be deployed on farms to “speed-up” the redistribution of land and to protect settlers from violent farmers. Most of the farms invaded had been bought following independence by their owners.

Impunity issues

Zimbabwe has a disturbing pattern of impunity going back to the war of independence and the Matabeleland atrocities. In February 2000, a Supreme Court order granted two human rights organisations, the Legal Resources Foundation and the Catholic Commission for Justice and Peace, the right to sue the President’s office in order to release the two official reports on the atrocities in Matabeleland in the 1980’s.

On 6 October 2000, President Mugabe issued a clemency order granting total amnesty to every person liable to criminal prosecution, whose guilt or innocence had not been determined by a court, for any politically motivated crime committed during the period 1 January 2000 to 31 July 2000. Although the order makes exceptions for some grave crimes, such as murder, rape and possession of arms, the amnesty protects the perpetrators of human rights abuses who are liable to prosecution for, or are charged with, assault with intent to do grievous bodily harm, common assaults, kidnapping and abductions (involving in at least one case of “disappearance”) in connection with the 12 and 13 February referendum and the 24 and 25 June 2000 elections. Many international organisations expressed their grave concern surrounding the amnesty law, as it threatens the rights of every citizen and demonstrates a contempt for the Rule of Law. There is strong evidence that many of these gross violations of human rights were committed at the instigation, or at least with the acquiescence of the government officials.

Political violence

In the period following the June 2000 elections, violent attacks and death threats against real and perceived MDC supporters continued. Numerous cases have been reported of police or soldiers beating MDC supporters during rallies or civilians because they live in areas where the opposition is dominant. Torture, including beatings, electric shock and mock drowning, is widespread. In a number of rural areas, war veterans and ZANU-PF supporters conducted “*pungwes*”, or forced nightly political gatherings. Hundreds of villagers have been rounded up, driven to remote areas and forced to chant

ZANU-PF slogans or denounce the opposition until the following morning. The Amani Trust in Harare, which monitors human rights abuses in Zimbabwe, recorded 11 political murders, 61 disappearances, 104 cases of unlawful detention by the authorities, and 288 incidents of torture in July 2001. According to the Amani Trust, "torture is purely intimidatory, not to extract information. It is to terrorise people, to stop them being politically active. Often, it is done quite publicly to send a lesson to others. People are abducted publicly. Their neighbours see it."

The Human Rights Forum in Harare, a coalition of ten groups, including the Amani Trust, Amnesty International and the Catholic Commission for Justice and Peace, published a report in August 2001 concluding that "the rule of law has been replaced by rule by thugs. Armed militias roam the countryside assaulting people whose sole crime is to support the opposition party. The victims have received little or no protection from the law enforcement agencies; worse, members of these agencies sometimes participated in these assaults. "

FREEDOM OF EXPRESSION AND FREEDOM OF ASSEMBLY

During the period under review, the Government restricted freedom of expression, particularly by opposition members and supporters. Editors and journalists remained under constant threat and harassment. Many of them have been arrested, questioned and detained on defamation grounds. Journalists who tried to report independently on the events in Chinoyi were abused and intimidated by the mob. The offices and the printing house of the *Daily News* were bombed in April 2000 and January 2001, respectively. However, major independent newspapers continued to monitor and criticise government policies. Since January 2001, three foreign correspondents have been expelled from Zimbabwe. In July 2001, the government suspended the accreditation of all correspondents for the British Broadcasting Corporation, saying it could no longer tolerate the BBC's "distortions and misrepresentations". At the time of this writing, the Government was promoting new legislation aimed at banning all foreign journalists from working in the country and requiring special permits for domestic journalists.

THE JUDICIARY

Zimbabwe law is based on Roman Dutch law. The law to be administered by the courts, in addition the African customary law, is the law in force in the

colony of the Cape of Good Hope on 10 June 1891, as modified by subsequent statute. The court system is composed of the Supreme Court, the High Court, magistrates' courts and local courts.

Under the Constitution, the Supreme Court is the final court of appeal. It exercises appellate jurisdiction in appeals from the High Court and other courts and tribunals. It also has an original jurisdiction conferred on it by the Constitution to enforce the protective provisions of the Declaration of Human Rights. The Supreme Court consists of a Chief Justice and at least two Supreme Court judges. The Supreme Court is also competent, under the Constitution, to hear constitutional cases at first instance, especially when there is an alleged violation of the Declaration of Rights. It can also hear matters referred to it by other competent courts where a certain law has been challenged as unconstitutional. When it sits as a constitutional court, the Supreme Court sits as a Bench of five judges. The Court's permanent seat is in Harare, but it also sits regularly in Bulawayo.

