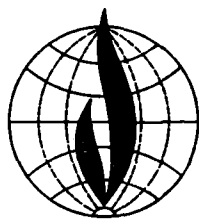


THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

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Human Rights in the World

East Timor and Self-Determination

Since December 1975, the United Nations General Assembly has passed numerous resolutions on East Timor, asserting the right of the people to self-determination and demanding that they be enabled freely to determine their future under UN auspices. Indonesia, on the other hand, claims that the integration of East Timor with Indonesia was the result of an act of self-determination by the representatives of the people. As is frequently the case in such disputes, the historical facts are complex.

East Timor, previously known as Portuguese Timor, is situated at the south-eastern extremity of the sprawling Indonesian archipelago. The people are predominantly Malay or Malanesian in origin with some African, Arab and Chinese influences. The most widely spoken language in the territory is Tetum. Until 1975, it was a colony of Portugal for more than four hundred years.

East Timor's population, approximately 650,000 in 1974, is largely rural. It is economically backward and in the colonial period was heavily dependent on imports and subsidies from Portugal. The majority of the population depend on subsistence farming. Socially, the territory is characterised by the survival of traditional groupings, loyalties and beliefs. Although Catholicism had made some impact and Islam had a few adherents, the local animist beliefs of the people remain the dominant religion.

Prior to the April 1974 coup in Portugal, the political system in East Timor reflected the character of the Portuguese dictatorship. It was considered a province of Portugal under the Organic Law of Portuguese Overseas Territories of 1953. Under Portuguese rule the territory was divided into thirteen administrative divisions, called *Concelhos* or Councils with populations ranging from 25,000 to 84,000. The administration of the *Concelhos* was headed by the *administrator do concelho*, a Portuguese official whose powers were very extensive and varied. Each *Concelho* was further divided into *postos* or sub-districts, administered by an *administrator do posto*. By 1974, there were some 58 *postos* and 60% of their administrators were Timorese. These Timorese became politically active in the territory after the April 1974 coup in Portugal.

The coup brought to power the Armed Forces Movement (MFA) whose objectives were to establish democracy in Portugal and withdrawal from Portugal's colonies. In June of the same year, the new régime in Portugal spelt out three options for the Timorese people. They were: continued association with the metropolitan power, independence, or integration with Indonesia. Interestingly, it was Portugal that offered integration with Indonesia as one of the options, when Indonesia had stated on previous occasions that it had no territorial

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claims to Portuguese Timor.

Within a few weeks of the coup in Portugal, political groupings emerged in East Timor. The three main political parties that emerged at first represented the three options offered by the Portuguese government. They were the Timorese Democratic Union or UDT, the Association of Timorese Social Democrats or ASDT, which later became the Revolutionary Front of Independent East Timor (Fretilin), and the Timorese Popular Democratic Association of Apodeti.

The UDT started as a party strongly in favour of continued association with Portugal but later changed its position to federation with Portugal as an intermediary step before achieving complete independence. The ASDT or Fretilin advocated the 'right to independence and the rejection of colonialism and countermeasures against neocolonialism'. Though initially the leaders of ASDT envisaged a lengthy time frame for the process of decolonisation, their position changed in September 1974 when ASDT became Fretilin and the leaders demanded an immediate declaration from the Portuguese authorities that they would grant independence to East Timor. The Apodeti, claiming that there were close ethnic and cultural links between the people of East Timor and Indonesia, advocated integration with Indonesia. In contrast with the other two parties, Apodeti never gained large support, but it became a focal point for Indonesian interests in relation to East Timor.

In January 1975, the two main parties, UDT and Fretilin, agreed to form a coalition. On 7 May of the same year the first phase of talks on decolonisation took place between the Portuguese authorities and a joint delegation of UDT and Fretilin members. At the talks Fretilin objected to the inclusion of Apodeti in the future talks to be held in Macau, arguing that a pro-inte-

gration party advocating 'recolonisation' should not be allowed to play a rôle in decolonisation talks.

Fretilin's impatience, combined with its interests in radical agrarian and educational reforms, alienated the UDT which unilaterally withdrew from the coalition at the end of May.

Fretilin boycotted the talks that took place in Macau between 26 and 28 June since Apodeti was a participant. After the conference, the Portuguese government proclaimed a constitutional law based on the conference text agreed to by UDT and Apodeti. The new law provided for a three-year interim period before the termination of Portugal sovereignty. It also provided for the setting up of a High Commissioner's Council, comprising a High Commissioner and five Joint Secretaries, two of them to be nominated by Portugal and the other three to come from UDT, Fretilin and Apodeti respectively. There was also to be a consultative government council consisting of two representatives nominated by each of the regional councils. In addition, each of the three political parties was to nominate four members to the government council. The new law stated that elections would be held in October 1976, envisaging the end of Portuguese sovereignty two years later.

It is well-known that in many decolonisation situations opposing political interests have found it difficult to arrive at a consensus and East Timor was no exception. But the political crisis in Portugal, particularly shifts in the ideological position within the MFA, aggravated the rifts within the parties in East Timor. For example, after the abortive right-wing coup by forces under the leadership of General Spínola, the suspicion of the UDT Leaders increased that the MFA officers were conspiring to place Fretilin in the leading decolonisation rôle at the expense of the UDT.

This state of flux was effectively used by Indonesia to create further tension among the parties. The Indonesian newspapers frequently alleged Chinese and Vietnamese involvement in Timor, saying, in particular, that the members of Fretilin were receiving military training from Vietnamese officers who had entered East Timor clandestinely. These reports created fears among the conservative section of the population.

The state of tension and mistrust between the parties culminated in a coup by the UDT. On 11 August 1975, members of the UDT attacked and seized key installations and gained control of the capital, Dili. This was followed by an outbreak of violence between members of UDT and Fretilin. Already, by 20 August the territory was in the midst of a civil war. On 26 August, the Portuguese governor and his staff left Dili for Atuario, an island 30 miles north of Dili. On 11 October, Fretilin announced that it was in full control of the territory and had established a transitional administration. However, this was countered by the Indonesian government saying that pro-Indonesian forces had control of large areas of the territory and predicting that by the end of October they would regain control of the whole of it.

Meanwhile, the then Australian Prime Minister, Mr. Gough Whitlam, ruled out any military or political rôle for Australia in East Timor, stating that "the future of the territory is a matter for resolution by Portugal and the Timorese people themselves, with Indonesia also occupying an important place because of its predominant interest".

In the first week of November, the Indonesian Foreign Minister met with his Portuguese counterpart in Rome and they issued jointly a 'memorandum of understanding'. This noted that Portugal represented the legitimate authority in East

Timor and was responsible for its decolonisation. The two Ministers agreed on the need to hold a meeting of all political parties of East Timor with a view to ending the fighting.

On 28 November, Fretilin declared East Timor an independent 'Democratic Republic' and announced that some fifty Afro-Asian countries had pledged support to the new republic. On 1 December, Mozambique announced its recognition of East Timor under Fretilin.

The Portuguese government rejected Fretilin's declaration as well as a statement made on 29 November by UDT, Apodeti and two other parties which said that Fretilin's action had removed the last remains of Portuguese sovereignty and declared East Timor to be part of the Indonesian territory. On the next day, 30 November, Portuguese representatives at the United Nations formally requested the UN to help settle the East Timor question.

On 7 December, Indonesia made a full-scale invasion of East Timor, seized the capital, Dili, and drove the Fretilin supporters to the hills. The Portuguese government reacted by breaking diplomatic relations with Indonesia and said it would seek the help of the UN to put an end to Indonesia's military intervention. On the other hand, Indonesia reacted by stating that Portugal's sovereignty had ended on 28 November when Fretilin declared independence.

On 11 December, the UN Trusteeship Committee called on Indonesia to withdraw and urged it to desist from 'further violation' of East Timor's territorial integrity. The next day the General Assembly, in a resolution passed by 72 votes to 10 with 43 abstentions, called on Indonesia to withdraw from East Timor to enable the people to decide their own future and condemned the military intervention.

According to some sources, by the end

of December there were nearly 20,000 Indonesian soldiers in East Timor and reports were smuggled out of the territory indicating that the Indonesian troops were involved in systematic killing of Fretilin supporters including civilians. According to some reports, nearly 10,000 people were alleged to have been killed within the first few weeks of the invasion.

Meanwhile, with the help of the Indonesian authorities, the leaders of the UDT, Apodeti and two other smaller parties established a 'Provisional Government of East Timor' (PGET). In February 1976, the PGET announced that all political parties had 'dissolved themselves' and a new unified party had been created. Another PGET statement said that a 'People's Assembly' had been set up by 'consensus and consent', implying that the members were chosen and not elected. On 31 May, the newly convened People's Representative Council of East Timor approved a petition to integrate with Indonesia. The Indonesian government, on 29 June, announced its official acceptance of the merger and a bill legalising the annexation of the territory was passed by the Indonesian Parliament on 15 July.

Two questions that arise in relation to the invasion by Indonesia and the subsequent annexation of East Timor are whether the armed intervention made by Indonesia was justified in law and whether the people of East Timor participated in a genuine act of self-determination.

Indonesia has argued that basically its interest in the territory of East Timor arises out of the geographic, historic, ethnic and cultural ties which makes East Timor an integral part of the Indonesian archipelago. Further, it has also stated that independence for East Timor was unrealistic in view of the economic backwardness of the

territory.

The latter point is not an acceptable justification for denying the people their right to self-determination. Paragraph 3 of the UN Declaration on the Granting of Independence to Colonial Countries and Peoples, states that: "Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence."

As for the cultural ties, the East Timorese generally speaking may belong to the South-East Asian family of cultures but there are doubts as to their direct link with the Indonesian culture. According to Professor Shepherd Forman¹, a leading authority on the anthropology of East Timor, "It manifests an ethnic heterogeneity which characterises the entire region from the Philippines to Australia and from the islands east of Papua New Guinea to the Malagasy Republic". He has also noted that it "... did not come under the aegis of the early Javanese/Islamic principalities and, historical conjecture notwithstanding, Indo-Javanese and Islamic influences barely can be noted, except insofar as Dutch hegemony later effected the spread of some ideas, particularly in the political domain, to Western Timor. East Timor, under Portuguese rule was largely exempt from those influences".

Even if one accepts the argument of the Indonesian authorities and looks for factors that unite both cultures and people, integration between them cannot legitimately be imposed by force.

The Indonesian government seeks to justify its armed intervention by saying that it had a moral responsibility to guarantee the peaceful decolonisation of East Timor and the internal strife endangered national security and the stability of the South-East Asian region.

1) Quoted in *Timor - A People Betrayed*, by James Dunn, the Jacaranda Press, p. 3.

In answer to this it may be said that Indonesia's moral responsibility was to 'promote the realisation of the right of self-determination' in accordance with the provisions of the charter. These provisions state that, 'members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state'.

Indonesia claims that "from the outset... it firmly supported the free and democratic exercise of the right to self-determination by the people of East Timor in accordance with... the Charter of the United Nations and resolution 1514 (XV) and 1541 (XV) of the General Assembly"². The latter resolution specifies the conditions for a valid act of self-determination resulting in integration with an independent state in these terms:

- “(a) The integrating territory should have attained an advanced state of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;
- “(b) The integration should be the result of the freely expressed wishes of the Territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.”

Never before nor since the Indonesian annexation of East Timor have there been any "informed and democratic processes impartially conducted and based on univer-

sal suffrage", and neither the parties which declared on 29 November 1975 that East Timor was part of Indonesian territory, nor the 'People's Representative Council' which approved it in May 1976 were appointed by any such democratic processes.

As for the threat to the security of Indonesia and the region, it is difficult to understand how a small territory in the midst of civil strife could have been a threat to Indonesia which has a considerable military strength.

Indonesia also claimed that it intervened for humanitarian reasons at the request of the UDT, Apodeti and two other parties, which wanted Indonesia to put an end to the civil strife. The doctrine of humanitarian intervention is not recognised by the UN Charter and is generally considered by international lawyers to be now outdated. In any event, as was said in ICJ Review No. 8 of June 1972 on the Indonesian invasion of East Pakistan, "... unilateral action is likely to be arbitrary and to lack the disinterested character which humanitarian intervention should possess". Moreover, when Indonesia intervened the matter was already before the UN and the Indonesian intervention by no means stopped the bloodbath. The killings continued with the Indonesian forces themselves taking part.

As to the present state of opinion in East Timor, it is impossible to obtain any reliable and independent account of it as Indonesia refuses to permit independent observers to visit the territory to assess the situation. This ban applies even to Indonesian citizens who are equally in the dark about events there.

Such reports as have come out of East Timor indicate a degree of repression which suggests that the government has little popular support. These include reports of systematic use of torture, arbitrary killings and

2) *Decolonisation - East Timor*, Indonesian Department of Foreign Affairs, p. 42.

disappearances. Amnesty International has published extracts from a handbook of military interrogators on the case of torture practices. In 1983 the ICRC suspended its activities in the territory following the refusal of the Indonesian authorities to grant ICRC delegates access to all villages requiring assistance. As long as these reports of

massive violations of human rights continue and as long as access to East Timor by visitors is severely restricted, it will be difficult for the Indonesian government to convince the international community that the people of East Timor have freely accepted integration with Indonesia.

Haiti

The Republic of Haiti (27,750 km²) occupies a third of the island of Haiti, of which the other two-thirds are the territory of the Dominican Republic. The border between the two States was determined under a Treaty of 1929, supplemented by another of 1935. In addition to the main island, there are various neighbouring islands, one of which is La Tortuga, famous in literature for having been the base and refuge of Caribbean pirates. The population of Haiti amounts of some 6 million inhabitants.

Haiti is the first example of a successful rebellion of black slaves against their white masters and against the colonial authorities. As a result of the rebellion, France, which had replaced Spain as the colonial power, proclaimed in 1793 the liberation of all slaves in the colony. Having tasted freedom, the struggle was renewed for independence of the people. Eventually, a general insurrection overcame the French troops and Haiti's independence was proclaimed on 1 January 1804. Haiti thus became one of the first countries on the American continent to obtain its freedom.

In 1957, another period began in Haiti's history, that of 'Duvalierism', when a phy-

sician, Dr. François Duvalier, later known as 'Papa Doc', was elected President. It took Duvalier two years to establish an absolutist and dictatorial régime. Then, having gathered all power into his hands, he unleashed a savage campaign of political repression against all who opposed him. He made persecution and terror his mode of government. Human rights and fundamental freedoms were violated and ignored, and a climate of general insecurity was generated for the people. His government was based on repressive groups of supporters, mainly a body of militia called the Volunteers for National Security and better known as the 'Tontons Macoutes'. He placed his political followers in key government posts, controlled the economy and deprived the legislative and judicial branches of all real power. By a constitutional amendment of June 1964, he was designated President for Life (art. 99 of the Constitution), in replacing the article which provided for the election of the President by popular vote for a term of six years.

In 1971 he had further amendments made to the Constitution enabling his régime to continue even after his death. Article 99 of the Constitution confirmed his

designation as President for Life, enumerated in 12 paragraphs his "merits", listed his numerous honorific titles and stressed the need for the *République Duvalériste* (sic) to continue. In article 100, he was empowered to designate his successor, who was also to be President for Life (article 104). The successor designated by Papa Doc was his son, Jean-Claude Duvalier.

One obstacle still remained to be surmounted: this was that under the 1963 Constitution the minimum age for the office of President was 40 years whereas his son Jean-Claude was then only 18 years old. Accordingly, article 91 was amended in 1971 to lower the minimum age to 18 years. For the sake of consistency, the minimum age for election as a Deputy of the Legislative Chamber was also reduced to 18 years (art. 50).

In April 1971, François Duvalier died, and his son became President for Life. On 27 August 1983, the Constitution was again amended, in the space of one week, confirming the Life Presidency of Jean-Claude Duvalier and empowering him to designate his successor, although this time not necessarily a member of his family, and reinforcing the control of the State by the Executive (arts. 107, 108 and 109).

Constitutional framework

Haiti is a party to the following, among other, international instruments relating to human rights:

- the Universal Declaration of Human Rights;
- the American Convention on Human Rights of 1969;
- the International Labour Organisation's Conventions, No. 87 of 1948 concerning Freedom of Association and Protection of the Right to Organise, No. 98 of

- 1949 concerning the Right to Organise and to Bargain Collectively, No. 105 of 1957, concerning the Abolition of Forced Labour, and No. 111 of 1958 concerning Discrimination in respect of Employment and Occupation;
- the Convention on the Elimination of Racial Discrimination of 1965;
- the Convention on the Prevention and Punishment of the Crime of Genocide, of 1948; and
- the Convention for the Abolition of Slavery of 1956.

Haiti is not, however, a party to the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights of 1966.

At the national level, the rights and duties of citizens were laid down in some thirty articles of the Constitution, as well as in laws and regulations. A large number of these rights exist only on paper.

Under the Constitution of August 1983, the administration of the State purports to be based on the three powers - the Executive, Legislative and Judicial. These are supposed to act independently and may not delegate the functions entrusted to them by the Constitution.

Executive power

This is exercised by the President for Life, although the national Constitution establishes that "National sovereignty is an attribute of all citizens. The people shall exercise the prerogatives of sovereignty directly, through 1) the election of the President of the Republic...". In practice, Haitians have not been able to take part in the election of the President during the last 20 years. The institution of a Life Presidency is incompatible with the exercise of this political right.

The head of the Executive has extremely wide powers which often supersede the powers of the other branches. He is responsible for the general administration of the country, the appointment and dismissal of State employees, the conduct of foreign affairs, the command of the armed forces, of the police and of the militia, etc.

Legislative power

This is exercised by a single chamber known as the Legislative Chamber, consisting of 59 deputies elected directly by the people. In certain cases, for instance in order to amend the Constitution or to constitute itself a High Court of Justice to try members of the government, this body is called the National Assembly.

The first legislative elections organised by Jean-Claude Duvalier were held in 1979. Only one opposition candidate was elected. The second elections took place on 12 February 1984, but not a single opponent was elected. A mission sent on that occasion by Americas Watch and the Lawyers Committee for International Human Rights¹ concluded that "the recent elections in Haiti make a mockery of democratic procedures". According to the survey made on the spot by these two human rights organisations, only two opposition political parties were allowed to take part; their main officials were prevented from participating, their active members were threatened, harassed and arrested, there was no press freedom to enable opponents to make their points of view known, and there were no checks or controls to prevent electoral fraud.