The High Court has original full jurisdiction, in both civil and criminal cases, over all persons and all matters in Zimbabwe. The High Court is also headed by the Chief Justice, assisted by the Judge President and a number of High Court judges as may be assigned from time to time. The Judge President is in charge of the Court, subject to the directions of the Chief Justice. The Court has permanent seats in both Harare and Bulawayo and sittings are held three times a year in three other principal towns. There are currently 23 judges in the High Court.

Magistrates' courts are established by an Act of Parliament and are divided in regional and provincial courts. Regional magistrates' courts exercise criminal jurisdiction that is intermediate between that of the High Court and magistrates' courts. Regional magistrates' courts are established in Harare and in Bulawayo but also holding sittings in other town centres. Provincial magistrates' courts exercise both civil and criminal jurisdiction. The provincial magistrates' courts are established in 20 centres throughout the country and are staffed by full-time professional magistrates. The Chief Magistrate is in charge of all magistrates throughout the country. Magistrates are appointed by an executive authority.

In 1981, the tribal courts and the colonial era district Commissioner's courts were abolished and were replaced by a system of primary local courts consisting of village courts and community courts. Village courts are competent to try certain types of civil cases and have jurisdiction only where African customary law is applicable. Village courts are presided by officers selected from the local population, sitting with two assessors. Community

courts have jurisdiction over all civil cases determined by African customary law and also deal with appeals from village courts. They have limited criminal jurisdiction over petty offences. Community courts are headed by presiding officers in full-time public service who may be assisted by assessors.

Under the Small Claims Court Act, small claims courts have been established to relieve the workload of the ordinary courts of the land. Under the Act, a qualified lawyer with three years experience, a former legal practitioner or a magistrate may be appointed to preside over claims in these courts. Legal representation is not allowed in these courts. The procedure is designed to be as informal as possible so as to allow for speedy resolution of matters. No formal pleadings are required, but simple forms of application are provided. The courts are designed to deal only with small claims and do not handle, for example, divorce cases. The decision of the adjudicator is final and not subject to appeal, although the proceedings can be reviewed for procedural impropriety before the High Court.

The Administrative Court Act 1979 establishes the Administrative Court, which functions as a court of appeal from a variety of administrative and judicial decisions issued under legislation and by tribunals and statutory authorities.

The Ombudsman

The Office of the Ombudsman is established under an Act of Parliament of 1982. The Ombudsman is appointed by the President acting on the advice of the Judicial Service Commission. The Ombudsman investigates complaints on administrative actions and may only initiate an investigation where a complaint has been lodged. The Act restricts the investigative powers of the Ombudsman to ministries, government departments and statutory authorities. Therefore, actions by the defence forces, police, prison services, the President and presidential staff, the Cabinet office, the Attorney-General and judicial officers may not be investigated by the Office.

Appointment and security of tenure

The Constitution of Zimbabwe provides for an independent judiciary. Section 79B states that in the exercise of judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary.

The Chief Justice and other judges of the Supreme Court and High Court are appointed by the President of the Republic after consultation with the Judicial Service Commission. The Judicial Service Commission consists of the Chief Justice, the Chairman of the Public Service Commission, the Attorney-General, and no less than two other members appointed by the President. It should be noted that the Judicial Service Commission operates in the absence of any written procedures and rules. Under Section 84(2) of the Constitution, if "the appointment of a Chief Justice or a Judge of the Supreme Court or the High Court is not consistent with any recommendation made by the Judicial Service Commission, the President shall cause Parliament to be informed as soon as possible."

Section 86 of the Constitution provides that a judge of the Supreme Court or the High Court shall retire when he or she attains the age of sixty-five years. A judge in good health may retire on attaining the age of seventy years, provided that a medical report attesting to the mental and physical fitness of the judge has been submitted and accepted by the President after consultation with the Judicial Service Commission. A judge of the Supreme Court or the High Court, who has attained the constitutional age of retirement, may sit as a judge for the purpose of giving judgement or in relation to any proceedings commenced or heard by him or her while in office. These provisions do not apply to an acting judge or to a judge who has been appointed for a fixed period of office. Under Section 86(3) of the Constitution, a judge of the Supreme Court or the High Court may at any time resign from his office by notice in writing to the President. The office of a judge of the Supreme Court or the High Court shall not, without the judge's consent, be abolished during his or her tenure of office.

The independence of the judiciary is enhanced by section 87 of the Constitution, which provides that judges of the Supreme Court or the High Court may be removed from office only for inability to discharge their functions or for misbehaviour. The procedure for determining the removal of judges is also guaranteed by the Constitution. Section 87(2) describes the procedure in the case of removal of the Chief Justice, where the President shall appoint a tribunal to inquire into the matter. Section 87(3) describes the procedure in the case of removal of judges other than the Chief Justice, where also a tribunal should be established for inquiry. A tribunal appointed under Section 87 (2) or (3) shall consist of no less than three members selected by the President from persons who have held office as a judge of the Supreme Court or the High Court, persons who hold or have held office as a judge of a court having unlimited criminal or civil jurisdiction in a country in which the common law is Roman-Dutch or English, and legal practitioners who have

been nominated for this purpose. The procedures require investigation and recommendation by the independent tribunal of inquiry and the involvement of the Judicial Services Commission before any dismissal may take place.

The salaries and conditions of service of judges are fixed by the President.

THE RULE OF LAW AND THE COURTS

THE NON-ENFORCEMENT OF COURT ORDERS

Zimbabwe's courts have succeeded against significant odds in maintaining their independence. The Courts have issued many rulings that have declared government policies illegal.

Following inaction by the police and the government concerning the farm invasions, the Commercial Farmers Union made an application in March 2000 to the High Court, to obtain declarations that the farm occupations were unlawful and to obtain orders which would have the effect of ordering the police to act. The orders were sought against the Commissioner of Police, against the War Veterans Association and its apparent leader, Chenjerai "Hitler" Hunzvi, and against the Governor of Mashonaland Central, who was alleged to be encouraging the invasions. On 17 March 2000, an order by consent was made declaring the occupations unlawful and ordering that the persons who had occupied the land should vacate it within 24 hours. Nonetheless, on 10 April 2000, the Commissioner of Police applied before Judge Chinhengo of the High Court to amend part of the order on the grounds that the Commissioner did not have adequate resources to enforce the order. Judge Chinhengo rejected the application in a clear, firm and courageous judgement. In the Judge's view, the Constitution guarantees the right of protection of the law to the farmers, and the police were obliged to provide that protection. Despite the orders of the High Court, the Government still did not act to enforce the orders of the Court, but allowed the farm invasions to continue.

The International Bar Association (IBA), in its report issued pursuant to a visit to Zimbabwe in 2001, noted that "once orders of the courts were issued but not executed the situation got out of control." The non-enforcement of the court orders led to the dismissal of the authority of the courts and the encouragement of general lawlessness. Allegedly, the non-enforcement of court orders was inspired by high-ranking police officials. In some cases, local

police officers who tried to carry out the court orders were either demoted or transferred to other stations. Moreover, it was reported that higher ranking officers have ordered local and lower-ranking officers not to carry out the court orders. Judges complained to the IBA delegation that there was no use in giving certain judicial orders, as they would not be carried out. There was also a widespread perception that selective prosecution based on political allegiance was taking place, in contravention of Section 18 of the Constitution, which guarantees that "every person is entitled to the protection of the law".

Threats to judges

President Mugabe and some cabinet ministers have publicly criticised the justices of the Supreme Court as "relics of the Rhodesian era". "War veterans" have invaded the premises of the Supreme Court and both Supreme Court and High Court judges have received death threats. Traditional chiefs, who are appointed by the Government, called for the resignation of the Supreme Court and in particular the resignation of Chief Justice Gubbay. The apparent reason behind that extensive harassment is that the Government seems to want to reduce the threat posed by cases in which the MDC had challenged the June 2000 victories of the ruling party in 37 constituencies on grounds of gross violence and intimidation during the campaign. The Government also allegedly seeks to ensure favourable decisions in cases dealing with land-related issues.

On 24 November 2000, approximately 200 "war veterans" descended upon the Supreme Court as the Supreme Court Justices were in an adjacent room preparing to enter the Court. They jumped on the tables and shouted slogans, including "kill the judges", for over an hour. The Government failed to prosecute any of the persons who had invaded the Supreme Court and there has never been an official statement condemning the incident. The Attorney General has said that he did not take any steps concerning the incident, because he had not received any official complaint and therefore was powerless to do anything.

In December 2000, the Minister of Information revealed that he had received a statement from that war veterans threatening to descend upon the homes of hostile judges and force them to resign. Throughout February 2001, judges remained in fear for their security, especially when the Deputy Chairman of the Zimbabwean Liberation War Veterans' Association in Harare Province, Mike Moyo, stated that the "war veterans" would raid and occupy the homes of all white judges until "they have boarded the plane back

to Britain". Mr. Moyo noted that "those black judges who sympathise with whites also need to watch out." Even after the agreement between Chief Justice Gubbay and the Minister of Justice (*see below*), war veterans have vowed to continue their attack on the judiciary, including the use of violence to oust from the Bench the Supreme Court and certain judges of the High Court.