The Legislative Chamber, which is responsible for approving the laws, is nor-

mally in session for only three months of the year, a period which can be extended. In the last few years, the practice has been, at the close of the annual session, for the Chamber to confer full powers on the President for Life during the nine-month legislative recess, and to suspend for the same period numerous rights which the Constitution grants to the people. In some years, the suspension has extended to as many as 24 rights. The full powers authorise the President to approve legislative decrees in all matters that he deems useful in the "general interests of the Republic". It will be appreciated that, as a result, the Haitian people have lived for years in a semi-permanent *de facto* state of emergency for 9 out of each 12 months. The legislature has thus become virtually a facade, since it retains only a fraction of its legislative powers and the President can at any time deprive it even of these powers.

The draft laws approved by the Legislative Chamber are submitted to the President, who has an almost unqualified right of veto. The Constitution of 1983 amended its earlier text to the effect that if the President exercises his right of veto, his views may only be over-ridden by the Chamber if there is unanimity among its members (art. 87). This means that it is only necessary for one Deputy to support the views and objections of the President for these to be accepted and the draft law amended or rejected. This is an utterly anti-democratic provision which has no parallel in any other text or constitutional law.

Judicial power

This is exercised by the Court of Cassation, the Courts of Appeal and the lower

1) "Election 1984: Duvalier Style. A report on Human Rights in Haiti based on a mission of inquiry", March 1984.

courts. Both the judges and the judicial officers are appointed by the President for Life, although judges cannot be removed from office except for reasons expressly stated by law.

An analysis of the way in which the Judicial Power is exercised leads to the conclusion that, save in exceptional cases, it keeps within the limits imposed upon it by the dictatorship, and that as a result it has been remiss in its duty of applying the law and defending the rights of the inhabitants, particularly in political cases. It has no true independence, something which is of special importance in the difficult conditions of Haiti.

In response to the criticisms that many political prisoners remain in prison for months or even years without coming to trial, the parliament passed a law in August 1977 setting up a Court of State Security Tribunal, which functioned outside the structure of the normal judiciary. The procedures and decisions of this Court were strongly criticised by Haitian lawyers and eventually, in March 1979, it was integrated by another law into the structure of the ordinary courts.

Freedom of opinion and expression

There is no radio or press freedom in Haiti and the television stations are completely under government control.

In 1977, Jean-Claude Duvalier announced a programme of liberalisation of the régime, which was enthusiastically greeted both within and outside the country. The hope grew that it would be possible to leave behind the marks of a régime which, since 1957, had been characterised by brutality, arbitrary action and the denial of rights and which had contributed to increasing

the economic and social backwardness of the country. This move indicated that there were social forces in Haiti ready to move towards and to demand democracy. It soon resulted in an open and critical press, the formation of political parties which called for participation and economic measures to remedy the crisis, and the creation of non-governmental human rights organisations such as the Haitian League of Human Rights and the National Commission for Human Rights. Lawyers, for their part, were extremely active in defending detainees and political prisoners.

Unhappily, this period of liberalisation lasted for only a short time, less than three years. The régime then began again to use its apparatus of repression which it had kept intact. Critics of the régime or its policies were once again persecuted, arrested without charges or with vaguely worded accusations and threatened or expelled from the country without the right to return. The repression was less overt and more subtle: there were no longer as in the past large-scale massacres or public executions with the bodies of the victims displayed to the gazes of passers-by. All this points to the view that the liberalisation was motivated by a wish to improve the image of the régime abroad and pave the way for the grant of international credits, rather than by any genuine desire to achieve a pluralistic democracy.

On 28 September 1979, a new press law was passed restricting freedom of expression. The law required every person wishing to work as a journalist to register as such and to obtain permission in advance, and new publications had to obtain the approval of the authorities before they could be issued. The law also created the offence of defaming or insulting the President for Life or his family². Owing to the wide-

2) Sylvio Claude, the well-known leader of the Christian Democrat Party in Haiti, was condemned on the basis of this law.

spread protests with which it was greeted, this law was amended in March 1980, although the provisions which had been criticised remained in force in their essentials.

Freedom of expression, although recognised by the Constitution, has been severely curtailed by the press law referred to, by various laws on the security of the State, by the periodic enforcement of legislative declarations suspending fundamental rights and conferring full powers upon the President for Life, and by the Law against Communism of 29 April 1969, which makes Communist beliefs and the dissemination of "communist or anarchist doctrines" liable even to the death penalty³.

Political repression — treatment of prisoners

Duvalierism has been and still is characterised by the enforcement of a merciless political repression, in legal and illegal ways, which is directed from the Government Palace itself and is not subject to control of any kind by other organs of the State. It is in this respect that we have referred to the lack of independence of the judiciary.

A mission dispatched by the Inter-American Commission on Human Rights (of the OAS) to Haiti in August 1979⁴, reported on the situation of human rights there. One of the conclusions of the report referred to the large number of persons who had died as a result of summary executions or while held in prison, especially in 1975 and 1976. In this respect, there has since then been a notable improvement. It should also be said that the government has decreed various amnesties which led to the release of a great many prisoners (in 1972, 1973, 1975, 1976 and 1977).

Nevertheless, torture continues to be a common practice in Haiti. At the beginning of 1983, Mr. Gérard Duclerville, a young Catholic layman, was severely tortured in the Dessalines barracks. Strong pressure brought to bear on his behalf led to his release in February 1983, but no explanation was ever given as to why he had been arrested and tortured, or subsequently released.

Amnesty International recently denounced the ill-treatment meted out to Mr. Frank Blaise, a Haitian teacher and agronomist of 70 years of age. He had travelled to Haiti from the United States where he normally lives and on 25 August 1983, some weeks after his arrival, he was arrested and taken to the Dessalines barracks for interrogation. He was asked about trips he had made to African countries and about a book he had written analysing the different agricultural policies applied by successive Haitian governments. When the questioning was over, he was forced to strip to his underwear and locked up in a tiny cell with a cement floor. It was damp, dark, almost unventilated and full of mosquitoes. He was given nothing but a mattress on the floor and a bucket for his physical needs. Once a day, at dawn, he was taken out of his cell to wash. He was kept in these conditions, despite his age, for 77 days until he was finally released on 19 November 1983, and returned to the United States. No charge was brought against him nor was he given any reason for his detention. Hundreds of people have been held for long periods, sometimes of several months, without any formal charge being brought against them and without being taken before a judge.

Haitian lawyers encounter endless difficulties in the exercise of their profession

3) This law was commented on in the ICJ Review No. 25 of December 1980.

4) See *ibid.*

when they try to concern themselves with trials for political offences. They are intimidated, arrested and often taken by force to the airport and expelled from the country. The Centre for the Independence of Judges and Lawyers gave an account in its Bulletin No. 7 of April 1981 of the persecution suffered by distinguished defence counsel, such as Lafontant Joseph, Jean-Jacques Honorat, Joseph Maxi and Eugène Grégoire.

The prisons lack the most rudimentary requirements of hygiene and sanitation, the prisoners are given very poor food, and medical and dental attention is either lacking altogether or very sporadic. Deaths often occur in prison, either as a direct result of torture and ill-treatment or indirectly through an illness (such as tuberculosis) which would not be fatal in normal circumstances.

The provisions of Haitian law which establish rights and safeguards such as, for example, that every person arrested must be brought before a judge within 48 hours of his arrest for the judge to decide whether the arrest was lawful and that there may be no punishment save as authorised by law and then only after a legal trial, and the provisions which expressly prohibit torture, all these have become a dead letter in cases which the authorities consider affect or threaten the security of the State or the government.

One instance of penal proceedings which drew international attention to the shortcomings of the administration of justice in Haiti was the prosecution of Mr. Sylvio Claude, well-known as the leader of the opposition and President of the Christian Democrat Party, one of the first independent political parties to have been created during the period of liberalisation from 1977 to 1979. Arrested for the fifth time in 1980, he was tried with 20 other people and sentenced to 15 years' imprisonment

with hard labour for the crimes of "attempted arson, conspiracy against the security of the State and insulting the Head of State". National and international reaction was vociferous and the sentence was quashed by the Court of Appeals. Sent again for trial, Claude and the other defendants were sentenced in August 1982 to between 4 and 6 years' imprisonment. A month later they were pardoned by the President for Life and were released, although Claude was kept under strict house surveillance. In these circumstances he was visited in November 1982 by a French lawyer, sent by the International Commission of Jurists to review the situation of human rights in Haiti. Some time later, Sylvio Claude went "underground" until he was again arrested in October 1983, tortured and then released without any charge being brought against him on 24 December 1983.

A measure often used against opposition leaders has been expulsion from the country. This is wholly illegal. It is an administrative act, without any law or decree to authorise it and without any judicial control.

Duvalierism is supported at the political and economic levels by a small Creole oligarchy which is allowed to enjoy a high income, often increased by corruption, including the appropriation for their own benefit of large sums of money taken from foreign aid.

The political repression is exercised through the Armed Forces, which are well-trained and equipped with modern weapons, aided by the Police and their security services, in particular the so-called Detective Service (S.D.) and by the above-mentioned body of militia called Volunteers for National Security (V.S.N.) and popularly known as the Tontons Macoutes. The Tonton Macoutes have played a major rôle in the installation and subsequent maintenance in power of François Duvalier and his son Jean-Claude. They have achieved

notoriety for abuses and ill-treatment of all kinds.

The opposition

In the last few years, opposition to the Duvalier régime has been developing slowly but surely and, in spite of the repression, has begun to question the tenets on which this régime is founded. Up to now, the various opposition groups and parties have failed to unite or form a common front so as to offer a real alternative to the existing power. The diaspora of the Haitians and the forced exile or imprisonment of many of the opposition leaders have contributed largely to this failure.

Three trends can be identified within the opposition, namely:

- centrist, such as the Social Christian Party (PSC), Christian Democrat Party (PDC) and the Reunion of Progressive National Democrats of Haiti (RDNP);
- left-wing, both Marxist and non-Marxist, comprising the 18th of May Revolutionary Organisation (or 18 May), the National Movement of 28th November, Unified Party of Haitian Communists (PUCH) and the Union of Haitian Democratic and Patriotic Forces (IFOPADA);
- right-wing, such as the Haitian National People's Party (PPNH) and the Federation for the Liberation of Haiti (FLH).

There are other associations and groups but of all those named, only two have been able to act with some degree of freedom and then only for short periods. The rest have been exposed to repression to a greater or lesser degree and have had to remain in clandestinity.

There is only one political party that can freely exercise its rights in Haiti and

that is the Jean-Claudist National Council of Action (CONAJEC), i.e., the party of the President for Life.

New forms of opposition are also emerging at the trade union level and in the countryside, despite the strict limitations in practice as well as in law on the rights of assembly, association and unionisation. There have been large-scale conflicts and demonstrations by peasants, one of the most outstanding being the movement against the construction of two hydroelectric dams in the Artibonite valley, which the peasants considered to be against their interests. They believed that the project would benefit the capital and the transnational enterprises, but would harm them by flooding some of the most fertile land in Haiti and rendering it unusable for them. Another example is the opposition to the 1980 plan for the elimination of the Haitian pig species (and its replacement by another). The plan was drawn up by the government at the instigation of North American and Mexican companies.

The Catholic Church of Haiti has reacted strongly in the last few years, after a long period of silence following its neutralisation by François Duvalier in the 1960s. This 'new church' with its oecumenical vocation follows the path for aiding the poor laid down in the Episcopal Conference at Puebla in 1979. It lays stress on the Charter of the Haitian Church for Human Promotion, approved by the Episcopal Conference and made public in December 1983, in which an appeal was made for the restoration of the inalienable rights of the human being and specific proposals were made for the transformation of Haitian society.

The Protestant Churches also play a prominent part in promoting human rights and in formulating and financing projects and works to overcome situations of extreme poverty.

The economic and social situation

The economic and social situation of the Haitian people is undoubtedly the worst in the whole American continent. The gap between the numerically tiny oligarchy and the masses of the poor is also the most marked.

Most of the almost 6 million inhabitants live in extreme poverty, while the oligarchy controls the plantations of sugar, coffee, cocoa and sisal, the best land for food crops, the supermarkets, the hotels and tourist restaurants, the big shops, the luxurious real estate and the construction industry. Their ownership of these is shared with foreign investors and with a number of transnational companies which regard the government as a safety factor for their investments and are attracted by a weak trade union movement and low production costs.

A few statistics may help to complete this picture. Per capita, income is \$ 120 a year, but for peasants and others in the rural areas it is \$ 60 a year. Unemployment is hard to estimate because there are no reliable figures, but, according to the ILO, 62% of the active population is either totally or partly unemployed.

Infant mortality was estimated by the World Bank in 1978 to be 149 per thousand and life expectancy 51 years. Owing to malnutrition, many children have been irrevocably affected in their mental and physical development and they remain vulnerable to infectious and contagious diseases and are prone to die from diseases that would be curable in a well-nourished child.

The situation of health care is disastrous. Half the doctors, nurses and health personnel trained in Haiti have left the country, for political reasons, for lack of employment opportunities, or having been tempted by the salaries paid in other countries. The

health personnel left in the country are concentrated in the capital and the towns and are few and far between in the rural areas where the great majority of the population live.

Education also shows enormous deficiencies. Illiteracy is 80% and even higher in the countryside. There are very few public schools in the rural areas and children from those areas who have received schooling either obtained it because they were sent to the towns or because they attended private schools and colleges. This state of affairs prevails despite article 204 of the Constitution of Haiti, which states that "schooling is obligatory and shall be provided free of charge by the State".

A project launched in 1981 to teach children during their first years of schooling in Creole, their mother tongue, and then to continue in French, the official language, was dropped in 1982 and the Minister who had sponsored it fell from power. Education, in short, is limited to an urban and affluent minority.

Foreign aid

In the last few years the country has received large sums in cash and kind to finance development projects and to palliate the serious problems of food and health, as well as other shortcomings. This aid has not been able to achieve the objectives for which it was given, chiefly due to corruption, waste and poor management. Part of the aid received in cash has gone – either directly or indirectly – into the bank accounts of members of the government, of the Duvalier family and their supporters. Part of the food and medicaments supplied by governments and international agencies is sold on the growing black market. Inquiries undertaken by the *Miami Herald* into the food aid given to Haiti by the United

States government led to the conclusion that a large number of sacks of grain forming part of this aid were sold in Miami by Haitians living there, who had reintroduced them into the United States as contraband. In Haiti itself, from 10% to 50% of these cereals were sold on the black market⁵.

Corruption has become institutionalised at alarming levels. When hurricane Allen swept the southern coast of Haiti in 1980, accusations were made that members of the government and of the Duvalier family had illegally appropriated several million dollars' worth of the aid provided by the United States, that soldiers in the regular army had seized a truck loaded with blankets donated by the Church at the Port-au-Prince airport, and that the truck had subsequently been returned but not the blankets, that food packets sent by the United Nations were being stolen on the quays of Les Cayes, and that government officials were seizing large quantities of foodstuffs that had been stored by the Church against the emergency in the warehouses of the Catholic Aid Service in the locality of Jeremie.

The Haitian diaspora

Almost a million Haitians have taken the path of emigration, for political or economic reasons or both. The selective exile of political and trade union leaders and activists that was familiar in the past has now developed into a mass exodus of peasants, workers and ordinary people. In the last few years, this phenomenon has been commented on in the world press, owing to the so-called "boat people" of the Caribbean. These are thousands of people who leave the island secretly in fragile boats in search of what they hope will be a better life in

the United States or the other Caribbean countries, but who often perish by drowning in the Caribbean before being able to arrive at their destination. In other cases, they are forcibly returned to Haiti or housed in jails in the United States and Puerto Rico until it is decided what to do with them.

Another serious situation is that of the "braceros" or manual workers, who go to the neighbouring Dominican Republic on a collective labour contract to cut the sugar cane crop, and who are subjected to working conditions that are considered akin to slavery by the United Nations Working Group on Slavery. This problem has since 1979 been repeatedly referred to the Working Group by the Anti-Slavery Society based in London. In its last report, dated May 1983, following several missions to the Dominican Republic, a clear description is given of these problems: harassment by military guards in the plantations, forced labour, 14 hours of work a day for 7 days a week, deplorable living conditions, a miserable wage, no social security or medical assistance and the sale of Haitian men, women and children.

The Haitian workers, numbering from 15,000 to 20,000, cross the border legally for the annual cane harvest. The two governments have signed agreements to regularise this situation which provides for a number of measures to protect the workers, including the appointment of Dominican and Haitian inspectors. The agreements, however, are not observed and the owners of the sugar plantations establish their own rules which impose these slavery-like conditions. Even worse is the situation of thousands of others who cross the border illegally at harvest-time and who, with their status of "illegals", are even more vulnerable. It is estimated that between 85% and

5) *The Miami Herald*, 19 December 1982.

95% of the cane-cutters in the 16 sugar plantations of the Dominican Republic are Haitians.

The following estimates have been made of the number of Haitian exiles: 400,000 in the United States, 300,000 in the Dominican Republic, 40,000 in Canada, 30,000 in the Bahamas, 20,000 in French Guinea, 10,000 in Surinam, 8,000 in France, 5,000 in Guadeloupe, 2,000 in Martinique, and thousands more in Colombia, Mexico, Venezuela and various countries of Europe and even Africa⁶.

The Haitian government does not seem

to be disturbed by this tragic state of affairs. On the contrary, it serves in a way as an escape valve by reducing the internal pressure built up by the political repression and poverty. It also serves as an appreciable source of foreign exchange which the exiles send to their families in Haiti.

But the diaspora has begun to organise itself, to acquire a better understanding of the reasons for exile, to support the opposition movements inside Haiti and to create a collective awareness that the situation will change only with the end of the dictatorship.

The Mentally Ill in Japan

For some time, the United Nations and its specialised agencies, regional inter-governmental organisations and non-governmental organisations, have been concerned with the protection of rights of mental patients. A study on the protection of the rights of the mentally-ill has been completed by the Special Rapporteur, Mrs. Erica Irene Daes, of the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (E/CN.4/Sub.2/1983/17). In 1980, the International Commission of Jurists, in collaboration with the International Association of Penal Law, prepared draft guidelines for the protection of persons suffering from mental disorder, which were submitted to the Sub-Commission. These were closely followed in the preparation of the text at present being discussed by a working group of the Sub-Commission.

The debate within the United Nations and elsewhere on the rights of the mentally ill has shown that it is a difficult and sensitive issue and that, when assessing the protection afforded to the mentally ill in different countries, the differences in resources and socio-cultural practices have to be taken into consideration.

Nevertheless, recent reports concerning the situation of patients in mental health institutions in Japan raise questions about the adequacy of the legal protection afforded to these patients.