Governmental officials have openly criticised judges for allegedly obstructing the Government's reform programs and have called publicly for the resignation of several judges. For example, in January 2001, in a public statement, the Minister of Justice not only criticised the work of the Supreme Court but also called into question the character of the Supreme Court. On 8 January 2001 at the opening of the legal year in Bulawayo, the Judge President, who has since been appointed Chief Justice, gave a widely reported speech in which he made certain criticisms of the Supreme Court and of Chief Justice Gubbay. In February 2001, in an interview with newspaper editors, President Mugabe stated that "judges drank tea with whites". Government officials have called on certain Supreme Court judges to excuse themselves from hearing citizenship cases between white Zimbabweans and the Government. In November 2000, the Minister of Justice had attacked the judiciary on the basis of racism in a speech questioning the ability of judges that had "so faithfully" served the Smith regime to "so faithfully" serve the current Government. In fact, all judges that have been attacked by the Minister of Justice were appointed to the Bench by the Government of President Mugabe.

As a result of these strong personal attacks on judges for making unpopular decisions, judges may be subjected in making their decisions to pressures extraneous to the merits of the case. According to Yvonne Mahklunge, one of the MDC legal advisers, most Zimbabwe judges, fearing attacks and political interference, have refused to handle MDC petitions. The MDC legal advisers have challenged Jacob Manzuzu, the Registrar of the High Court, over delays in replacing Justice James Devittie (*see also Cases below*) in the 29 pending hearings challenging ZANU-PF electoral victory. Against this background, the Government should clearly denounce such threats and should investigate these incidents. However, the Zimbabwe government has been unwilling to protect judges against threats of physical violence and has not provided reasonable security measures. Under Article 4 of the UN Basic Principles on the Independence of the Judiciary, "there shall not be any inappropriate or unwarranted interference with the judicial process". Consequently, the Zimbabwe government has a special responsibility to discourage and criticise publicly such attacks on the judiciary.

Despite the verbal attacks on the judges, the Zimbabwe judiciary is standing up admirably to ZANU-PF's campaign of threats. The trial of Zimbabwe's main opposition leader, Morgan Tsvangirai, on charges of encouraging the overthrow of President Mugabe's government illustrates efforts by judges to uphold the rule of law. On 7 May 2001, the High Court accepted the argument made by Tsvangirai's lawyers that a Rhodesian-era law used to press terrorism charges against him may be illegal. Consequently, the Supreme Court should determine the constitutionality of the sections of the Law and Order (Maintenance) Act that deal with violence and incitement to violence. The charges against Mr. Tsvangirai arise from a statement he made in a rally, in September 2000, when he said that "what we would like to tell Mugabe is please go peacefully, and if you don't want to go peacefully, we will remove you violently". Many Zimbabweans see the trial as an attempt to prevent Mr. Tsvangirai from running for President against Mugabe. If the opposition leader is convicted and given more than six months in prison, he would be barred from standing in the elections.

The resignation of Chief Justice Gubbay

Chief Justice Gubbay was appointed to the post by President Mugabe in 1990 and has served with apparent distinction. In March 2001, the Chief Justice resigned from office with 14 months of his term left to serve. The position taken by Justice Minister Chinamasa was that the Chief Justice had resigned voluntarily. However, the IBA in its mission report in April 2001 stated that "Chief Justice Gubbay was forced into early retirement by relentless pressure from the government and state-controlled Government-supporting media that he should resign, coupled with unfair and untrue allegations about him and threats of violence which the Government appear at least to have condoned." Chief Justice Gubbay had several times challenged the Government's use of special decrees to bypass the Constitution on various issues.

Following threats and intimidation made against Zimbabwe judges, Chief Justice Gubbay, together with Supreme Court Justice Wilson Sandura requested a meeting in mid-January 2001 with the then-acting President Muzenda. The two Justices asked the executive to intervene and to persuade the war veterans to cease their intimidation and threats against judges. In the written request for the meeting, the Chief Justice said that in light of the threats and the intimidation, the judges had become concerned for their safety as well as for the safety of their families. He informed the Government that it had become difficult for the judges to carry out their duties under such

pressure. Reportedly the meeting was not successful, as the acting President was not sympathetic to the judges' concerns. He said that just as the judges felt threatened by "war veterans", the latter felt threatened by the judgements on land issues. During the emotionally charged exchanges between the acting President and the Chief Justice, the latter said that he should perhaps resign if the government was unwilling to provide him and the rest of the judges with additional security. According to the IBA report, his statement was not taken at the time as an offer of resignation.

On 2 February 2001, two weeks after the meeting, the Minister of Justice visited the Chief Justice, who was told that his resignation had been accepted by the President and that a public announcement would be made. At this meeting, the Minister and Chief Justice came to an agreement according to which the Chief Justice would retire from his position on 30 June 2001 and would remain on leave of absence pending retirement from 1 March 2001 to June 2001. The Minister of Justice contended that the Chief Justice had agreed that an acting Chief Justice would be appointed in the meantime. However, the Chief Justice contended that the only commitment he had made was to remain Chief Justice until 1 July 2001.

On 26 February 2001, the Chief Justice wrote a letter to the Minister of Justice in his capacity as the Chairman of the Judicial Service Commission, replying to a request made by the Minister for a meeting of the JSC to appoint an acting Chief Justice. Chief Justice Gubbay questioned the need to convene such a meeting of the JSC and stated that it would be premature to appoint an acting Chief Justice. On 26 February 2001, the Minister of Justice responded with a letter dismissing the Chief Justice from his position. The Minister of Justice informed the Chief Justice that his apparent refusal to comply with the request and to call a meeting of the Judicial Service Commission constituted misconduct and a basis for termination. Therefore, Section 87(2) of the Constitution could be invoked. Furthermore, the Minister of State for Information and Publicity informed Chief Justice Gubbay that the police would bar him from entering his chambers after 28 February 2001. On 27 February 2001, in a press release made by the lawyers of the Chief Justice, it was affirmed that the Chief Justice would not vacate his chambers nor his official residence until his seventieth birthday on 26 April 2002. The lawyers of the Chief Justice contended that the Minister of Justice's letter of 26 February 2001 constituted a breach of the agreement between the Chief Justice and the Minister on 2 February 2001.

On 1 March 2001, Chief Justice Gubbay showed up for work. The police did not prevent the Chief Justice from entering his chambers, but several

officials insisted that the Chief Justice should vacate his office. While Chief Justice Gubbay was in his chambers, Joseph Chinotimba, the leader of the demonstrators who had stormed the Supreme Court on 24 November 2001, and who was currently on bail awaiting trial for attempted murder, forced his way into the Supreme Court demanding to see the Chief Justice. Mr. Chinotimba reportedly took over a guard's cell phone and ordered the Chief Justice, who was at the other end of the cell phone, to vacate his office. Subsequently, the Chief Justice and the Minister of Justice reached a written agreement. In that agreement, they jointly acknowledged "the importance of the independence of the judiciary" and stated that "any action by any party that seeks to undermine or interfere with the independence of the judiciary is contrary to the interests of the people of Zimbabwe."

The two men agreed on the withdrawal of any public statement by the Minister of Justice or other governmental officials demeaning or putting in question the reputation, honour and integrity of the Chief Justice either in his official or personal capacity. The Chief Justice also agreed to remain in his post until 26 April 2001 and to take early retirement with effect from 1 July 2001. Under the agreement, the Chief Justice would be on leave from 1 March 2001 until 1 July 2001 and he would not raise any objection to the appointment of an acting Chief Justice during the period of his leave pending retirement. The Chief Justice insisted that the Minister of Justice, on behalf of the Government, give assurances that there would not be any unlawful suspension, removal or resignation of any of the judges of Zimbabwe. According to the Special Rapporteur on the Independence of Judges and Lawyers, "Chief Justice Gubbay might not have opted for an early retirement if the international community had moved in early enough in support of his office. However, it was early enough to save the other senior judges from being intimidated to retire."

On 13 March 2001, Judge President Godfrey Chidzaisiku was sworn in as acting Chief Justice. A group of about 200 black lawyers has questioned the suitability of Godfrey Chidzaisiku taking over as the substantive top judge. The acting Chief Justice assured the IBA delegation that, although he felt sympathy for the landless people, he would respect the rule of law and judicial independence and he would protect judges from attack. On 20 September 2001, the Chief Justice dismissed an application by the Commercial Farmers Union that he should not be among the five Supreme Court judges to hear a government appeal on the legality of President Mugabe's land reforms. The CFU said in an affidavit that Judge Chidzaisiku's public profile, his close political association with President Mugabe and his statements endorsing President Mugabe's land policy called his impartiality into question. The

Chief Justice dismissed the application saying that he found some of the submissions in the affidavit "contemptuous, insulting, and very racist".

The Minister of Justice also called on two other Supreme Court judges and sought to persuade them to retire. In the case of Justice McNally, the Minister informed the Judge that "President Mugabe would not like anything to happen to him". The Minister of Justice declared that the war veterans, through Chenjerai Hitler Hunzvi, would not recognise any agreement between the Government and Chief Justice Gubbay. The Minister of Justice reportedly commented that Chief Justice Gubbay is the first judge to go and that the remaining judges of the Supreme Court as well as one third of the High Court judges should follow.

In the case of the resignation of the Chief Justice, the constitutional provisions for a judge to be removed from office were not followed. No independent tribunal was established and the Judicial Service Commission was not involved. Moreover, according to the UN Special Rapporteur on the Independence of Judges and Lawyers, the Government's decision to pay the Chief Justice four months salary in lieu of leave is "contrary to the very grain of the office of a judge".