At the beginning of 1970, a well-known daily in Japan, *Asahi*, serialised a report on the condition of patients in a mental hospital. The report was based on the first-hand experience of a journalist on the staff of the paper who succeeded in having himself admitted as an alcoholic. His report alleged that the patients were often physically as-

6) These estimates, like much of the information in this article, were taken from *Haiti - briser les chaînes*, prepared by CETIM, Editions Favre, Lausanne, Switzerland, 1984.

saulted and otherwise ill-treated, detained in isolation cells and not provided with enough food or other basic amenities, and that the doctors were indiscriminate in prescribing drugs for the patients.

The same reporter, writing some years later, said that in spite of the public debate that took place after his earlier report things had not changed much in the mental hospitals in Japan. His view has been supported by recent reports about the deaths of two patients in a mental hospital in Utsunomiya City in Japan.

According to information given by the staff and inmates of the hospital, the first death occurred in April 1983 when a patient was beaten with a one-metre metal pipe for complaining about the food. The second patient died in December 1983 after being beaten with fists and sticks for trying to escape from the hospital.

Questions about these deaths were raised in the Japanese Parliament in March 1984. A report prepared by some members of Parliament on the situation in this particular hospital alleged that the inmates were routinely assaulted and were forced to work, including in the erection of buildings and in a deep-freeze factory owned by the Superintendent of the hospital. The report also alleged that the hospital was understaffed and over-crowded.

According to lawyers who are working for the rights of the mentally ill in Japan, conditions revealed in this particular hospital are to be found in most of the mental health hospitals in Japan. They say that nearly 200 deaths have taken place in only one hospital in Utsunomiya without satisfactory explanations in the last three years. The lawyers say that the human rights of mental patients are not respected. In many hospitals, they are not provided with adequate facilities, treatment and even food.

They are physically abused and overdosing of drugs is common. Once inside, a patient cannot communicate with his relatives, friends or lawyer. The health authorities do not check the conditions of mental hospitals and there is no independent supervisory mechanism to prevent the abuses taking place in the mental hospitals.

Even if these allegations are applicable only to some of the mental institutions of Japan, it is still an alarming situation in view of the large number of mental patients. According to official sources, in 1979 there were 304,192 patients in mental hospitals. Unofficial sources say that by 1982 the number had increased to nearly 320,000. From 1970 to 1982 there appears to have been a remarkable increase of nearly 70,000 patients.

Several reasons are advanced for this increase. It is said that people who are unable to cope with the rapid technological and other changes taking place in Japan become marginalised and are considered a burden to society and the family, and the mental hospitals seem to provide a place for such marginalised people. A general lack of awareness about mental illness is said to make people opt for the easy solution of detaining the mentally-ill in hospitals. Mental hospitals which are run by private foundations or by individuals for profit encourage voluntary and involuntary admission of patients. These institutions, which receive social welfare subsidies or medical insurance payments for the patients, come to consider the patients as 'fixed assets'. Attention was drawn in a WHO report¹ to the possible effect of the profit involved in some of these hospitals. The report said: "... these problems are particularly bad when the proprietor, anxious for a return on his investment, is putting pressure on the medical staff to increase

1) Assignment Report, by Clarke, D.H., 30 May 1968, p. 16.

the income by overcrowding the institutions'.

The Japanese Mental Health Act contributes to this state of affairs by providing for involuntary committal of the mentally-ill in the hospitals without adequate safeguards. Article 3 of the Act defines mentally-disordered persons as 'psychotic persons (including persons who are psychotic as a result of intoxication), feeble-minded persons and psychopathic personalities'. Under Article 29 of the Act, if, as a result of medical examination undertaken by two or more certified mental health practitioners, a person is diagnosed as mentally-disordered and is liable to injure himself or others, then the governor of a prefecture can commit the person to a mental hospital.

Under Article 33, an 'administrator' of a mental hospital can commit a person to the hospital if that person has been diagnosed as mentally disordered. Under Article 34 an administrator can commit a person provisionally for not more than three weeks if the administration feels that a considerable period of time is required for medical examination of that person. Under both these Articles, consent of the patient is not necessary if persons responsible for the patient give their consent to committal.

The law does not specify whether an 'administrator' who has the power to commit a mentally-ill person has to be a qualified psychiatrist. It is said that in most mental hospitals the administrators are not qualified but that they commit a mental patient after referring the patient to the doctor on duty. The administrators of private mental hospitals commit persons to their own hospitals on the basis of diagnoses made by their own hospital doctors and usually the relatives of the patients, trusting the doctors, give their consent.

It is believed that more than four-fifths of the patients currently in hospitals were committed under Articles 33 or 34.

The Mental Health Act does not provide for periodic review of the cases of those who are committed to the hospitals. Except by way of a *habeas corpus* petition, there is no other procedure by which a patient or the relative of the patient can take a proceedings before a court of law to question the need for continued detention. This safeguard is, however, inadequate as *habeas corpus* was proved to be an ineffective remedy. The Japanese Mental Health Act does not provide for any judicial decision in the case of an involuntary detention, or any right of appeal against it, or any automatic periodic judicial review at reasonable intervals to ascertain whether the patient still needs to be confined.

The following case illustrates the consequences of involuntary committal without review. A man who was found drunk and unconscious was committed to a mental hospital as a guardian-less person. He was not permitted to contact relatives or friends. After 26 months, his plight became public when he was arrested for murdering an employee of the mental hospital. While sentencing him to seven years' imprisonment, the trial court referred to 'the extreme wrongdoing of the hospital's patient administration, where violent acts occurred daily, and the long and unjust detention'.

This case, coupled with the large number of hospital patients and the fact that the great majority of them are said to be held involuntarily, raises questions about the adequacy of the Japanese Mental Health Act. The 'draft body of principles and guidelines for the protection of persons detained on grounds of mental ill-health or suffering from mental disorder', which is being considered by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, states that, "involuntary admission is a great infringement of the human rights and fundamental freedoms of the patient". The draft

proposes that the recommendation of at least two medical practitioners should be required for an involuntary admission and that the decision should be taken by a competent court or health tribunal. Further, it recommends that there should be periodic judicial review of all cases of involuntary admission.

The following decisions of the European Court of Human Rights on the detention of persons of unsound mind and the safeguards that should be afforded to them are also relevant².

In *Winterwerp v. Netherlands*, the court specified three minimum conditions before there could be a 'lawful detention of a person of unsound mind': except in emergency cases, a true mental disorder must be reliably established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory medical confinement; and the validity of continued confinement must depend on the persistence of such a disorder.

In the same case, the European Court observed that special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental disability, are not fully capable of acting for themselves. The court took the view that it would be contrary to the object and purposes of Article 5(4) (Right to take proceedings to test the lawfulness of arrest or detention) of the European Convention on Human Rights, to interpret it as making the detention of persons of unsound mind immune from subsequent review of its lawfulness, merely because the initial decision had been issued

from a court. In such cases, judicial review of lawfulness should be available at 'reasonable intervals'.

In *X v. United Kingdom*, the European Court explained that the scope of the periodic judicial control of the lawfulness of the continued detention of persons of unsound mind need not empower the court of review to substitute its own discretion for that of the decision-making authority. But the review must be wide enough to bear on the essential conditions, especially on the questions of whether the patient's disorder still persisted, and whether the administrative authority was entitled to think that his continued compulsory confinement was necessary in the interests of public safety.

In January 1982, in response to the European Court's judgment, the government of the United Kingdom introduced amendments to the Mental Health Act of 1959. Under the amended Act, Mental Health Review Tribunals are empowered to consider the substantive grounds for the continued detention of a restricted patient and are required to order discharge where appropriate. Furthermore, patients are entitled to apply directly to a Mental Health Review Tribunal once in the second six months of their detention, and thereafter once in any further twelve month period.

In view of the emerging principles and procedures for the protection of the rights of persons suffering from mental disorder, it is suggested that the Japanese government should consider appointing an independent high-powered Commission to review the situation of the mentally-ill with a view to amending its Mental Health Act.

2) The decisions quoted are taken from the *International Law of Human Rights*, by Paul Sieghart, Oxford University Press, pp. 148 and 157.

Pakistan — Women Under Threat

A remarkable organisation came into existence in Pakistan in 1981. Women's Action Forum (WAF) is, in its own words "a non-political lobby consisting of women's organisations and concerned individuals working to safeguard the present status of women and reverse the trend to isolate and segregate them."

In third world countries, especially those under martial law and in particular those in the process of Islamisation, women have not been known for their ability to organise themselves at national level, articulate their grievances and attempt to improve their status. WAF, however, working through chapters set up throughout the country (whose activities are vetoed by the two oldest chapters, Karachi and Lahore) has developed quickly into a dynamic force in Pakistan with rapidly growing membership from all classes and constantly expanding activities, such as organising symposia and workshops, lobbying, acting as a pressure group and taking part in and initiating mass demonstrations. These acts have been directed against legislation in the name of Islamisation which is severely discriminatory against women. In many cases WAF argues that the legislation is not supported by the Koran.

At a time when politicians have been unable to mount an effective national movement in opposition to President Zia al-Huq because of differences in their goals, women opposed to the President's Islamisation policies are presenting a united front, thus placing them in the forefront of almost all other political formations in Pakistan at this time. Such unity makes them a force to be reckoned with in a country where 52% of the population is female.

That an organisation like WAF is des-

perately needed can be seen by a brief look at enacted and proposed legislation and the opinions expressed by certain officials in positions of power and influence. Not only does the Islamisation process begun by President Zia in 1979 restrict women's lifestyles but it also affects their status as members of society on an equal footing with men. The attempts to reduce women to the status of second class citizens has frightening implications and makes them increasingly vulnerable to exploitation as a result of both discriminatory legislation and the mentality that such an official position fosters. This mentality is exemplified by Dr. Israr Ahmed's publicly expressed opinion that female employment should end and women should be restricted to their homes. Dr. Ahmed is a member of the President's advisory council, the Majlis-e-Shoora, and is therefore, in a position to influence policy-making decisions in the country. Dr. Ahmed had a weekly TV show in which he continued to make sexist statements of a similar nature. One of WAF's major successes was a campaign it ran to have him removed from this programme.

Similarly offensive and potentially dangerous for women's status are opinions such as those expressed by Justice Sheikh Aftab Hussain, Chief Justice of the Federal Shari'a Court. Chief Justice Hussain, after expressing the opinion that corrupt civil servants should be shot in public, went on to blame the problem on the efforts of officials to satisfy the material greed of their wives.

In 1979, the President promulgated the *Hadood* ordinance laying down conditions for the imposition of the maximum penalty for certain crimes such as murder, rape, theft and adultery. It excludes the evidence of women altogether. Therefore, if a murder

is committed in the presence of a woman but no male witnesses are present, the maximum punishment cannot be imposed for the crime.

Shortly after the promulgation of this ordinance the President proposed another ordinance, in essence making the testimony of one man equal to that of two women. This has serious repercussions for women which touch every aspect of their lives. For example, in a custody case, the evidence of the mother would be less acceptable than that of the father. Further, a rape case relying solely on the testimony of the victim cannot be proved.

In Lahore in February 1983, WAF demonstrated against these proposed changes in the law of evidence. Tear-gas and batons were used by the police in order to break up the demonstration and local newspapers said "the protest was marked by unprecedented police brutality".¹ At least 20 women were injured and another 30 arrested. In spite of this demonstration which had a firm body of support from men, the proposed legislation was pushed through less than a month later.

WAF has also recently taken a position on a draft law proposed by the Council of Islamic Ideology which reduces the value of a woman's life to half that of a man. In its position paper of February 1984, WAF states that not a single ayat or verse from the Holy Koran is quoted in support of the draft, for the simple reason that there is none, because "there is no justification for such a law in Islam."

The proposed ordinance concerns *diyat*, the compensation for causing the death of a *believer* (as sex is unspecified it presumably applies equally to males and females). A person found guilty of causing the death of a believer is entitled if the victim's family agrees to save his life by payment of

diyat. This is specified in the Koran as either blood money and the freeing of a believing slave or fasting for two months. There is no suggestion that a slave should be half freed or half the compensation paid if the victim happens to be a woman. Therefore, as the WAF's position paper asks, under what pretext does "the Council of Islamic Ideology put forth the ridiculous and baseless assumption as in section 12(b) of the draft law which reads: 'Where the victim is a female, her *diyat* shall be one half of the scale specified'."

The degradation of the status of women is merely the culmination of a series of attacks on women. The government of Zia ul-Huq has issued other proclamations banning the participation of women athletes in international and mixed sports events. Attempts have also been made to put an end to coeducation and to institute separate universities for women. In addition some moves were made toward repealing the 1961 family laws ordinance which, after a long struggle, had been finally passed in 1961. This ordinance recognised women as rightful heirs of agricultural property under Islamic law, made second marriages contingent on the consent of the first wife, made divorce more difficult for the male and for the first time gave women the right to initiate divorce on certain specified grounds only. This ordinance was never adequately implemented but it was seen as a major victory in that it showed the state recognised the need for reforms to better the status of women. If this ordinance is repealed it will deal a bitter blow to women's rights in Pakistan.

WAF waged a successful campaign in support of the family laws ordinance and for the moment no proposals are actively threatening it, but the potential threat still exists and can be reactivated at any time.

1) International Herald Tribune, 22 February 1983.

WAF feels that better representation of women on the Council of Islamic Ideology and other decision-making bodies would be a major step towards safeguarding the results of 35 years of slow but steady progress in the field of women's rights and toward helping to ensure future develop-

ments. As has been stated by WAF, the fear is that "if the women, themselves, do not express their concern and opinions, it is more than likely that issues which affect their lives will be decided upon without their participation.

South Africa — KaNgwane

KaNgwane is one of the ten tribal homelands (bantustans) created by the South African government to further entrench its policy of apartheid. The declared policy of South Africa is that the entire Black population should be arbitrarily assigned to one or other of these homelands even though a large percentage of them have never lived in these areas and have expressed no desire to do so.

The homelands represent a total of 14% of the South African land mass and have to accommodate a theoretical population of 19.8 million; the remaining 82% of the land is the preserve of the 4.5 million Whites and 3.4 million Asians and Coloureds.

Blacks have no citizenship rights whatsoever except within their own particular bantustan. It is the policy of the South African government to 'encourage' (forcibly or otherwise) the Black population to relocate to their designated homeland, and, in addition, gradually to force 'independence' on these homelands. This has already happened to the bantustans of Transkei, Ciskei, Venda and BophuthaTswana. Each has a president, parliament, flag and diplomatic service, though none has been recognised by any state other than South Africa. Their 'independence' has enabled South Africa to eliminate 8 million Blacks from

'white' South Africa.

This bantustanisation policy, once fully implemented, would mean, in the words of the South Africa Minister of Bantu Administration in 1978, "there will be not one Black man with South African citizenship... Every Black man in South Africa will eventually be accommodated in some independent new state in this honourable way and there will no longer be a moral obligation on this Parliament to accommodate these people politically."

'Independence' strips Blacks of South African nationality. They become nationals of the new 'state' created for them by the South African government; a state which is generally carved out of the land in such a way as to avoid encroaching on white-dominated areas and to exclude any land of particular value. Blacks from homelands which become independent suddenly find themselves aliens in their own country — a situation that is especially acute for those who live and work in white areas outside their designated bantustan. On 'independence' the right to work outside one's homeland ceases except on special dispensation from the South African government. As the homelands themselves are not economically viable, being in general agriculturally poor, with little industrial development and prac-

tically no mineral wealth (boundaries have been drawn specifically to exclude valuable deposits), a large percentage of families depend on the income of members who commute daily to work in industrial centres outside their 'border'.

Even more dramatically affected by 'independence' are the citizens who have had no connection whatsoever with their designated homeland, have lived and worked elsewhere and who suddenly become foreigners in their own community. They are able to continue their normal life only through the good graces of the South African government but are liable to be deported at any time to a bantustan that is already economically incapable of supporting its resident population.

The bantustan of KaNgwane is contiguous with the northern and western borders of Swaziland. In 1977 it was given certain legislative powers, receiving a constitution and a legislative assembly. However, the leadership of KaNgwane strongly resisted full 'independence' on economic, humanitarian, political and legal grounds. In the face of this opposition the South Africa government in 1982 by Proclamation R (108), unilaterally dissolved the constitution of KaNgwane and its legislative assembly and announced its intention of ceding KaNgwane to Swaziland. The government of KaNgwane and its leader Enos J. Mabuza brought an action against the Government of South Africa in the Supreme Court of South Africa Transvaal Provincial Division regarding the legality of the unilateral dissolution. It was argued that the 1971 National States Constitution Act (which provides for the granting of certain legislative powers to the bantustans) limited the powers of the South African president so that prior consultation with the legislative as-

sembly concerned was necessary before its legislative powers could be repealed.

In a similar case brought against the South Africa government by the government of KwaZulu, the president's action was declared *ultra vires*. Following this the proclamation regarding KaNgwane was withdrawn. KaNgwane officials were then reinstated and the "Rumpff Commission"¹ was set up "to investigate, report on and make recommendations in regard to the desirability or otherwise of incorporating the South African territory of KaNgwane into the Kingdom of Swaziland."

As already stated, the leadership of KaNgwane have economic, humanitarian, political and legal reasons for resisting 'independence' from South Africa. These reasons also apply to cession to Swaziland, which is seen as just another artifice by which 750,000 Blacks can be excised from 'white' South Africa.

It is true that Swaziland has for the past hundred years claimed the area that now constitutes KaNgwane, but there are arguments for saying that historically its case is not strong for asserting sovereignty over this area. In his *Memorandum on the Proposed Incorporation of KaNgwane into Swaziland* of August 1983, Dr. P.R. Maylam of the University of Natal, Durban enlarges on his contention that "Swazi history is characterised by ethnic diversity, shifting allegiances and regular secessions and migrations, all of which made for fluidity and a lack of definition in the Swazi territorial domain... It is accepted that the 1880 boundary (between Swaziland and the Transvaal) was perhaps unfair to the Swazi. But against this, two points should be noted. First, the Swazi king at that time, Mbandzeni, agreed to the demarcation. And second, there is no legal or historical

1) A high-level government Commission chaired by the Hon. F.L.H. Rumpff, former Chief Justice of the Appellate Division of the South Africa Supreme Court.

justification for redrawing state boundaries on the basis of claims that are more than one hundred years old." Concerning this latter point, regard must be had to the principle of *uti possidetis* which has been generally adhered to during decolonisation in the Americas and Asia and is of special significance in Africa. Indeed, in 1964, the Organisation of African Unity adopted a resolution which stated "Considering that border problems constitute a grave and permanent factor of dissension (the OAU) solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence." This resolution, taken in tandem with subsequent state practice endorsing it has led Professor Brownlie to state that it now "provides the basis for a rule of regional customary international law binding those state which have unilaterally declared their acceptance of the principles of the *status quo* as at the time of independence."