International reaction to threats to the judiciary

The UN Special Rapporteur on the Independence of Judges and Lawyers, Dato Param Cumaraswamy, has made a number of public statements and urgent appeals regarding the developments in the Supreme Court. In remarks delivered on 12 and 25 January 2001, he drew the attention of the Government to Principle 2 of the UN Basic Principles on the Independence of the Judiciary providing that the judiciary are able to conduct their professional duties "without restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect, from any quarter for any reason." On 21 February 2001, the Special Rapporteur sent an urgent appeal to the Government after receiving information that Mike Moyo, a member of the War Veterans Association, had threatened that squads of the war veterans would invade the houses of judges refusing to resign and that they would harm those judges and their families. In his communication, the Special Rapporteur drew the government's attention to the Vienna Declaration and programme of Action of the 1993 World Conference on Human Rights, as well as to Article 26 of the African Charter on Human and Peoples Rights, which holds that "State parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the

promotion and protection of the rights and freedoms guaranteed by the Charter". The Special Rapporteur expressed further concern at the requests by the Justice Minister for certain judges to resign, the early retirement of the Chief Justice and the provocative public comments by government ministers against judges, such as one accusing judges of "favouring whites over the majority black population". On 28 February 2001, the Special Rapporteur asserted that "Judges, including the Chief Justice, are not employees of the Government or any other authority" and that their offices are constitutional appointments. In his Statement to the 57th session of the Commission on Human Rights, the Special Rapporteur remarked that "since the execution of an agreement on 2 March 2001 between the Chief Justice and the Government, threats and harassment seem to have eased". The Special Rapporteur added that he was awaiting indication from the Government as to a date for a mission to which it had previously agreed. The Government has so far failed to agree to a date for an *in situ* mission.

The ICJ has closely followed events in Zimbabwe. In statements dated 7 February 2001 and 2 March 2001, the ICJ expressed serious concern over allegations of executive intervention in judicial appointments and tenure. On 24 April 2001, the ICJ welcomed the decision of the Government of Zimbabwe to grant permission to visit the country later in the year in order to carry out a fact-finding mission with regard to developments regarding the rule of law. The Government has since informed the ICJ that the visit would have to take place in May 2002, after the Presidential elections scheduled for early 2002.

On 23 April 2001, the International Bar Association issued a report that condemned the Government for policies which had caused a breakdown of the Rule of Law. The detailed report followed a visit to Zimbabwe in March 2001 by seven eminent judges and lawyers. The delegation "found much concern that the effectiveness of the judiciary is being corroded by the executive as well as by several police officers' statements that the non-enforcement of judicial orders and acquiescence to land invasions and other criminal behaviour are political matters requiring political decision." On 23 April 2001, the Minister of Information, Jonathan Moyo, dismissed criticism from the IBA, stating that "it was self-evident to any fair-minded person that the judicial system in Zimbabwe is functioning well" and without interference, "save perhaps from teams such as the IBA, whose report seeks to inflame an otherwise settled situation."

The Commonwealth Lawyers Association issued a statement in regard to the threats to the judiciary in March 2001 that concluded: "It is obvious that

Zimbabwe today poses the greatest challenge to Commonwealth political values”.

LAWYERS

Historically, the legal profession in Zimbabwe had a bar divided between advocates and attorneys similar in nature to that between barristers and solicitors. In 1981, the legal profession was fused. The Bar Association of Zimbabwe continues to exist for those practitioners who practice solely as advocates. The present number of registered practitioners in Zimbabwe is approximately 600-800, most of whom practice in Harare, with some 79 situated in Bulawayo. Among this number, 21 attorneys are members of the Bar Association. The main professional body is the Law Society of Zimbabwe. The position and responsibilities of the Law Society are recognised by the Legal Practitioners Act of 1981. The overall number of lawyers in private practice is still extremely small in relation to the size of the population of 12 million. According to the report of the International Bar Association issued after its visit to Zimbabwe in 2001, “this apparent imbalance of the populace to the small numbers of the legal profession and the judiciary may affect public perception on the rights of access to the courts”.

Threats to the legal profession

The Law Society of Zimbabwe has come under pressure by the Government to curtail its criticism of official actions with regard to the judiciary. The Law Society has been courageous in supporting the judiciary. On 5 February 2001, at its annual general meeting, it passed a Resolution deploring, *inter alia*, the culture of violence and intimidation developing in Zimbabwe, especially towards the judiciary. The Law Society also took steps to denounce the speech of the Judge President at the opening of the legal year criticising the Chief Justice. It expressed its dismay at the executive’s promulgation of Statutory Instrument 318/2000, which sought to invalidate all pending legal challenges to the parliamentary elections. When in February 2001 the ZANU-PF recommended that the Government contract exclusively with black firms, the majority of the legal community rejected this proposal.

The Minister of Information and Publicity has reportedly suggested that the Government would amend existing legislation in order to prevent lawyers from issuing statements criticising governmental action relating to legal matters in the future. Such legislation would violate Article 17 of the UN Basic

Principles on the Role of Lawyers, which provides: "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 ...".