If the case for ceding KaNgwane to Swaziland is allowed to rest on such a justification as uniting an ethnic group divided by colonial boundaries, this type of precedent could lead to confusion and conflict throughout the continent. Indeed, Lesotho has an outstanding claim to the eastern part of the Orange Free State which is better founded than that of Swaziland to the eastern Transvaal.

It is, of course, lawful for two independent states to enter into a treaty whereby one cedes a portion of its territory to the other. If, however, such a treaty conflicts with a peremptory norm of international law (i.e. of *jus cogens*) it is void *ab initio*. The principles of racial non-discrimination and the right to self-determination are now generally considered to be part of *jus cogens*. Both these principles have been violated by the South African government in its dealings with the Black population.

Therefore any treaty purporting to cede KaNgwane to Swaziland and denationalise 750,000 Black citizens would be void.

Blacks in South Africa have had no say in instituting the homeland policy, in general, or the proposal to cede KaNgwane to Swaziland, in particular. As has been stated in the Lawyer's Committee for Civil Rights Under Law's Brief for the Rumpff Commission, "Self-determination must at least constitute a legal right to participate effectively in governing the territory... Accordingly the right of all groups to have a say in decisions concerning the dismemberment of the national patrimony is an integral right of self-determination." It cannot be said that Blacks in South Africa have ever had a chance to exercise that right and that indeed "although, generally, national independence from foreign domination is sufficient to satisfy the right of self-determination, in the specific case of South Africa, political independence from Britain did not fulfill the right of self-determination of the Black people of South Africa." Thus, the essence of self-determination is the ability to have a say in one's destiny. In the particular case of KaNgwane, the South African government, although treating it as a political entity, with a legislative assembly and constitution, is denying it any say in its future. A request by the KaNgwane leadership for a referendum of KaNgwane citizens on the proposed cession was refused. Indeed, it has been argued that a referendum of *all* South Africans is necessary to fulfill the requirements of the principle of self-determination.

One of the most harrowing aspects of the Black denationalisation policy of the South African government as exemplified in its proposals regarding KaNgwane, is that Blacks resident in other parts of South Africa, who have no connection with their allotted Bantustan other than their government-issued identity document, will live in

constant insecurity, liable to be deported to Swaziland at any time.

Under international law, nationality laws must be consistent with international conventions and customs. Thus, discrimination on the grounds of race is proscribed. It follows that a blanket denationalisation of 750,000 people on the basis of their supposed membership of a certain ethnic class is a breach of international law.

In addition, the acquisition of a new nationality should have a voluntary element, with an opportunity for the population involved to express their agreement or disagreement. As the KaNgwanes have never been and seem highly unlikely to be consulted in any meaningful way regarding cession, an enforced change of nationality would be so arbitrary as to merit immediate reaction by the world community in accordance with the Stimson doctrine of collective non-recognition.

As well as the breaches of international law which would occur on cession to Swaziland, economic considerations prompt the KaNgwane authorities' refusal to accept incorporation into Swaziland. Most importantly, as mentioned above, a large percentage of KaNgwanes actually work across the 'border' in 'white' South Africa. Their ability to do so once they became Swazi citizens would be severely curtailed as legal restrictions were placed on migrant labourers from Lesotho, Botswana and Swaziland in the early 1960s. Further, Swaziland could not accommodate economically the theoretical population of KaNgwane should all its citizens be forced to return to their new homeland.

Swaziland is in a severe economic crisis, the world price of sugar (its major export) having fallen by 56% between May 1981 and May 1982. Rural impoverishment is widespread and manufacturing suffers through dependence on foreign markets and lack of diversification.

The leadership of KaNgwane feels that its prospects for industrial development are greater if it remains part of South Africa as it has access to the South Africa market, receives aid from the South Africa government through the KaNgwane Economic Development Corporation and benefits from the government's industrial decentralisation policy. As Dr. Maylam says in his Memorandum "It is... in the interests of KaNgwane to cling on to these short-term benefits and to hold out for a stake in a future, more egalitarian South Africa."

It is also felt that an influx of such a large unwilling population, the majority of whom would feel press-ganged into becoming Swazi, would have a deleterious effect on the political situation in Swaziland, which is already uncertain and unstable.

Bearing in mind the historical factors regarding the proposed cession of KaNgwane to Swaziland, as well as the total lack of participation of Black South Africans in general and KaNgwanes in particular in the decision-making process, and the seeming complete disregard for both the best interests of the KaNgwane citizens and the human suffering involved in the potential arbitrary uprooting of some 400,000 people, it can be clearly seen that the proposed cession of KaNgwane to Swaziland is but another mutation of South Africa's apartheid policy and a blatant example of the lengths to which it is prepared to go to ensure separate development for the White and Black population of South Africa.

In the words of Enos J. Mabuza, the vast majority of KaNgwanes "believe that the purpose of the proposed excision is to strip Swazi-speaking South Africans of their citizenship, deny them access to the wealth and prosperity they helped build and reduce the number of Black South Africans so they can no longer strive and struggle for political rights in the land of their birth."

Since this article was written, the South African government has "decided to dissolve the commission of inquiry investigating the proposed land [deal]" (Guardian, 20 June 1984). The government will in future consider only proposals made jointly

by the leaders of Swaziland and KaNgwane. As the leadership of KaNgwane is totally opposed to incorporation into Swaziland, any such joint proposal would seem unlikely.

The Western Sahara¹

The following questions are addressed in the hope of shedding some light on "a temporary decolonisation problem" which seems as intractable as it is obscure:

- who are the people of Western Sahara, the Saharawis?
- what kind of relations did they have historically with their Moroccan neighbours to the north and with the Mauritanian tribes to the south?
- how did such an apparently barren territory as the Western Sahara come to be colonised by Spain?
- how and why did Morocco and Mauritania lay claim to the Western Sahara from the late 1950s?
- what indigenous political parties and liberation movements took shape within the Spanish colony and what have the United Nations, the Organisation of African Unity and the International Court of Justice had to say about the controversy surrounding its future?

The tribes, or qabael, in the region now known as Western Sahara, were regarded by themselves and their neighbours as the

ahel es-sahel (the people of the littoral), since they lived in the extreme western stretch of the Sahara desert. Ethno-culturally speaking, they are a sub-group of the beidan, or 'Moors', nomads of mixed Arab, Berber and black African descent who speak an Arabic dialect known as Hassaniya.

The Saharawi economy was based on pastoral nomadism. The limited and dispersed pastures required migration in relatively small groups. Saharawi society was divided horizontally and vertically into tribes and castes. At the top were free qabael. Beneath them were qabael of tributary status, who were forced to pay tribute for 'protection' to powerful free tribes. At the bottom of the social scale were castes of craftsmen and bards who were attached to qabael of free or tributary status.

Each quabila was segmented into fractions. Politically, each tribe and fraction regulated its affairs through an assembly (djemaa) of the heads of its most distinguished families. The djemaa selected the group's sheikh, established its own body of law, the orf, to complement the Sharia, and appointed a qadi (judge) to administer justice.

1) An interesting and informative article on the Western Sahara by Tony Hodges of the Economist Intelligence Unit was published in Third World Quarterly (January 1984, Vol. 6, No. 1). With their kind agreement the article is here summarised.

In an exceptionally arid and hostile environment which kept them dispersed, no single group could draw on sufficient power or resources to establish even a semblance of supra-tribal government.

Spanish Colonisation

The first European contact with the Western Sahara came in the fifteenth century. In 1441, the Portuguese made their first slave raid and thereafter raiding alternated with trading. The inlet at Dakhla, where gold was acquired, was named Rio de Ouro by the Portuguese. Castile, which was the main rival to the Portuguese, sent a force in 1476 to the Saharan coast to build a fortress, Santa Cruz de Mar Pequeña, which became a trade centre. Castile and the Portuguese agreed on spheres of influence along the coast under successive treaties, signed in the years between 1479 to 1509.

However, in 1524, Santa Cruz de Mar Pequeña was attacked and sacked by the local population. Meantime, Spain's interest shifted to the Americas and it did not renew its interest in the Western Sahara till 1881, when the Sociedad de Pesquerías CanarioAfricanas established a pontoon in the Río de Oro Bay. In 1885, Spain established a settlement, known as Villa Cisneros, on the bay.

The Spanish Sahara's borders were delineated by four successive Franco-Spanish conventions, signed in 1886, 1900, 1904 and 1912. In all, Spain acquired 112,000 square miles of desolate desert, comprising two outright colonies – Río de Oro (71,000 square miles) and Saguia el-Hamra (31,650 square miles).

Since Spain was too weak to occupy its allotted zone of desert, for more than thirty years Villa Cisneros remained the only Spanish settlement in Western Sahara. Mean-

time, the hinterland became a sanctuary for nomad forces resisting the French advance into the neighbouring regions of Mauritania, Morocco and Algeria. In 1934, the French forces 'pacified' the border regions of the north-western Sahara and, at France's behest, Spain at last occupied a few strategic points in the interior of its zone of desert, including the town of Smara, the region's only pre-colonial settlement.

Still, Spanish Sahara remained an almost forgotten colony. From 1934 to 1946, it was governed as an offshoot of the Spanish protectorate in northern Morocco. Then, from 1946 to 1958, it formed part of Africa Occidental Española (AOE) with Ifni, a small enclave on Morocco's Atlantic coast. As late as 1952, there were only 216 civilian employees, 24 telephone subscribers and 366 children in school in the whole of Spanish Sahara. Almost all the Saharawis remained nomads.

In 1958, two years after Morocco's independence, AOE was dissolved and Spain's Saharan territory was converted into a Spanish province, governed by a Governor-General, with its own capital at El-Ayoun. Under a 1962 decree, El-Ayoun and Villa Cisneros each had municipal status and so were administered by city councils. Smara and La Guera were deemed 'minor local entities' and were administered by local juntas. For the territory as a whole, there was a 14-member provincial council. From 1963, when the first election to these bodies was held, three procuradores represented the province in the Spanish parliament. Their number was raised to six in 1967.

As for the nomads (the overwhelming majority of the population until the early 1970s), the Spanish authorities continued a policy akin to 'indirect rule' through the qabael's traditional djemaas. As sedentarisation increased, the Spanish, in order to facilitate consultation with the Saharawi population, established in 1967 a territorial

Djemaa, composed of 82 members. They represented tribal, rather than geographical constituencies and less than half were directly elected. The assembly had a purely consultative rôle.

The economic changes of the 1960s and early 1970s brought about a rapid modernisation of Saharawi society. The majority of Saharawis gave up their precarious nomadic way of life and settled in the towns to take up wage-employment, set up as traders and sent their children to school. The number of Saharawis living in the three main towns, El-Ayoun, Smara and Villa Cisneros, tripled between 1967 and 1974, reaching 40,600, or 55% of the Saharawis recorded in the 1974 census.

Formation of the Polisario Front

The profound changes within the Spanish colony and in the international arena during the 1960s gave rise to a modern urban-based nationalist movement called the Harakat Tahrir Saguia el-Hamra wa Oued ed-Dahab (Liberation Organization of Saguia el-Hamra and Oued ed-Dahab). The Harakat Tahrir was a small clandestine movement which advocated social reforms as well as decolonisation. But it did not continue for long and disintegrated in mid 1970 after being severely repressed.

Saharawis living abroad in Morocco and Mauritania took the initiative in re-organising the anti-colonial movement. The embryo of the new movement was formed in Zouerate in 1971-72 and finally in May 1973 the Frente Popular para la Liberación de Saguia el-Hamra y Río de Oro, better known as the Polisario Front, was born. In its Second Congress in August 1974, Polisario came out unambiguously in favour of full independence. By 1974-75, the Polisario Front had become a mass movement. A United Nations mission of inquiry which

toured the territory in May 1975 reported (UN document no. A/10023/Rev. 1, p. 59):

"At every place visited, the Mission was met by mass political demonstrations and had numerous private meetings with representatives of every section of the Saharan community. From all these it became evident to the Mission that there was an overwhelming consensus among Saharans within the territory in favour of independence and opposing integration with any neighbouring country... The Mission believes, in the light of what it witnessed in the territory, especially the mass demonstrations of support for one movement, the Frente POLISARIO... that its visit served as a catalyst to bring into the open political forces and pressures which had previously been largely submerged."

The Rôle of the UN and the OAU, 1965-1974

The UN General Assembly adopted its first resolution on Western Sahara and Ifni in December 1965, in which it requested the government of Spain as the administering power to take all necessary measures for the liberation of the territories of Ifni and Spanish Sahara and to this end to enter into negotiations on problems relating to sovereignty presented by these two territories.

While the population of Ifni clearly wished to join Morocco, the desires of Western Saharans were unclear, in particular in relation to the rival claims of Morocco and Mauritania. Accordingly, the UN General Assembly, in its second resolution adopted in December 1966, distinguished the decolonisation procedures to be applied in Ifni and Western Sahara. It requested Spain 'to determine at the earliest possible

date, in conformity with the aspirations of the indigenous people of Spanish Sahara and in consultation with the governments of Mauritania and Morocco and any other interested party, the procedures for the holding of a referendum... with a view to enabling the indigenous population of the territory to exercise freely its right to self-determination'.

This referendum proposal was repeated in all six subsequent resolutions adopted by the General Assembly between 1967 and 1973.

The Organisation of African Unity (OAU) began endorsing the UN resolutions on the Western Sahara from 1969. Even at a session held in Rabat, Morocco, in June 1972, the OAU's Council of Ministers requested African states to "intensify their efforts to enable the population of Sahara... to freely exercise their right to self-determination."

Prelude to Crisis, 1974—1975

Western Sahara's future suddenly hung in the balance when the Spanish government at last began to lay the ground work for Spain's withdrawal from the territory. In July 1974, Spain announced a statute of autonomy known as the estatuto político, under which the Djemaa was to be converted into a legislative assembly, while a Governing Council in which Saharans would be represented was to assume executive powers. In the same year, in August, the Spanish government announced that a referendum would finally be held under UN auspices during the first half of 1975.

Till then, Morocco and Mauritania had tailored their policies to accommodate the UN's decolonisation principles in the hope, or expectation, that self-determination would lead to territorial integration. But, after soft-peddalling the Moroccan claim to

Western Sahara for more than a decade, Morocco was now determined to thwart Spain's plan for internal autonomy, which it saw as a prelude to independence, and force Spain to negotiate the territories' cession to Morocco. King Hassan of Morocco launched a patriotic crusade to recover the 'Moroccan Sahara' which aroused enormous enthusiasm among his people.

As a way of blocking the referendum, Morocco persuaded the UN in December 1974 to urge Spain to postpone the referendum, while the dispute was examined by the International Court of Justice (ICJ). The UN General Assembly agreed to do so and requested Spain to postpone its plans for a referendum until the ICJ had given an advisory opinion on the following questions:

- (1) Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonisation by Spain a territory belonging to no-one (terra nullius)?
- (2) If the answer to the first question is in the negative, what were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?

After 27 sessions in June—July 1975, at which the governments of Spain, Morocco, Mauritania and Algeria (but not Polisario) were represented, the Court decided unanimously that Western Sahara had not been terra nullius before Spanish colonisation began in 1884. The Court held that the Western Sahara was inhabited by peoples who, if nomadic, were socially and politically organised in tribes and under chiefs competent to represent them. With respect to Morocco's pre-colonial relations with these tribes, the Court was of the opinion, by 14 votes to two, that:

"The inferences to be drawn from the

information before the Court concerning internal acts of Moroccan sovereignty and from that concerning international acts are... in accord in not providing indications of the existence, at the relevant period, of any legal tie of territorial sovereignty between Western Sahara and the Moroccan state. At the same time, they are in accord in providing indications of a legal tie of allegiance between the Sultan and some, though only some, of the tribes of the territory, and in providing indications of some display of the Sultan's authority or influence with respect to those tribes.

By 15 votes to one, the judges found that:

"... at the time of colonisation by Spain there did not exist between the territory of Western Sahara and the Mauritanian entity any tie of sovereignty, or of allegiance of tribes, or of 'simple inclusion' in the same legal entity.

"There were merely legal ties relating to such matters as migration routes, the use of wells, and the settlement of disputes."

The Court concluded, therefore, that:

"... the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonisation of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory."

(ICJ Advisory opinion of
16 October 1975)

The Madrid Accords

On the publication of the International Court of Justice's advisory opinion on 16 October 1975, King Hassan announced that 350,000 volunteers would march, Quran in hand, across the Western Sahara border to assert Morocco's territorial claim. This precipitated events before the UN had time to consider the ICJ's conclusions.

In Spain, General Franco had entered into his long, final illness. Both his premier and the heir to the Spanish throne, Juan Carlos de Borbon, who became the acting head of the state on 30 October, were determined to avoid a military confrontation with Morocco. Therefore, Spain began negotiations with Morocco on 21 October.

On 6 November, King Hassan ordered his 'green marchers' to enter Western Sahara. Spain had promised not to interfere with the marchers as long as they proceeded no further than a 'dissuasion line', about eight miles from the border, to which Spanish troops had already been pulled back. Three days after King Hassan ordered the marchers to return since they had achieved what was expected of the march.

On 12 November, the negotiations were resumed in Madrid and culminated two days later in a tripartite agreement between Spain, Morocco and Mauritania. Spain agreed to "proceed forthwith to institute a temporary administration in the territory, in which Morocco and Mauritania will participate in collaboration with the Djemaa", and finally to withdraw from Western Sahara by the end of February 1976.

Within a fortnight of the accords, a new tripartite government took office in El-Ayoun. In January, the Spanish troops withdrew, leaving the main towns in Moroccan or Mauritanian hands. Some smaller settlements were occupied by Polisario before being seized by Moroccan or Mauritanian troops.

The members of the Djemaa proved far less pliant than the signatories of the Madrid accords had anticipated. At an extraordinary session held under Polisario auspices on 28 November, 67 of the Djemaa's 102 members proclaimed the assembly's dissolution and their unconditional support for Polisario, and set up a 41-member Provisional Saharawi National Council.

Morocco and Mauritania succeeded in persuading 57 members of the Djemaa to attend a rump session of the assembly in El-Ayoun on 26 February 1976, and vote unanimously to give 'full approval' to Western Sahara's 'reintegration with Morocco and Mauritania'. Spain officially ended its 91-year period of colonial rule on the same day.

Six weeks later, on 14 April 1976, Western Sahara was formally partitioned by Morocco and Mauritania.

The War

Polisario singled out Mauritania, the weaker of its enemies, as the main focus of its attacks, which caused great damage to the Mauritanian economy. A new military government which took power in Mauritania in July 1978, signed a peace agreement with Polisario on 5 August 1979. The Mauritanian government stated that 'it does not have and will not have territorial or any other claims over Western Sahara'. Moroccan troops occupied the areas that had been under Mauritania, thereby obstructing the Polisario from taking control of them.

Polisario's war with Morocco is continuing and Morocco has now abandoned many

of the smaller and remote outposts it occupied in 1975-76. Morocco has built a continuous defence line in order to seal off the whole north-western corner of Western Sahara, enclosing El-Ayoun, Smara and the territory's valuable phosphate mines at Bou-Craa.

Meanwhile, the Saharan Arab Democratic Republic (SADR) was proclaimed by the provisional Saharawi National Council on 27 February 1976 to fill the juridical vacuum left by the formal termination of Spanish rule. The SADR's leading bodies tend to overlap in function and composition with those of Polisario itself. The SADR's constitution, which was adopted by the Third Congress in August 1976, states that the functions of the supreme legislative and executive body, the Council for the Command of the Revolution (CCR), will be performed transitionally by the Front's executive committee until the holding of the first General People's Congress after the recovery of sovereignty.

So far, the SADR has been recognised by 56 states² of which 29 are African states.

The OAU and the UN, 1976-1983

The annexation of Western Sahara by Morocco transgressed two of the OAU's most hallowed principles - the right of colonial peoples to self-determination and the sanctity of the frontiers, albeit artificial, inherited from the European powers.

At its summit meetings in 1976 and 1977, the OAU did not take any substantive position on Western Sahara but refer-

2) Algeria, Angola, Benin, Botswana, Burundi, Cape Verde, Chad, Congo, Ethiopia, Ghana, Guinea-Bissau, Lesotho, Libya, Madagascar, Mali, Mauritius, Mauritania, Mozambique, Rwanda, Sao Tomé and Príncipe, Seychelles, Sierra Leone, Swaziland, Tanzania, Togo, Uganda, Upper Volta, Zambia, Zimbabwe; Afghanistan, Iran, Kampuchea, Laos, North Korea, South Yemen, Syria, Vietnam, Bolivia, Costa Rica, Cuba, Dominica, Mexico, Nicaragua, Panama, St. Lucia, Grenada, Guyana, Jamaica, Surinam, Venezuela, Kiribati, Nauru, Papua New Guinea, Solomon Islands, Tuvalu, Vanuatu.

red the problem to an extraordinary summit, which was never held. In 1978, an ad hoc committee of five African heads of state, known as the 'wise-men', was set up to consider 'all the data on the question of Western Sahara, among which, the exercise of the right of the people of this territory to self-determination'.

The 1979 OAU summit meeting endorsed the 'wise-men's' proposals which included an immediate ceasefire and the exercise by the people of Western Sahara of their right to self-determination, through a general free referendum.

Morocco refused to attend a meeting of the ad hoc committee in December 1979 but agreed to do so in July 1980 as a way of avoiding the SADR's attendance at a meeting of the OAU as a member state, since 26 of the 50 African states had by then recognised the SADR.

The OAU's 1981 Nairobi summit appointed an implementation Committee, composed of the presidents of Kenya, Guinea, Mali, Nigeria, Sierra Leone, Sudan and Tanzania, to take all necessary measures to guarantee the exercise of a general and regular referendum. Despite holding two meetings in 1981 and 1982, the Committee failed to make any real progress, because Morocco refused to recognise Polisario as its adversary.

With the Committee's lack of progress, the supporters of the SADR within the OAU tried to seat it as the organisation's 51st member. The SADR took its seat at a session of the OAU's Council of Ministers in February 1983. However, eighteen states joined Morocco in a protest walk-out, thereby endangering the two-thirds quorum required for holding its meetings. The SADR took a voluntary and temporary decision not to take its seat and this finally enabled the OAU to hold its summit meeting in June 1983.

Polisario was rewarded for this gesture

by the adoption of a resolution by consensus, which for the first time named Morocco and Polisario as the parties to the conflict and urged them to undertake direct negotiations. They were asked to meet with the implementation Committee as soon as possible, so that the referendum could be held within six months, i.e., by December 1983.

As for the UN, its General Assembly continued to reaffirm the inalienable right of the people of Western Sahara to self-determination and independence (Resolution 37/28, 1982).

Economic Resources

Besides the existence of some oil and iron ore, the territory is known for its large phosphate deposits and fishing resources. About 1 million tons of fish are caught in Western Sahara's waters each year. The territory's total phosphate deposits are estimated to be 10 billion tons. From 1969, Spain had been exploiting the deposits and exports began in 1972. In 1975, annual output was said to be 2.6 million tons. The phosphate industry came to a standstill in 1975 after the outbreak of war between Polisario and Morocco. Mining was resumed on a small scale in 1982, after the completion of the 'wall'.

The World Powers

Though the USSR has publicly supported the Western Saharans' right to self-determination, it has not recognised the SADR. The main reason is that the USSR values its growing economic relationship with Morocco. The USSR signed a 'contract of the century' in 1978 under which it will provide \$ 2 billion for the development of Morocco's huge Meskala phosphate deposits

and will trade oil, chemicals, timber and ore-carriers for phosphate and phosphoric acid over the next 30 years.

As for the USA, Morocco is of great strategic value because of its geographical location, en route to the Middle East. In May 1982, Morocco signed an agreement giving the USA's Rapid Deployment Force transit facilities at Moroccan air-bases. 'Morocco is important to broad American interests and occupies a pivotal strategic area', a State

Department official told Congress in 1981.³

The Reagan administration set up a joint military commission with Morocco in 1982 and proposed to treble its Foreign Military Sales (FMS) credit to Morocco from \$ 30 million in fiscal year 1982 to \$ 100 million in 1983. This policy of increased support was clearly reflected in the UN when the USA was the only Western power to cast a negative vote in 1982 on the resolution on Western Sahara.

3) Morris Draper, Deputy Assistant Secretary, Near Eastern and South Asian Affairs, in *Arms Sales in North Africa and the Conflict in the Western Sahara: an assessment of US policy*, p. 3.

COMMENTARIES

UN Commission on Human Rights

The most positive outcome of the 1984 session of the UN Commission on Human Rights was the agreement reached without a vote upon the draft Convention against Torture. The draft has been forwarded to the General Assembly with all but two of the articles agreed. The two left for decision at a higher level both relate to implementation. Article 19 deals with the consideration by the proposed Committee against Torture of States Parties' reports on their implementation measures. The outstanding issue is whether the Committee should be able to make only 'general comments', as is the case under the International Covenant on Civil and Political Rights, and as the Soviet countries in particular wish, or whether, as other countries prefer, the Committee should be able to make 'comments and suggestions'. This would be in line with the Convention on the Elimination of Racial Discrimination which permits "suggestions and general recommendations".

The other point of disagreement is perhaps of greater importance. Article 20 proposes an unprecedented implementation measure which would permit the Committee against Torture to institute on its own initiative, and without any formal complaint, a confidential inquiry if it received apparently reliable information of a systematic practice of torture in the territory of a State Party. The question at issue here is whether this procedure should be mandatory on all States Parties, or as the Soviet countries contend, should apply only to

those States which consented to be subject to it.

Among the agreed articles are those which provide for 'universal jurisdiction'. This means that a State Party in whose territory a person is found who is alleged to have committed torture in any other country shall be under an obligation, if it does not extradite him, to try him itself, providing the necessary evidence is available. In other words, no State which is a party to the Convention will be a 'safe haven' for a torturer.

Other articles impose upon States Parties duties

- to take effective legislative, administrative and judicial measures to prevent torture,
- not to extradite or return a person to a country where there are reasonable grounds to believe he would be in danger of being tortured,
- to penalise all acts of torture,
- to assist other countries to bring torturers to justice,
- to give instruction on the prohibition of torture in the training of police, military and medical personnel, public officials, prison officials and interrogators,
- to investigate promptly and impartially allegations of torture, and
- to give redress to victims of torture.

At the instigation of the International Commission of Jurists and Amnesty International, nearly all the non-penal provisions

of the Convention apply not only to torture but to all "other acts of cruel, inhuman or degrading treatment or punishment". Unfortunately, this does not apply to civil redress to victims.

Israeli Occupied Territories

As on previous occasions the Commission began its work by discussing at length the situation in the Israeli occupied territories, the right to self-determination, and Southern Africa and Apartheid. The resolutions on Israel followed familiar patterns, but included a proposal that the Security Council should be asked by the General Assembly to adopt the measures referred to in Chapter VII of the UN Charter for its persistent violation of human rights of the population of Palestine and other occupied Arab territories. Chapter VII relates to action with respect to threats or breaches of the peace and acts of aggression, and may take the form either of economic sanctions, as was done against Southern Rhodesia, or military action. Among the human rights violations condemned in the resolutions were mass arrests, collective punishment, administrative detention, systematic repression against cultural and educational institutions, the imposition of Israeli citizenship and identity documents on Syrian citizens of the Golan Heights, the proliferation of Israeli settlements, and the arming of settlers to commit acts of violence against the Arab population.

Self-determination

Issues on self-determination were debated for four full days. Situations frequently referred to were Afghanistan, Kampuchea, Grenada, Central America and Western Sahara. A resolution proposed by

the Chairman, Mr. Kooijmans, was adopted on Grenada. It called upon all States to show the strictest respect for its sovereignty, independence and territorial integrity, and reaffirmed the inalienable right of the people of Grenada to decide their own future, and the obligations of all States not to interfere or intervene in its internal affairs.

The resolution on Afghanistan called again for the withdrawal of all foreign troops so as to permit the Afghan people to choose freely their own form of government and their economic, political and social system. The resolution on Kampuchea also called for the withdrawal of foreign forces; that on the Western Sahara took note of the resolution of the Organisation of African Unity calling for direct negotiation between Morocco and the Polisario and a peace-keeping force during the organisation and conduct of a referendum; and that on Namibia called again for the ending of its illegal occupation by South Africa.

South Africa and Apartheid

There were in all six resolutions dealing with South Africa, Namibia, the Convention on the Crime of Apartheid, and Racism and Racial Discrimination. The Commission condemned the massive and cruel denials of human rights under the apartheid regime in South Africa and Namibia and South Africa's military attacks against neighbouring African states. All specialised agencies, and in particular the International Monetary Fund (IMF) and the World Bank were requested to refrain from granting any type of loans to the racist regime in South Africa. Another resolution endorsed the Sub-Commission's proposal for a Special Rapporteur to study the achievement made and obstacles en-

countered during the first Decade for Action to Combat Racism and Racial Discrimination. It suggested that the study should propose new or additional measures for examination by the Sub-Commission.

The Sub-Commission

Following last year's decision to invite the Chairman of the Sub-Commission to attend the Commission, the report of the Sub-Commission was presented by its Chairman. The discussion in the Commission this year was more conciliatory towards the Sub-Commission. This was referred to by the Chairman of the Sub-Commission, who commented that there was a welcome awareness of the complementary nature of their respective tasks and of the need to preserve the Sub-Commission's independent status.

Based on the Sub-Commission's report the Commission adopted resolutions:

- recommending to ECOSOC the appointment by the Sub-Commission of a Special Rapporteur to undertake a study in consultation with the Centre for Social Development of the causal connection between serious violations of human rights and disability;
- commending the Working Group on Indigenous People for its efforts to establish a long term programme of work and saying that it looked forward to receiving the draft standards regarding the right of indigenous people;
- expressing its concern at the persistence of tensions and conflicts in Central America and the increase in outside interference and acts of aggression against the countries of the region, and extending its firmest support to the efforts of the Contadora group of

countries;

- proposing that a seminar be organised, in collaboration with the ILO, on ways and means to eliminate exploitation of child labour in all parts of the world;
- calling upon the government of Iran to cease immediately the use of children in the armed forces of Iran, especially in time of war;
- recommending the establishment of a group of experts designated by the Sub-Commission, WHO, UNESCO and UNICEF to conduct a study on the phenomenon of traditional practices affecting the health of women and children;
- recommending that the report of Mr. Eide and Mr. Mubanga Chipoya on conscientious objection to military service should be printed and given the widest distribution;
- recommending the appointment of Mr. Mubanga Chipoya as a Special Rapporteur to prepare an analysis of current trends and developments concerning the right of everyone to leave any country, including his own, and to return to his country, and
- deciding to postpone to next year consideration of the Sub-Commission resolution concerning the terms of reference for a High Commissioner for Human Rights.

The representative of Brazil introduced a draft decision calling upon the Sub-Commission to refrain from submitting draft resolutions concerning human rights which are under consideration under the confidential procedure 1503, as it had done this year in the cases of Afghanistan and Paraguay. He argued that the Sub-Commission could in the future send resolutions on every situation being considered under 1503 procedure, thereby rendering the procedure meaningless. In the debate on this

proposal the view was expressed that this proposal would set a bad precedent if it imposed a blanket prohibition of this kind. Some suggested that the Sub-Commission should be requested to study the problem of any possible conflict between resolutions under the public procedures and under resolution 1503. Finally the Commission voted to postpone consideration of the draft decision to the next year.

The resolution on Paraguay was, however, adopted under a later item dealing with the human rights of persons under detention or imprisonment. The resolution expressed serious concern at the application of the state of siege in Paraguay for more than twenty years and invited the government of Paraguay to consider ending it in order to encourage the promotion of and respect for human rights in the country.

Under the same agenda item the Commission adopted a resolution urging Israel to release immediately all civilians arbitrarily detained since the beginning of the invasion of Lebanon. In another resolution it expressed concern at the extensive detention in many parts of the world of persons who exercise the right to freedom of opinion and expression, appealed for their release, and decided to review the matter at its next session.

Missing and disappeared persons

The report¹ of the Working Group on Disappearances admitted that the progress has been slow in finding solutions, and concluded that the time might have arrived for the Commission to adopt a more active role and make a firmer appeal to the governments concerned to cooperate with the Group.

In extending the Working Group's mandate for another year, the Commission urged governments to consider with special attention the wishes of the Group to visit their countries.

Chile

The Commission once again reiterated its dismay at the disruption in Chile of the traditional democratic legal order and its institutions, particularly through the maintenance and institutionalisation of emergency legislation and the extension of military jurisdiction. It urged the Chilean authorities to investigate and clarify the fate of persons who were arrested and disappeared, to respect the right to life and physical integrity by halting the practice of torture, to respect the right of Chilean nationals to live in and freely enter and leave their country, to restore the full enjoyment and exercise of trade union rights, to restore and respect economic, social and cultural rights and to cooperate with the Special Rapporteur.

Gross violations

The Chairman announced before the public discussion on gross violations that situations relating to Albania, Benin, Haiti, Indonesia in relation to East Timor, Paraguay, Philippines, Turkey and Uruguay were under consideration under the confidential procedure of ECOSOC Resolution 1503.

In the public discussion under this agenda item the Commission had before it reports on Poland, Iran, Guatemala, El Salvador and Sub-Commission resolutions on Afghanistan and Sri Lanka. Besides these

1) E/CN.4/1984/21 and Add 1 and 2.

situations numerous other country situations were referred to by the members, observers and NGOs. One such intervention on Nicaragua was made by a Miskito Indian refugee from Nicaragua who spoke as a delegate of the Honduran government. On a point of order raised by the Nicaraguan representative, the Chairman stated that he had received information from the Honduran representative that this person was an accredited member of their delegation. Many delegates considered it very unusual for a government to accredit and present a refugee from another country as an official member of its delegation.

Poland

The report² on Poland was presented by the Under Secretary General Patricio Ruedas, who replaced Mr. Hugo Gobbi as a representative of the Secretary General to undertake a thorough study of the human rights situation in Poland. The Polish authorities, holding that the Commission's resolution on Poland was an interference in its internal affairs, refused to cooperate with the Secretary General's representative. However, Mr. Ruedas has stated in his report that he visited Poland on official business and met various government officials, members of the Catholic church and others and his report was based on information obtained from various sources as well as information gathered during his visit.

The brief report after dealing with the legislative and other developments concludes that "The suspension and thereafter the lifting of martial law, as well as the enactment and implementation of the clemency measures and subsequently the amnesty law have produced conditions

favourable to a reconciliation between different sectors of Polish society". Some delegations raised the question whether a number of key martial law provisions had not been institutionalised. The draft resolution on Poland requesting the Secretary General to continue direct contacts with the government of Poland was postponed to next year by 17 votes to 14 with 12 abstentions.

Guatemala

While presenting his report³ on Guatemala the Special Rapporteur, Viscount Colville of Culross, said that a major problem had been that of checking the allegations of terrible human rights violations which had for years emanated from Guatemala. In his report the Rapporteur frequently referred to this problem of verification and suggested that the government should devise a system of inquiry. A number of NGO representatives considered that the report corresponded little with the real situation in Guatemala. The Commission decided to extend the mandate of the Special Rapporteur for another year and expressed its profound concern at the continuing massive violations of human rights in Guatemala, particularly the violence against non-combatants, widespread repression, massive displacement of rural and indigenous people, and disappearances and killings.

Iran

The Commission expressed its deep concern at the continuing violations of human rights in Iran, in particular summary or

2) E/CN.4/1984/26.

3) E/CN.4/1984/30.

arbitrary executions, torture, detention without trial and religious intolerance. It urged the government as a State Party to the International Covenant on Civil and Political Rights to respect and ensure to all individuals within its territory the rights recognised in the Covenant. It requested the Chairman to appoint a Special Representative of the Commission to establish contact with the government and to make a thorough study of the human rights situation there.

El Salvador

Referring to the report⁴ of the Special Representative, Mr. José A. Pastor Ridruejo, the Commission expressed its deep concern at the fact that the gravest violations of human rights are persisting in El Salvador. It regretted that the appeals for the cessation of acts of violence formulated by the General Assembly and the international community in general had not been heeded and that the promulgation of an amnesty law and the creation of a national human rights commission had not altered the general situation of human rights. The mandate of the Special Representative was extended for another year.

Afghanistan

The Commission endorsed the Sub-Commission's recommendation to the ECOSOC that a Special Rapporteur be appointed to examine the human rights situation in Afghanistan with a view to formulating proposals which could contribute to ensuring full protection of the human rights of all residents of the country before, during and after the withdrawal

of the foreign forces.

The Commission also requested the Secretary General to appoint an expert to visit Equatorial Guinea to study the best way of implementing the plan of action proposed by the United Nations. In a separate decision it decided that further consideration of the situation in Sri Lanka was not called for.