With certain exceptions in individual cases, there are no overarching impediments to the work of lawyers, and Zimbabwean lawyers have not been prevented from representing and advising their clients. However, it has been reported that "war veterans" have engaged in frequent attacks against paralegals working in rural areas. Paralegals are the main providers of legal services in the rural areas of Zimbabwe. They are not licensed as lawyers, but are trained to provide legal advice and inform people of their legal rights. Lawyers supervise the work of paralegals. Paralegals have been forced to limit their activities and have closed offices in Lupane and Nkayi, as they have been subjected to harassment and intimidation. Lawyers were said to avoid working in the rural areas because they have no confidence in the police to stop the intimidation and physical attacks. Concerns have been therefore been raised about the Government's commitment to the UN Basic Principles on the Role of Lawyers. Article 16 of the Principles stipulates that "Governments shall ensure that lawyers (a) are able to perform all their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and 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." Article 17 provides that "where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities."

CASES

Justice George Smith and Justice Adam: On 11 November 2000, the Minister of Justice, Patrick Chinamasa delivered a speech in which he questioned "how can personnel so high up in the pecking order of a regime grounded in a racist grundnorm faithfully serve a democratic state?" The question was aimed in particular against Justice George Smith, whom the Minister of Justice said had served as a Cabinet Secretary for the Smith Government. The Minister of Justice also pointed out that Justice Adam "whilst unsoiled by the UDI years, somehow turned up at the Lancaster

Constitutional Conference as a member of the Smith legal team.” (In response to this speech, Justice Smith sent a letter to the President of the Law Society saying that Minister Chinamasa’s speech contained certain untrue statements. Justice Smith explained that he was appointed Cabinet Minister when Bishop Muzorewa was Prime Minister, and that he stayed on in that post for more than three years under Mugabe’s presidency. Justice Smith also noted that Justice Adam had not represented the Smith Government but Bishop Muzorewa in the Lancaster talks.)

Justice James Devittie [High Court Judge]: On 7 May 2001, Justice Devittie, who had ruled on petitions challenging four ZANU-PF victories in the June 2001 parliamentary elections, submitted his letter of resignation but declined to make public the reasons for the resignation. The Judge’s decision came some days after Zanu-PF activists had accused him of bias in favour of the opposition MDC. Justice Devittie had upheld one ruling party victory in a constituency in south-western Zimbabwe and struck down three others on the grounds that the election procedures had been tainted by violence. Justice Devittie had also delivered the verdict upholding the MDC leader’s challenge to the constitutionality of the Law and Order Act (see above). The judge had reportedly received death threats.

Chief Justice Gubbay: The Chief Justice was pressed by the Government to take early retirement (see above).

Tawanda Hondora [Lawyer, Chairperson of Zimbabwe Lawyers for Human Rights]: On 7 April 2000, in Sadza Growth Point, 50 kilometres south of Harare, Mr. Hondora was allegedly violently attacked by ZANU-PF members. Mr. Hondora had gone to Sadza Growth Point to investigate the alleged assaults by police officers of witnesses who had testified in court cases challenging election victory results of the “war veterans” leader Chenjerai Hunzvi. They observed some 30 persons, most of whom were wearing ZANU-PF T-shirts, beating Nelson Chivanga, one of the witnesses in the case. Mr. Hondora was kicked, slapped, and whipped by the ZANU-PF supporters in full view of the police, who did not take action to stop the attack. The lawyer was forced to chant the ruling party’s slogans while marching to the police station, where he was subjected to further beatings by the police. The local police rejected Mr. Hondora’s report of the incident and he and his colleagues filed a complaint at the Harare Central Police Station.

Justice Nicholas McNally and Justice Ahmed Ebrahim [Judges of the Supreme Court]: On 9 February 2001, Justices McNally and Ebrahim went into a meeting with the Minister of Justice believing he was making a courtesy call, and instead found themselves confronted by implicit threats. They

were allegedly pressured to consider early retirement with the stated reason that the Government would not want them to come to any harm. However, the Minister of Justice has denied ever pressing the two judges to resign, saying that the move would be unconstitutional. In a statement issued on 2 March 2001, the ICJ welcomed the stance of the two Supreme Court Justices in affirming their intention to carry out their full terms of office. The Minister of Justice was reportedly seeking to held meetings with two other Supreme Court judges, presumably also to ask them to resign. However, Justices Wilson Sandura and Simbarashe Muchecheterere were reported to have declined to attend a proposed similar meeting unless the agenda was clearly set out beforehand. The Minister has said that he was going to discuss with them “matters of mutual interest”, which he maintained were confidential and not for public consumption.