The confidential Resolution 1503 procedure

The ICJ Secretary General speaking under the item on further promotion and encouragement of human rights, brought to the attention of the Commission the prolonged delays of the 1503 procedure. He made the following suggestions for accelerating it:

- 1) "that when a situation is referred to the Commission by the Sub-Commission, the government concerned be requested to provide a substantive reply before the meeting of the Commission, failing which the Commission will assume the truth of the allegations is admitted;
- 2) that once a situation has been referred by the Sub-Commission, any additional information relating to it in further communications be furnished directly to the Commission;
- 3) that when the Commission has examined the situation and the government's reply and observations, if any, it should as a general rule appoint a Special Rapporteur to make a thorough study, unless it decides not to proceed further with the matter; and
- 4) that the author of the original communication should have an opportunity

4) E/N.4/1984/25.

to answer the reply of the government or its observations on the situation referred to".

The full text of the intervention will be found in Appendix D of ICJ Newsletter No. 20.

Summary and arbitrary executions

Mr. Amos Wako, the Special Rapporteur on this subject, presented his second report⁵ to the Commission. His analysis of the information he received indicates that summary or arbitrary executions take place in situations of political upheaval, internal armed conflict, suppression of opposition groups or individuals, and abuse of power by agencies entrusted with law enforcement. For each of these situations he gave specific examples without naming the country or countries concerned. He also identified the following factors as likely to foment the conditions for summary or arbitrary executions: absence of democratic political process, existence of special security measures such as states of siege or emergency, existence of special courts, control of the judiciary by the executive or military power, existence of secret police security forces and para-military groups outside the normal law enforcement agents or military personnel. He also drew attention to the following economic and social factors: inequitable distribution of wealth, ethnic conflicts, religious intolerance and racial discrimination. In response to appeals from various sources making allegations of imminent or threatened summary executions, he sent urgent messages to the concerned governments, namely Bangladesh, Belize, Chile, Ghana, Guatemala, Iran, Iraq, Libya, Malawi and Sri Lanka.

The Commission, strongly deploring the large number of summary or arbitrary executions, including extra legal executions which continue to take place in various parts of the world, decided to extend the mandate of Mr. Amos Wako and asked him to pay special attention to cases in which summary or arbitrary execution is imminent or threatened.

Economic, Social and Cultural Rights

On the Right to Development the Commission had this year before it a 'consolidated text' of a draft declaration prepared by the working group of governmental experts on this subject, and regarded by them as providing 'an informal technical basis for further work'. The ICJ Secretary-General urged that the Draft Declaration should expand its treatment of participation, making clear that it must be at all levels of decision making and at all stages of the development process, "starting from the setting of overall objectives, through the planning of programmes and ending with their implementation and evaluation", as stated in the UN Secretary General's Preliminary Report on popular participation. The full text of this intervention is at Appendix A of ICJ Newsletter No. 20.

Under the item on economic, social and cultural rights the Commission recommended that Mr. Raul Ferrero's study on the New International Economic Order and the Promotion of Human Rights should be published and given the widest possible distribution.

Under another item, the Commission invited the Sub-Commission to consider elaborating a draft of a second Optional Protocol to the International Covenant on

5) E/CN.4/1984/29.

Civil and Political Rights, aiming at the abolition of the death penalty, and decided to consider this matter further under the item on the status of the Covenants.

Another resolution calls upon States to take effective measures to prohibit propaganda for war, in particular the formulation, propounding, dissemination and propaganda of political and military doctrines and concepts intended to provide 'legitimacy' for the first use of nuclear weapons, and in general to justify the 'admissibility' of unleashing nuclear war.

The Commission also proposed that the General Assembly should hold a special commemorative meeting during its 1985 session to celebrate the fortieth anniversary of the end of the Second World War and the founding of the United Nations, and to consider on that occasion ways and means of avoiding the spread of all forms of totalitarian ideologies or practices.

Under the agenda item on advisory services, the Commission adopted resolutions concerning Uganda and Bolivia. It asked the Secretary General to continue

his contacts with the government of Uganda and to bring to its attention the types of assistance the government of Uganda can draw upon. On Bolivia it asked the Secretary General to examine ways and means and possible resources for rapid implementation of projects suggested by the Commission's special envoy in his report.

The Commission's Working Group on the Draft Convention on the Rights of the Child and on the Draft Declaration on the rights of national, ethnic, religious and linguistic minorities will continue their work next year. Meanwhile the Commission has asked the Sub-Commission to prepare a definition of the term "minority" taking into account studies in this field.

In the elections to membership of the Sub-Commission, the Commission re-elected 11 of the existing members and 15 new members for the three year period ending in September 1987. The absence of the Chairman of the Working Group on Indigenous Peoples, Mr. Asbjorn Eide, will be much regretted by those interested in its work.

Individual Petitions Under the Convention on the Elimination of Racial Discrimination

Article 14 of the above Convention entered into force on 3 December 1982, following the deposit with the Secretary-General of the declaration by Senegal, the tenth State party to recognise the competence of the Committee on the Elimination

of Racial Discrimination (CERD) to receive and consider communications from individuals or groups of individuals. The other States which made the declaration in accordance with Article 14 are: Costa Rica, Ecuador, France, Iceland, Italy, Norway,

Netherlands, Sweden and Uruguay.

Until now, the CERD has examined reports from States Parties about the legislative, judicial, administrative and other measures taken to give effect to the provisions of the Convention. The Convention defines the term "racial discrimination" to mean any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Due to the entry into force of Article 14 of the Convention, the CERD was called upon to examine the preliminary draft provisional rules of procedure submitted by the Secretary-General. These rules have been grouped into three main categories:

- general provisions (rules 79 to 84) relating to the collection of information by the Secretary-General on cases brought before the Committee;
- the procedure for determining admissibility of communications (rules 85 to 92); and
- the consideration of communications on their merits (rules 93 to 96).

In drawing up the preliminary draft the Secretary-General took into consideration the relevant provisional rules of procedure of the Human Rights Committee, as well as its practice. There is, however, one important difference. Article 14 enables the CERD Committee, when considering State Party reports, to formulate suggestions and recommendations. It is not, like the Human Rights Committee, limited to general comments.

Who is entitled to present a communica-

tion to the Committee? The answer is to be found in the first paragraph of Article 14, which does not distinguish between citizens and non-citizens, but simply refers to "individuals or groups of individuals within the jurisdiction of a State party". This resulted in a very interesting debate in the Committee when reviewing rule 90 of the provisional rules of procedure about admissibility.

The rule reads as follows:

"With a view to reaching a decision on the admissibility of a communication, the Committee or its Working Group shall ascertain:

- a) That the communication is not anonymous and that it emanates from an individual or group of individuals subject to the jurisdiction of a State party recognizing the competence of the Committee under Article 14 of the Convention;
- b) That the individual claims to be a victim of a violation by the State party concerned of any of the rights set forth in the Convention. As a general rule, the communication should be submitted by the individual himself or by his relatives or designated representatives; the Committee may, however, in exceptional cases, accept to consider a communication submitted by others on behalf of an alleged victim when it appears that the victim is unable to submit the communication himself, and the author of the communication justifies his acting on the victim's behalf;
- c) That the communication is compatible with the provisions of the Convention;
- d) That the communication is not an abuse of the right to submit a communication in conformity with Article 14;
- e) That the individual has exhausted all available domestic remedies, including, when applicable, those mentioned in

paragraph 2 of Article 14. However, this shall not be the rule where the application of the remedies is unreasonably prolonged;

- f) That the communication is, except in the case of duly verified exceptional circumstances, submitted within six months after all available domestic remedies have been exhausted, including, when applicable, those indicated in paragraph 2 of Article 14."

Three opinions were expressed on the latter part of sub-paragraph (b): the first favoured its deletion; the second was not opposed to deletion but thought it advisable to indicate that the person or persons representing the victim should be subject to the same jurisdiction as the victim; the third favoured the text and stressed that, if the modification were adopted, it would be likely to exclude non-political organisations which sought objectively to promote human rights, and, on the contrary, would benefit organisations which acted from political motives. Another member of the Committee observed that the suggested modification could in fact prevent the Committee from examining some of the most serious cases of racial discrimination, i.e., those in which the individuals are placed by their governments in a situation making it impossible for them to submit a communication. In the end, the second part of sub-paragraph (b) was adopted as drafted by the Secretariat.

Throughout the rules of procedure the word "author" has been replaced by "petitioner" in order to follow, as far as possible, the wording of Article 14 of the Convention. In this respect, it was explained that, from a legal standpoint, the petitioner remains the legal entity lodging the complaint, whether or not a lawyer or other representative submitted communications on behalf of the alleged victim.

According to Rule 94, "admissible communications shall be considered by the Committee in the light of all information made available to it by the petitioner and the State party concerned... After consideration of an admissible communication, the Committee shall formulate its opinion thereon. The opinion of the Committee shall be forwarded, through the Secretary-General, to the petitioner and to the State party concerned, together with any suggestions and recommendations the Committee may wish to make... The State party concerned shall be invited to inform the Committee in due course of the action it takes in conformity with the Committee's suggestions and recommendations." There is an important provision in Rule 96 which enables the Committee to "issue communiqués, through the Secretary-General, for the use of information media and the general public regarding the activities of the Committee under Article 14 of the Convention."

At the time of writing, it appears that the committee has not yet received any communication under Article 14 of the Convention. This raises the question whether the States Parties which have made the declaration have undertaken the necessary steps to make persons under their jurisdiction aware of their rights and remedies. It is to be remembered that the States Parties have agreed to "assure to everyone within their jurisdiction effective protection and remedies, through the competence of national tribunals and other State institutions, against any act of racial discrimination..." Furthermore, "any State party which makes a declaration under Article 14 may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals... who claim to be victims of a violation... and who have exhausted other available local remedies".

The entry into force of this procedure for individual complaints marks an important step in the struggle for the elimination of all forms of racial discrimination. The experience of the Human Rights Committee and of the European Human Rights Commission has shown the significance of the right of individual petition for the protection of human rights. It is essential for the individual to have the means to see that his rights are respected, without which he would be powerless in face of a State which fails to recognise his rights. It is to

be hoped that the procedure under Article 14 will have a real deterrent effect and contribute, as stated in the preamble of the Convention, "to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination". It should also lead, as has done the jurisprudence of the Human Rights Committee, to important legal developments in the interpretation of the provisions of the Convention.

ARTICLES

Developments in International Human Rights Law

— an address to an NGO Conference in Geneva on 10 December 1983
to mark the 35th anniversary of the Universal Declaration of Human Rights

by
Eric Suy

Please allow me first, in my capacity as Director-General of the United Nations Office at Geneva to welcome you to the Palais des Nations. The few days you will spend with us will be of great importance. You will be able to take stock of the 35 years that have elapsed since the adoption of the Universal Declaration of Human Rights and learn lessons from the past while looking to the future, a future which may enable us to devise new means of promoting respect for human rights and draw up new texts and even new conventions. Your ideas on these two topics will undoubtedly lead you to some important conclusions on the future development of human rights. In this connexion, I would like to share with you some thoughts on the past and on the future.

First, the past:

If we go back almost 40 years to 1945, to the time of the adoption of the Charter, we are struck by one particular fact. For the first time, an international text gave serious consideration to the question of respect for human rights: the authors of the Charter were the first to regard respect for human rights as an instrument of peace.

In the days of the League of Nations, respect for human rights was regarded as an internal affair of States in which no international organization or any other State

could interfere. However, as a result of events of which you are aware, the authors of the Charter resolved to put an end to that era and to make human rights an important instrument of peace that was to be further strengthened in the Universal Declaration of Human Rights.

At this stage, I would like to make a few other points. When the Charter and the Universal Declaration of Human Rights were adopted, the international community was not at all what it is today. Most of the States of which it is now composed did not even exist and it was relatively small. The outlook at the time was predominantly what I would call western. At that time, the members of the international community did not, moreover, face the same problems that now confront the members of the Group of 77 or the non-aligned countries. This has to be borne in mind in order to understand some of the remarks I will make later. The Universal Declaration of Human Rights, which was originally a resolution of the United Nations General Assembly, was not a text of positive law but only a recommendation. In view of the lofty principles it embodies and as effect began to be given to human rights, however, it gradually came to be accepted as a text of positive law and, in the 1966 Covenants, its basic

elements took the form of binding international instruments.

The growing importance assumed by human rights in the 20 odd years between the time of the adoption of the Charter and 1966 shows that the revolution which its authors sought to bring about has exceeded all expectation. World public opinion is making it increasingly apparent that human rights no longer mean only respect for human rights and are no longer only an instrument for peace. Although positions based on national sovereignty are still occasionally adopted in discussions in the Commission on Human Rights and other bodies, human rights have been removed from the private sphere of States and are no longer regarded as "private property".

The Charter, the Universal Declaration of Human Rights and the Covenants have served as a basis for the adoption of other international instruments relating, for example, to the elimination of racial discrimination, genocide and *apartheid*. Considerable advances have also been made in the important field of international humanitarian law.

In a relatively short time, international relations have undergone unprecedented changes. In 1945 and even in 1948, no one would ever have said that States would have to account to an international forum for their conduct in matters relating to human rights. No such possibility was envisaged even when the Universal Declaration of Human Rights was adopted.

The adoption of the International Covenants on Human Rights led to the establishment of the very important procedure of requiring States to submit regular reports to a committee of independent experts on the measures they have taken to give effect to, and ensure observance of, human rights. This obligation and this procedure have, in my view, revolutionized international relations. Since that time,

moreover, a number of non-governmental organizations have begun to play a key role in the protection of human rights. I need not stress the fact that they work day and night to ensure that human rights are denounced and publicized. Their activities make it possible for public opinion and States as well to keep abreast of the human rights situation throughout the world. As I stated earlier, the Universal Declaration of Human Rights was the result of the efforts of what might now be regarded as only a handful of States. Fashioned as it was by a particular category of States, which would now be called the States of the North, it did not reflect the ideals, views and perceptions of the majority of States that now form part of the international community. Imperceptibly, moreover, a trend towards the regionalization of human rights began to develop in western Europe, Latin America and Africa. This trend is also to be seen in the work of the United Nations General Assembly, where the Third Committee, in particular, has been discussing the problem of the regionalization of human rights for several years. Whether this is a destructive element is something only time will tell.

A related question is whether the regionalization of human rights is prejudicial to the idea that human rights are indivisible and universal. In practice, there is a tendency to believe that the provisions of the Covenants and the Universal Declaration of Human Rights are only of limited value and that each region has to formulate rules for the protection of human rights that are based on its own ideology and cultural identity. My personal opinion is that the elaboration of regional conventions would be a positive development, but this is a matter that you may wish to discuss.

Let us now try to see what the future holds in store. I have referred to the problem of regionalization, but, as far as human

rights are concerned, we have to see whether we should move ahead and try to find other areas where further codification would be desirable. Is there further room for codification in this area? The recently invented concept of the right to development is another topic that you probably wish to discuss at greater length. What is the right to development? Can it be codified? Can it be regarded as a human right in the conventional sense? What does it involve? Are we not creating further problems by assuming that human rights can be promoted both at the regional level and at the international level by establishing a new category of human rights? Is this new category really necessary? Would it not be better to improve what we have instead of being carried away by ideas whose time has not yet come? Perhaps we might focus on trying to improve monitoring procedures, thereby doing everything that needs to be done. Indeed, although the procedure of requiring States to submit periodic reports to a committee of independent experts is a revolutionary one, it has not yet been used to the full. It is a step in the right direction — and a good one — but, in my view, non-governmental organizations have to consider the possibility of establishing new, more effective and more binding procedures and have to take account of the practical and political problems involved in their implementation.

What I have to say in conclusion may seem somewhat critical. When the United Nations was established, the Commission on Human Rights was set up under the Economic and Social Council. The Commission on Human Rights is the only United Nations body that deals with human rights. However, the committees set up under the International Covenants and other United Nations conventions are not United Nations bodies. It is nevertheless interesting to note that progress on human

rights and the monitoring of human rights is, contrary to what might be expected, the result not of the efforts of the Commission on Human Rights, but of the efforts of the committees of independent experts set up under the Covenants and other instruments.

The mass media display keen interest in the work of the Commission on Human Rights, which is a political body if ever there was one and which regards human rights as an instrument of international policy (although they should not be), whereas the work of the committees of experts is usually overlooked. I have yet to see the international press pay any attention to the periodic reports which States have to submit to the Human Rights Committee or attach any importance to the careful scrutiny to which such reports are subjected.

We must not, however, go to the other extreme and underestimate the work of the Commission on Human Rights: the work of its Sub-Commissions is extremely valuable and the recent procedure of entrusting special rapporteurs with the task of investigating some particularly odious practices is an important and very promising innovation.

Human rights are far too important to be judged by purely political and diplomatic standards. They are not a government's prerogative. They are just as much a matter of concern to those who are governed, namely, individuals.

With these few thoughts, I shall conclude this introduction and express hope that, within a few days, you will have a clearer idea of human rights problems. I also hope that, now that we have taken stock of the 35 years that have elapsed since the adoption of the Universal Declaration of Human Rights, you will be able to look to the future of human rights both from the point of view of substance and from that of monitoring procedures.

I wish you a fruitful stay in Geneva and every success in your work.

The Fight Against Torture

by
J.H. Burgers*

I should like to make some comments on the significance of the convention against torture which we are trying to bring about.

I would consider the conclusion of such a convention an important contribution to the struggle for eradicating the evil of torture. At the same time, we should place this importance in proper perspective. The convention would be a *contribution*, it would not be *the solution* to the problem of putting a stop to torture. We should not expect miracles. When some day in the future the convention against torture enters into force, we cannot expect that this by itself is sufficient to make torture disappear. Much more will be required.

In the struggle for the protection of human rights, it is necessary to be both a believer and a skeptic. A recollection of such healthy skepticism comes to my mind. On the 10th of December of 1975, the day after the General Assembly had adopted the Declaration against Torture, I congratulated a colleague of mine in the Dutch Ministry of Foreign Affairs, a colleague who during the preceding months and weeks had spent an enormous amount of work in helping to bring this Declara-

tion about. This colleague was Dr. Theo van Boven, who later became Director of the Human Rights Division here in Geneva. That day in December 1975, I was surprised at Dr. van Boven's reaction: he sadly remarked that he did not know whether this was really something for which I should congratulate him. It remained to be seen, he said, whether the Declaration against Torture would turn out to be just another addition to the mountain of rhetoric, or would have a genuine impact on the real world.

I must admit that during the second half of the nineteen-seventies, that is after the adoption of the Declaration, torture was probably perpetrated in this real world on an even larger scale than during the first half. And yet, this is no reason for despair.

In the struggle for human rights, documents are not sufficient. But they are by no means unimportant.

In this connection I should like to recall another epoch in the struggle for human rights, namely the era of the Enlightenment in the eighteenth and the first part of the nineteenth century.

All too often torture is referred to as a "medieval" practice. I think this is not

* Mr. J. H. Burgers (Netherlands) was the Chairman/Rapporteur of the Working Group of the UN Commission on Human Rights which drew up the Draft Convention against torture. This article is taken from his speech to the Commission when the Draft Convention was adopted unanimously on 29 February 1984.

entirely fair towards the Middle Ages. Apparently it is not sufficiently well-known that the two centuries immediately following the close of the Middle Ages were a period of remarkable cruelty in the treatment of alleged offenders. It was a period during which capital punishment was applied to an ever-increasing number of offences. It was also a period during which torture was a standard element of criminal procedure in most European countries. I may mention, for instance, that when the famous Dutch lawyer Hugo Grotius was an attorney-general in Holland, one of his functions was to be present when suspected criminals were tortured on the rack. In those days torture was routine.

If we compare the situation in Europe at the end of the seventeenth century with the situation at the end of the nineteenth century from the viewpoint of the occurrence of systematic torture practices, it is a difference as between night and day. At the end of the nineteenth century, torture did no longer play a significant role in the Western world. This radical change had not been brought about by forces of nature, it had been effected by the dedicated and perseverent work of men.

In the course of the eighteenth century, a growing number of individuals in many European countries began to protest against the cruelty which then characterized the administration of criminal justice. I mention in particular the Italian scholar Cesare Beccaria, the author of the famous work "Dei delitti e delle pene" ("On offences and sanctions"), a book that made an enormous impact. Many other books and pamphlets were published, associations

were founded. The fight against torture was one of the principal elements of the human rights movement which developed in the era of the Enlightenment. And this fight was successful. What I wish to emphasize now is that an important part of this fight concentrated on standard-setting. As a result, national laws were changed in most European countries. The human rights movement brought about a change in mental attitudes, a change in actual practices, and a change in legislation. All these developments went hand in hand and mutually reinforced each other.

Now I am very well aware of the fact that such changes are not irreversible. In the first half of the present century, regimes came into power in some big European countries which used torture deliberately and massively as an instrument of policy. This experience has been one of the roots of the Second Human Rights Movement which was born at about the same time as the United Nations and of which our own Commission is so-to-say an offspring. We can never think that we have won the final victory, we must always expect new lapses into cruelty and oppression. But what I wanted to convey to you by recalling the experience of 200 years ago, is that action for the promotion and protection of human rights is not useless, even if its results are not perennial. The fight against torture is not a hopeless fight, and standard-setting is an important and indispensable part of that fight. Therefore I do look forward to the conclusion of the international convention against torture and other cruel, inhuman or degrading treatment or punishment.

Preservation and Access to Plant Genetic Resources

by
Upendra Baxi and Clarence Dias

The war against human deprivation has to be waged at many different levels and in many arenas. In this article we seek to draw the attention of those engaged in promoting development, which will liberate the poor through participatory and self-reliant social action, to the problem of plant genetic resources (PGR). At first sight, the problem of PGR might seem an esoteric diversion from concerns for social transformation at the grassroots' level. But this is not so. The problem of PGR is pressing and real. It bears vitally upon the struggle for liberation of the impoverished people of the South. It offers prospects of collaboration for individuals and groups. It calls for urgent and sustained initiatives by and on behalf of the impoverished.

In 1981, the Mexican government, taking the initiative, introduced a proposal in the Food and Agriculture Organization of the United Nations (FAO) to deal with the problem of PGR. This proposal was adopted by FAO in the form of a resolution calling for the Director-General of FAO to produce studies and appropriate proposals on the feasibility of establishing an international plant gene bank, and a legally-binding convention to insure the full exchange of plant genetic materials. These studies were to form the basis of action at the next FAO meeting in Novem-

ber 1983. Events at the November 1983 FAO meeting underscored the need for social-action groups in the South to play a larger role in bringing into being an equitable, international system for insuring preservation and access to the world's plant genetic resources.

It is a fact of geography that the world's centres of plant genetic diversity are to be found in the countries of the South. The South holds seventy-five percent of the world's plant varieties. Time and again, in the past and now, the nations of the North have collected germ plasm from the South, stored it and used it. It is difficult to overstate the North's dependence on the South for germ plasm. For example, every Canadian wheat variety contains genes introduced from up to 14 different third world countries. Disease resistance in American peas has come from Peru, Iran and Turkey while new spinach varieties are protected by genes from India, China, Iran and Turkey. Egypt, China and Ethiopia have all contributed genes barely to maintain production in Europe and North America. Thus, the South is "gene-rich," while the North is "crop-rich."

PGR assume importance for a number of reasons. New and improved varieties of plants (bred for higher yield or for disease resistance or for stress tolerance or any

combination of them are produced by cross-breeding of the propagative material (the germ plasm) of plants.¹ Moreover, genetic engineering techniques make it possible to mutate existing genes and new varieties of plants can be created with the desired genetic traits. Given the crucial importance of PGR, it is indeed ironic that the South, which is the main source of PGR, finds itself dependent on the North for continued access to crop germ plasm. Control over major crop germ plasm is also control over political destinies of the South. At a conservative estimate, about fifty-five percent of collected germ plasm is with the North. The North politically controls thirty-two important crops and has not shown any scruple in using its domination in generating political dependencies.

In recent years, countries in the South and in the North have both tended to express the view that PGR are the common heritage of mankind. But recently, countries in the South are reappraising this position since it appears that so far as PGR is concerned, the principle of common heritage of mankind seems to serve to promote an inequitable drain of PGR from South to North with no assurance that the South will be guaranteed access to its own PGR once they have been placed in private corporate collections in the North.

For people in the countries of the South (especially the poor) there are further problems with the concept of "common heritage of mankind" as it relates to PGR. It seems strange but true that deliberations and decisions concerning the common heritage of mankind rarely involve the majority of people constituting mankind. The current concept of mankind seems to exhaust itself in diplomats, technocrats, scientists,

international civil servants, opinion makers, leaders of multinationals and of governments. For far too long, the problem of world hunger has been dealt with exclusively by the well fed. If PGR is a common heritage of mankind, the starving millions ought to know what that "heritage" is and must begin to have some kind of say in its use and development.

As stated earlier, the war against human deprivation has to be waged at many levels, in many arenas. One such arena is food. What you do with seeds has much to do with control over the entire food system. Control over seeds will determine what crops will be grown, what inputs shall be used, who will buy the grain and how it may be marketed. The experience of the Green Revolution provides interesting insights into the relationships between PGR and impoverishment.

The Role of Multinationals in the Seed Industry

Today seed business is big business. In the rich, industrialized countries of the North, the seed industry has been attracting an investment of well over fifty billion U.S. dollars. The commercial seed market of the U.S. (estimated at thirteen billion dollars) is mostly in the private sector. In the last decade, seed companies have been taken over by huge multinationals whose primary interests lie in petroleum products including fertilizers and pharmaceuticals. This growing, multinational agribusiness sector is certainly not directly aimed at providing real or enduring solutions to the problems of world hunger. In the first, and the last analysis, corporate seed industry

1) 'Germ plasm' is the substance contained in germ cells, by which hereditary characters are transmitted. A 'gene' is an element of the germ plasm concerned with the transmission and development or determination of hereditary characters (Webster's Dictionary).

seeks profit and power, not peace and development.

The Green Revolution occurred because government planners were expecting bumper crops from the new so-called, high-yielding varieties (HYV) of seed. But strictly speaking, these varieties are really high response varieties which produce their yield only in response to the application of a number of inputs. HYV came as a package – an extremely profitable package for the multinationals which provide the agro-chemical pesticides and fertilizers.

On the estimate of the United Nations Food and Agriculture Organization (FAO) the third world consumption of pesticides is going to rise from 160,000 tons in the early seventies to over 800,000 tons by the mid eighties. Pesticides and herbicides have become necessary to protect the new varieties which tend to be vulnerable to diseases. It has been estimated that 375,000 third world peasants become ill every year from pesticides, and that 10,000 die. Substantial amounts of fertilizers also come from the North: fertilizer shortage in 1974 is estimated to have cost the poor countries of the South a loss of 15 million tons of grain – enough to feed 90 million people. Other elements of the package include farm tools and agricultural equipment to be imported from the North.

The connection between chemicals and seeds is now being strengthened. Seed coating (designed to "safen" new plants against unwelcome intruders in the soil) and seed pelleting (adding fungicide and plant growth regulators to the clay base of the pellet) are by now standard devices, arising from the preeminence of chemical companies in the seed industry. The impact of these innovations on food production is yet to be assessed but it is likely that chemically-coated seeds and plants may generate microtoxins fatal to the consumers, especially in the poor countries often used as

laboratories for testing where effective monitoring is weak or lacking.

From all this, it should be easy to understand the connection between multinational interests in seeds, agro-chemicals and drugs and medicines. Multinationals need plants for making drugs. A leading pharmaceutical company has acknowledged that 40 per cent of the global turnover in the industry is based on plant materials and it goes as high as 90 per cent in areas such as antibiotics and laxatives. This factor gives many multinationals added incentive to oppose any control through international agencies to regulate collection and use of germ plasm.

The Green Revolution saw the introduction of high-yielding varieties (HYV) of seed. Initially, government planners, and the more affluent farmers welcomed HYV, being lured by the attraction of bumper crops, more profits, and the prospect of surplus available to provide export earnings. For poorer farmers, HYV were either beyond reach or worse still, became an instrument for securing their total debt bondage as their credit needs increased to pay for the inputs needed by HYV. HYV comes as part of a package including agro-chemicals like pesticides and fertilizers. This package proved extremely profitable to the multinationals.

With all these costs, imposing heavy demands on the parlous foreign exchange reserves, the HYV have not always promoted increased agriculture production. In 1973-74, Bengali farmers lost 80 percent of the rice crop, and seedlings for the next crop, because high water in river deltas destroyed the new variety where the traditional ones would have survived. In 1972, Brazil lost half of its national wheat crop when it was exposed to a disease which it could not withstand. In 1975, Indonesian farmers lost half a million acres of rice to leafhopper insects for similar reasons. Undeterred

by such "trivial" casualties, agribusiness keeps on converting world hunger and misery into corporate power and profits. Needless to add, the poorer farmers have been hardest hit, being unable to bear the risk of such crop failures. Moreover, the Green Revolution has contributed to impoverishment in other ways. Land has been taken away from crops with a high nutritional value (like millets) and allocated to crops likely to be leading export earners. It is being increasingly acknowledged, even by its early promoters and proponents, that the Green Revolution has made the rich richer and the poor hungrier. Not unfairly, the Green Revolution has been considered as a pacesetter in national pauperization. The seed technology, being marketed by multinationals, has left agriculture in the South chemically dependent. In some instances this has led to permanent degradation of the physical environment for food production. The high costs of inputs has led to pauperization of the individuals and indebtedness of nations struggling to meet the foreign exchange costs of such inputs. The search for alternatives in agriculture which are less input dependent will inevitably involve new approaches to plant breeding, and for this access to PGR is vital. But plant breeders in the south are beginning to find their access to PGR (supposedly part of the common heritage of mankind) being increasingly restricted.

Genetic Erosion

Erosion of plant genetic resources is occurring in the North and South alike at an alarming pace. The narrowing of the plant base is inevitable when new and improved varieties (of undeniable superiority) emerge.

The growth of biotechnology has contributed to genetic erosion. Genetic engi-

neering techniques do not as yet, and may not ever, create genes. They can, and do, mutate them. To make new varieties, plant breeders have to look for desired genes. Seed germ plasm has to be found, wherever located. This, of necessity, involves gene-drain from South to the North. The gene-drain affects the world's pool of PGR in two distinct ways. First, successful mutations of genes and the large scale use of the new varieties adversely affects the preexisting plant varieties in nature. Sometimes the effects are devastating in their reach. The plant varieties simply disappear. For example, from 30,000 varieties of rice plants at the beginning of this century, India will be left with only 15 at the end of the century. Egypt, which has been the home for onions for thousands of years, now produces only one variety: the hybrid winter onion Giza 6 Improved. New hybrid varieties of barley have annihilated 70 percent of natural varieties of barley in Saudi Arabia and the Lebanon. The rate of genetic erosion is alarming: the world will soon have lost one-sixth of all its living species by the end of this century. And it is not merely a matter of loss of plant varieties. With every plant type lost, there will also be a loss of ten to thirty animal or insect species directly or indirectly dependent on such plant.

Second, there are heavy germ plasm losses. Plant breeders and seed multinationals hoard the germ plasm of the South: but they do not use it all or preserve it. Private firms exercise "life and death" powers over germ plasm under their collection and storage. For example, the United Fruit Company probably has control of about two-thirds of all the world's collected banana germ plasm. It announced on May 11, 1983 that it may close down its conservation program. As many as 700 rubber cultivars (cultivated varieties) collected from Southeast Asia, Brazil and Sri Lanka

were held by Firestone Tire and Rubber Company. On April 29, 1983, the company announced simply that its germ plasm research work had been "suspended." These examples (and they abound) represent "commerciogenic erosion" of PGR, motivated by corporate profit and power.

Control over major crop germ plasm is also control over political destinies of the South. About fifty-five percent of collected germ plasm is with the North. And this is a conservative estimate. The North politically controls thirty-two important crops and has not shown any scruple in using its domination in generating political dependencies.

Moreover, most elites of the South are permitted by people to diminish, and eradicate, their endowment of PGR. The rapid rate of deforestation and organized failure to achieve and operate a National Forest Policy threatens our plant genetic reserves. The irrigation and power policies which lead to construction of dams, policies or non-policies regarding environmental and marine pollution, flood control and related ecology policies also threaten the national plant gene heritage. Our governments, anxious to protect PGR as common heritage of mankind, must also be made anxious to protect and preserve the national heritage.

It is in this overall context that the call by Mexico for the creation of an International Gene Bank assumes great significance in the battle against genetic erosion. All governments of the South enthusiastically supported it. But such is the overt and covert opposition from the North, that the November 1983 agenda includes a Report by the Director-General which merely recommends that the present existing network "could be considered as constituting in practice an international gene bank." The existing network comprises 38 institutions in 29 countries holding collections

covering 33 crops. And most of these institutions have problems of storage facilities, qualified personnel, evaluation of materials stored, and finally of "creation of essential links between gene banks and breeding programmes." The FAO's International Bureau of Plant Genetic Resources (IBPGR) laments (in an expert group report), "enormous losses of valuable materials arising out of the lack of organization, continuity and finance."

Another significant factor of note is that none of the proposals before FAO are attempting to tackle the substantial problem of "commerciogenic erosion" of PGR.

The seriousness of the problem of erosion of PGR is beyond doubt. There is no time for complacency. Time is running out. As even the Executive Secretary of the International Board of Plant Genetic Resources himself said on December 2, 1982:

"If the work is not done in the next 5-10 years, we're finished."

And the work will not get done until it becomes an important component of the poor people's struggle in the South.

Privatization and Plant Genetic Resources

By privatization we refer to a variety of processes which result in a resource, a product, or a technology being moved from the public domain (i.e., the commons) into the control (and often the ownership) of private hands, be they individual or corporate. Privatization inevitably creates problems of access: what was freely accessible earlier becomes, as a result of privatization, either totally inaccessible or accessible under restricted conditions which are often onerous and usually more costly.

As far as plant varieties and crops are concerned, what has been privatized in-

cludes the following:

1. germ plasm and plant genetic resources essential to further plant breeding work and tissue culture research;
2. elite breeding lines which are used in the development of new plant varieties;
3. new commercial plant varieties, and in the case of tissue culture research, new products and new applications and uses of products; and
4. scientific and technological processes which have created (3) above.

Germ plasm resources are critical to plant breeding work. New technologies for plant breeding have direct and immediate implications for developing countries, especially in agriculture, and hence increasing privatization in this critical area of tissue culture technology is of special concern to developing countries.

It is important to view the phenomenon of privatization in its historical context in the first world and in the third world. Privatization occurred in the first world as a product of several forces. Several large chemical transnational corporations, fearing the impacts of environmental regulation, began to look for new products that they could sell in the global markets which they already commanded. Seeds came to be viewed as a delivery mechanism for products of these companies such as pesticides and fertilizers. With the advent of hybridization (and its built-in "natural" patent), seed itself became a commercially profitable product.

Transnationals observed the close relationship in the industrial sector between patent protection and market control and market monopolies, with higher prices and profit margins. Efforts were mounted by concerned segments of industry to extend patent or equivalent protection, first, to new plant varieties resulting from conven-

tional plant breeding technologies through plant breeders' rights legislation. This was followed by similar efforts to extend such protection to products resulting from recent advances in biotechnology. The creation of property rights provides a strong incentive for privatization. Rights of ownership and control are vital both in establishing market monopolies and in preserving existing market monopolies.

In the third world the spread of privatization has occurred for several reasons. In recent decades developing country governments, faced with a crucial need to step up domestic food production, have turned to high-yielding varieties (HYV) of crops, often supplied by large transnationals (TNCs). These countries have usually had (and continue to have) very weak regulatory and administrative mechanisms to deal with the day-to-day operations of transnational corporations after they have been let into the country. A variety of malpractices have occurred as a result.

Moreover, third world governments have (at times unwittingly and at other times wittingly and in direct collusion) facilitated the market penetration of TNCs by including the products of the latter in a "package" delivered by government agencies and comprising credit, water, fertilizers, pesticides, and extension services. A few third world countries have succumbed to pressures and adopted plant patenting and plant breeders' rights legislation.

For the third world, privatization creates problems of lack of or restricted access; perpetuation of technological dependencies; inappropriateness of "packaged" technologies; and inequities regarding the costs and terms on which access to such "privatized" technologies can be secured. Moreover, privatization in third world and first world alike, restricts the free flow of research information, thus inhibiting the diversity, if not the pace, of technological

innovation.

Thus, it is imperative that strategies be evolved in the third world (and industrialized countries alike) to:

1. arrest and, if possible, reverse the current trend toward greater privatization; and
2. cope with the adverse consequences resulting from existing privatization.

Some Possibilities for Social-Action Groups

We hope we have demonstrated the serious dimensions of the problem of PGR as it concerns the people who are trying to liberate themselves through participatory, self-reliant social action. What may social-action groups in the South do to help? Several lines of action are needed at *local, national, regional* and *international* levels.