Chris Ndlovu [Lawyer]: On 18 July 2001, Mr. Ndlovu reportedly was advised by the police not to enter the Magistrates’ court in the eastern city of Mutare, where his client, Philip “Blondie” Bezuidenhout, a farmer, was appearing on charges of murdering a squatter by running him down in his truck. The police stressed that the lawyer should not enter the court, in case he was attacked by “war veterans”. There were, however, numerous police officials situated both in and outside of the court. On 21 July 2001, Mr. Ndlovu had to flee a mob of war veterans, who were demanding to know why he “was defending a farmer who killed a black man”.

ANNEX I

THE 1985 UN BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

The Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985 adopted the Basic Principles on the Independence of the Judiciary by consensus.

The Congress documents were «endorsed» by the UN General Assembly (A/RES/40/32, 29 November 1985) which later specifically «welcomed» the Principles and invited governments «to respect them and to take them into account within the framework of their national legislation and practice» (A/RES/40/146, 13 December 1985).

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas the organisation and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixty United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

INDEPENDENCE OF THE JUDICIARY

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all government and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or communication by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

FREEDOM OF EXPRESSION AND ASSOCIATION

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
9. Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

QUALIFICATIONS, SELECTION AND TRAINING

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointment for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.
11. The terms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.
14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

PROFESSIONAL SECRECY AND IMMUNITY

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.
16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

DISCIPLINE, SUSPENSION AND REMOVAL

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential unless otherwise requested by the judge.
18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.
20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

ANNEX 2

THE UN 1990 BASIC PRINCIPLES OF THE ROLE OF LAWYERS

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Havana, Cuba, from 27 August to 7 September 1990 adopted by consensus Basic Principles on the Role of Lawyers.

In its resolution 45/121 of 14 December 1990, the General Assembly «welcomed» the instruments adopted by the Congress and invited «Governments to be guided by them in the formulation of appropriate legislation and policy directives and to make efforts to implement the principles contained therein... in accordance with the economic, social, legal, cultural and political circumstances of each country.» In resolution 45/166 of 18 December 1990, the General Assembly welcomed the Basic Principles in particular, inviting Governments «to respect them and to take them into account within the framework of their national legislation and practice.»

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language, or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights recalls the obligation of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safeguards guaranteeing protection of those facing the death penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and co-operation with governmental and other institutions in furthering the ends of justice and public interest.

The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

ACCESS TO LAWYERS AND LEGAL SERVICES

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.
3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall co-operate in the organisation and provision of services, facilities and other resources.
4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

SPECIAL SAFEGUARDS IN CRIMINAL JUSTICE MATTERS

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.
6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.
7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.
8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

QUALIFICATIONS AND TRAINING

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognised by national and international law.
10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.
11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

DUTIES AND RESPONSIBILITIES

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.
13. The duties of lawyers towards their clients shall include:
 - (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
 - (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;
 - (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.
14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognised by national and international law and shall at all times act freely and diligently in accordance with the law and recognised standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.

GUARANTEES FOR THE FUNCTIONING OF LAWYERS

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics.
17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.
18. Lawyers shall not be identified with their clients or their clients causes as a result of discharging their functions.
19. No court or administrative authority before whom the right to counsel is recognised shall refuse to recognise the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.
20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.
21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.
22. Governments shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

FREEDOM OF EXPRESSION AND ASSOCIATION

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take

part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisation and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organisation. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognised standards and ethics of the legal profession.

PROFESSIONAL ASSOCIATIONS OF LAWYERS

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.
25. Professional associations of lawyers shall co-operation with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognised professional standards and ethics.

DISCIPLINARY PROCEEDINGS

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognised international standards and norms.
27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.
28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.
29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognised standards and ethics of the legal profession and in the light of these principles.

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THE ELEVENTH EDITION OF **ATTACKS ON JUSTICE**, THE ANNUAL REPORT OF THE **CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS (CIJL)** OF THE **INTERNATIONAL COMMISSION OF JURISTS (ICJ)**, EVALUATES THE STATE OF LAW AND ACTUAL CONDITIONS RELATING TO THE INDEPENDENCE OF THE JUDGES AND LAWYERS IN 47 COUNTRIES. IT CATALOGUES THE CASES OF AT LEAST 315 JURISTS WHO SUFFERED REPRISALS FOR CARRYING OUT THEIR PROFESSIONAL DUTIES FROM JANUARY 2000 UNTIL NOVEMBER 2001. OF THESE, 38 WERE KILLED, 5 DISAPPEARED, 44 WERE PROSECUTED, ARRESTED, DETAINED OR EVEN TORTURED, 23 PHYSICALLY ATTACKED, 67 VERBALLY THREATENED AND 109 PROFESSIONALLY OBSTRUCTED AND/OR SANCTIONED. THE **CIJL** ALSO RECEIVED REPORTS OF AN ADDITIONAL NUMBER OF JURISTS WHO SUFFERED REPRISALS IN 2000-2001, BUT WAS UNABLE TO CONFIRM CONCLUSIVELY THOSE REPORTS.

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