At the local level, first and foremost, there is need for communicating the available information regarding the problem of PGR to the people in their language and idiom. People rooted to the soil and living on land will have little difficulty in relating the linkages between PGR and their own plight.

Second, out of a dialogue with the people may arise possibilities of action at the local, national, regional and international levels. Innovative initiatives are being taken by farmers in the South to halt PGR erosion and to restore traditional plant varieties. These must be encouraged and strengthened.

At the *national* level, the task is the most challenging and complex. Social-action groups and lawyers working with them might consider any or all of the following measures:

1. demand an integrated forest, ecology and energy policy;

2. create a demand for an appropriate seed technology, as explained below;
3. campaign for conservation of germ plasm as a national heritage and for legal and policy constraints on germ plasm collections by or under the auspices of multinationals;
4. campaign for high priority dedication of adequate resources for National Gene Banks under public sector management;
5. campaign for a periodic white paper from the governments as to the state of PGR in the country; and
6. demand an effective regulation of plant breeding activities in the private sector.

What would be an appropriate seed technology? Technically, this would at least mean development of plant varieties with vigour – that is, adverse soil tolerance, draught tolerance, deep water and flood tolerance, disease and insect resistance. There is also need to develop perennials.

The appropriate seed technology will need to strike a balance among the following competing needs:

- the needs of farmers to grow a safe crop at low cost;
- the needs of consumers to have adequate and continuous supplies at a reasonable price; and
- the need to secure greater profitability to the farmer producer rather than to the multinationals.

Perhaps the most significant aspects of seed technology choices in the third world relate to distribution, income and nutrition effects of the technology. If reaching and helping the smaller farmers and rural poor is an objective, seed technologies can, and should, be biased to *disproportionately benefit the rural poor*. Hard policy choices needed to achieve this may involve:

- a) preference for stable over unstable seed. Poorer farmers find it difficult enough to obtain seed. If they once obtain a stable seed, they can replant from their own resources, year to year, without loss of yield;
- b) higher-yielding varieties of the food crops grown and eaten by the poorer sections of the community (e.g., millets) can be expected to benefit them disproportionately. Thus, the choice of crop to which to devote seed-breeding expertise may itself benefit, to a greater or lesser extent, the poorer rural communities;
- c) preference for varieties with high yields of calories under conditions of low fertility will favour the poorer farmers who have more difficulty obtaining fertilizers;
- d) water-stress tolerance will benefit those less well-endowed farmers whose fields are likely to be short of water;
- e) storage for long duration, susceptibility to wetness;
- f) short-duration varieties may disproportionately benefit farmers who are unable to plant on schedule because of inability to obtain inputs;
- g) varieties with a high return to labor-intensity may favour poorer farmers who can rely on their family labour with negligible opportunity;
- h) varieties which will fit into existing traditional farming systems and existing or anticipated farm labour will tend to benefit the poorer, smaller men who are unable or less able than their better-off neighbours to attract or pay casual labour;
- i) varieties which can be inter-planted with other crops to reduce risk and increase calorie yields (and perhaps nitrogen fixation) may benefit those with very small plots of land; and
- j) varieties which are independent of mechanical requirements will reduce dependence on those who monopolize tractors or other machines.

At the *regional* level, there is need to communicate action, both at the national and international levels, to kindred social-action groups.

At the international level, it seems important to indicate solidarity with the governments and leadership of the South by supporting the Mexican Resolution 6/81, acknowledging the principle that PGR constitutes a common heritage of mankind, and supporting the establishment of an international gene bank. After the November 1983 FAO meeting, there has been much obfuscation of the key issues involved. Key PGR problems are being sidelined while an institutional struggle between the IBPGR and FAO is developing for control over whatever international gene banking facilities are to be established. The North has succeeded in replacing the Mexican call for an international, binding convention on the exchange of PGR. Instead, the South has been thrown the crumb of a voluntary "undertaking" in this regard. The undertaking represents, at best, a first step and much concerted effort will be needed if further progress is to be achieved.

Social-action groups in the South need not confine their actions to arenas within the U.N. system. The matters involved are of a global nature and they have implications for millions of people. There is a need, therefore, to politicize the issue on a mass scale. There is a need to work with peasant movements and farmers' associations in the South to help internationalize the issue from below. Among others, the following courses of action might be appropriate:

1. Mass meetings that include peaceful

marches to UN offices and some embassies to hand over petitions and appeals.

2. A massive signature campaign among farmers and concerned people against genetic erosion and the dominance of the North in the control of genetic resources.
3. Some joint meetings and campaigns with third world groups in Europe and America including "gene resources protection marches."

The problem of plant genetic resources may seem remote and far into the future to some. But the fact is that the issues involved touch the lives of tens of millions of people all over the world and especially those who are poor and powerless. It is precisely on behalf of the poor and the power-

less that human rights' law (both national and international) needs to be effectively invoked. Law is, after all, an instrument of policy — a kind of social technology to be developed to meet human needs. The PGR problem poses stern challenges to the international human rights' community. The right to food and other rights essential to the satisfaction of basic human needs need to be brought to life and need to be made a reality for the growing masses of the impoverished in the South. The struggle against impoverishment has to be waged in many different arenas and around many different issues. PGR is one such issue and, moreover, is an issue requiring urgent and concerted attention of social-action groups and lawyers in both the North and the South.

Arrest and Detention in Mexico

by
Raul F. Cardenas*

Mexico has a written Constitution and the fundamental principle of the legal system is the supremacy and inviolability of the Constitution. The Constitution alone is supreme in the Republic and from it emanate the secondary laws. Another fundamental principle is that of legality, by virtue of which the rights guaranteed to the inhabitants of the Republic are defined and the form of government accepted by the Mexican people is determined on the basis of article 40 of the Constitution, which states that it is the will of the Mexican people to establish themselves as a representative, democratic and federal republic composed of States that are free and sovereign as regards matters internal to them, but are united in a federation founded in accordance with the principles sanctioned and laid down in the fundamental law.

In the third title of the Constitution reference is made to the division of powers between the legislative, executive and judicial branches, which may not be united in a single person or body, nor may the legislative power be invested in a single individual, save in the case of extraordinary powers granted to the executive pursuant to the provisions of the Constitution.

The attributes and competence of these different powers are defined in the third

title, while the fifth specifies the powers of the States of the Federation which also have a republican and representative form of government that reflects the will of the people. The basic unit of its territorial division and of its political and administrative organisation is the 'Free Municipality'.

The Constitution of Mexico adopted a rigid system in that the procedure for its amendment in Article 135 is complicated. Nevertheless, the requirements specified in that article have not proved, as was hoped, an obstacle to the numerous constitutional amendments that have been made from 1917 to the present day.

Those who support the principle of the immutability of the Constitution consider the large number of amendments made to it a serious shortcoming, whereas others who deny the importance of this principle believe that the constitutional reforms have paved the way for the peaceful development of the legal and political system, and even for the inclusion of the so-called social guarantees in the Constitution.

The purely individual rights embodied in Chapter I of the first title of the Constitution, which are also known as human rights, fundamental rights, subjective public rights or rights of the governed, have not been amended, including those relating

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to the right to a fair trial, since any textual amendment of them would provoke a serious public reaction.

These individual rights now include the social rights as a result of later amendments to the original text of 1917. They are usually classified by students of the Constitution in the following broad categories: rights of equality, rights of freedom, rights of property and rights of security. However, the Mexican jurist, Don Juventino V. Castro, starting from the principle that a human being is by nature free and his freedom takes precedence over the State, proposes a different classification, viz.:

- a) rights of freedom,
- b) juridical rights and
- c) procedural rights.

The rights of freedom relate to personal freedom, freedom of action, freedom of belief and economic freedom, while the juridical rights comprise the right of equality before the law, the right to be heard by a competent court, the right to justice and the right to property, and the procedural rights those relating to non-retroactive application, legality, the strict application of the law and due process in judicial proceedings.

It is precisely in this last group that human rights are most often infringed in Mexico, especially those laid down in article 16 of the Constitution which relates to warrants of arrest:

"Article 16. No one shall be molested in his person, family, domicile, papers, or possessions except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken. No order of arrest or detention shall be issued against any person other than by the competent judicial authority, and unless same is

preceded by a charge, accusation, or complaint for a credible party or by other evidence indicating the probable guilt of the accused; in cases of *flagrante delicto*, any person may arrest the offender and his accomplices, turning them over without delay to the nearest authorities. Only in urgent cases instituted by the public attorney without previous complaint or indictment and when there is no judicial authority available, may the administrative authorities, on their strictest accountability, order the detention of an accused person, turning him over immediately to the judicial authority and which must be in writing, shall specify the place to be searched, the person or persons to be arrested, and the objects sought, the proceedings to be limited thereto; at the conclusion of which a detailed statement shall be drawn up in the presence of two witnesses proposed by the occupant of the place searched, or by the official making the search in his absence or should be refuse to do so.

Administrative officials may enter private homes for the sole purpose of ascertaining whether the sanitary and police regulations have been complied with; and may demand to be shown the books and documents required to prove compliance with fiscal rulings, in which latter cases they must abide by the provisions of the respective laws and be subject to the formalities prescribed for cases of search."

Don Eduardo Herrera y Lasso, a Mexican jurist, states that "128 years after the promulgation of the 1857 Constitution, and 60 years after the Constitution of 1917, illegal arrests are still the main problem". He goes on to refer to "the same abuses, the same rigorous isolation . . . to frighten the unhappy victims and force

them to make involuntary confessions, which are nearly always false...; the "secret arrangements and covert proceedings..." as well as "restrictions on the rights of the defence, which prevent the prisoner and his counsel from being present at the hearing of evidence against him...". It is only the perpetrators of the violations who have changed. The violations are now committed by members of the police force during unconstitutional detentions "for purposes of investigation".

The drafters of the 1917 text were, in fact, concerned to prevent any kind of illegal arrest and ensure that no one should be taken into custody without a judge's order, unless the accused was caught in *flagrante delicto*.

Mexican justice was formerly relatively successful in applying the provisions of the Constitution, but in the last few years, and especially from 1976 to 1982, it has become a common practice to take the accused into custody and hold him incommunicado without a judicial order, and only later bring him before the judicial authorities, in open violation of article 16 of the Constitution.

Unfortunately, many federal judges have accepted this anomalous situation without voicing any kind of criticism, and although respect for the law is now much greater than before, this unhappy practice has grown up through constant usage and toleration over the years. People are arrested without a warrant in certain cases and, after a confession has been wrung from them, they are held in custody at the judge's disposal. The judges for their part have taken refuge in a much criticised legal decision of the Supreme Court to the effect that the illegality of the confession must be proved by the person unjustly detained.

However, in view of an alarming rise in the number of crimes committed, the pres-

ent administration was forced to take steps to abolish anti-constitutional repressive bodies and to plan for proper police coordination, a move that was viewed with favour by the general public.

One of the newspapers with the largest circulation in the country, *Excelsior*, has referred to the security plan drawn up by the President, and emphasised that the result of several decades without any control has been to give the capital, and indeed the country in general, a police force that has acted arbitrarily and unconstitutionally. "It made for the violation of human rights and gave such bodies the image of illegal groups whose weapons are fear and insecurity".

In the *Novedades*, and in other periodicals published in Mexico City and the Province, stress has been laid on the importance of police coordination, but at the same time concern has been voiced that the Federal Constitution may be violated and that the country may move towards a police state, with consequences such as have been experienced in other South American countries. Moreover, lawyers have never tired of pointing to the spectacle of the police acting without control, creating clandestine prisons in which human rights are trampled upon, and violating laws deriving from the Constitution, such as the Law of Extradition.

In the periodical *Process* (No. 377 of 23 January 1984), reference is also made to the National Public Security Plan advocated by the Ministry of the Interior, which proposes to establish coordinated action between the Federal and State governments in order to root out delinquency. This Plan consists in concerting a number of joint actions, which will ensure cooperation among the organs of the Federation to achieve the common goal of expanding the scope of enjoyment of the rights afforded by the law, with the citizen as the sole

beneficiary. It states that the basic purpose of the Plan is to build up the morale of the police forces through modernisation, coordination between police, judicial and preventive bodies, and giving the people an opportunity to take part in the planning of public security.

At the national level, the Plan aims to reform the legal framework of the police, judicial and preventive institutions; to establish a programme of reorganisation, technological development and new operational systems, and also a complete programme for greater professional skills and incentives, in order to improve the services provided by the police forces.

These objectives are positive, but the general climate is one of mistrust, and the press takes a pessimistic attitude as a result of certain grave events that have come to light. It is true that there is a serious increase in criminality in Mexico at the present time, and this must be combatted, but in view of the fear of violations of the Constitution and human rights it is necessary to proceed with caution and to keep strictly within the bounds of the law.

As has already been said, the violation of article 16 of the Constitution has become a common practice in recent years. On the pretext of fighting the widespread corruption suspects are arrested, and, in express violation of their constitutional rights, made to confess whatever crime they are accused of. They are then placed at the disposal of a judge, who either has to release them or accept the violation of the law that has taken place, and make a formal order for their detention based on the police report.

Although the torture that accompanied arrests has largely been eliminated, illegality still continues in the sense that an arrest is made for the purpose of conducting an investigation and not an investigation for the purpose of making an arrest. In fact,

article 128 of the amended Federal Code for Penal Proceedings, instead of prohibiting the criminal police from arresting persons except within the terms of article 16 of the Constitution, specifies that:

"Article 128. The officials who perform the functions of criminal police shall decide in each case which persons must remain in custody and in what place, and shall enter these facts in the respective record.

If no decision is taken by the Federal Office of the Public Prosecutor, the Office shall be informed without delay so that it may be in possession of the facts and take the decision that is legally required of it.

...

As of the time at which it is determined to hold the detainee in custody, the Office of the Public Prosecutor shall inform him of the charge against him and of his right to nominate a person to defend him, and shall record that he has been so notified in the documents of the case. The Office of the Public Prosecutor shall receive the evidence which the detainee or his defence counsel shall provide at the appropriate time in the preliminary inquiries and, for the purpose of these inquiries, shall take the evidence into account in accordance with the requirements of the law in order to decide whether to request the court to order his imprisonment or release as appropriate. When it is not possible for the defence to submit all the evidence for the defence, it shall be entitled to present the remaining evidence to the judicial authorities, and the Office of the Public Prosecutor shall then begin the criminal proceedings if all the requirements of the law are met."

This reform effected some improvement

in the law. However, the confirmation that the judicial police can indicate in each case who should remain in custody and where, and recording this in the relevant document, preserves a dangerous procedure. It disregards what is expressly stated in the Constitution, namely that no order of arrest or imprisonment may be issued except by a judicial authority and unless it is preceded by a denunciation, charge or complaint on a matter punishable by imprisonment, and unless the denunciation, charge or complaint is supported by a sworn statement made by a person worthy of trust, or by other information which points to the supposed liability of the accused. The only exceptions are cases of *flagrante delicto*, when any person may seize the offender and his accomplices, and

place them at the disposal of the nearest authority. On the contrary, the reforms of the Penal Code authorise, in contradiction with the text of the Constitution, that officials who perform the functions of criminal police may decide in each case which persons shall remain in custody and in what place. This reform does not give full protection against the violation of fundamental rights expressly laid down in the Constitution.

There is still a long way to go before there is full respect for human rights. If this is the position in matters that are within the jurisdiction of federal justice, the situation in the States of the Federation and the Municipalities is far worse as regards the infringement of human rights.

Self Rule Proposals for Canadian Indians

In response to the many complaints voiced about difficulties in the relationship between Indians and the Canadian Federal Government, the House of Commons, at the end of 1982, set up a Special Committee on Indian Self-Government (hereafter "the Committee"). It was directed, among other things, to make recommendations to Parliament "... in regard particularly to possible provisions of new legislation and improved administrative arrangements to apply to some or all Band [Indian] Governments on reserves . . ."

The Committee traveled to all regions of Canada to hear oral testimony. It also received written submissions and commissioned research projects. This is a brief summary of the resulting report which contains many innovative recommendations for government action, including constitutional changes.

The report underscores the misconceptions and lack of understanding about Indian history and culture that continue to exist. Both have caused a one-sided and negative portrayal of the Indian people and blinded non-Indians to their own part in producing the stereotype "that victimizes people of the First Nations* as drunks and welfare recipients, unable to practice acceptable standards of conduct and incapable of learning".

The Committee expressed the wish that all Canadians could benefit from the information it had received during the course of

its hearing. Through such information they would learn "that Indians were not pagan and uncultured, but peoples who moved from free, self-sustaining First Nations to a State of dependency and social disorganisation as the result of a hundred years of nearly total government control".

This control can be seen, for example, in the suppression of the First Nations' own complex traditional forms of government and their substitution by band councils – an artificial form of government imposed on the Indian people by the Indian Act 1876. Although tribal councils, treaty organisations, and provincial regional and national associations of various kinds play a vital role in the political activities of the Indian people, band councils are the *only* Indian governmental organisation recognised in the Indian Act. Band councils exercise delegated powers and "are more like administrative arms of the [Federal] Department of Indian Affairs [and Northern Development (DIAND)] than they are governments accountable to band members".

The Indians resent the Indian Act because of its constraints and yet depend on it for the special rights it provides. The Committee saw the Act, and the massive control over Indian affairs exercised by the DIAND, as the main obstacles to Indian development and self-sufficiency. It is claimed that the DIAND makes planning and budgetary decisions without adequate

* The term which the Indian nations use to designate themselves.

input from bands. Chiefs and councillors are placed in an awkward position because they are accountable to DIAND for moneys received, but they are also accountable to their people, whose priorities and needs are often at variance with DIAND requirements. In addition all the legally recognised powers of bands and band councils are defined in and *limited to* those specifically mentioned in the Indian Act. Thus as "many important matters necessary to the functions of government in modern society are omitted from the Act "great uncertainty about the legal capacity of bands and band councils has resulted e.g. can a band council sign contracts or bring law suits in the name of the band? "This uncertainty is a great impediment to band initiatives."

Band councils have limited by-law making powers under section 81 of the Indian Act. However, these are totally inadequate for 20th century living, e.g. bands do not have power to enact zoning and building by-laws in connection with land development. The limited powers that do exist are even further reduced because they can be rendered invalid by federal laws, federal regulations, the Minister's disallowance or even provincial laws 'of general application'.

The band councils' role was described by many witnesses before the Committee as that of administrators of government policy:

"Under the current system of band government, the chief and council are so restricted in providing the three basic functions of government that it can hardly be called government at all, but more properly the administrator of federal policy at local level. Under the current Act the council can regulate little, except weeds and dogs on the reserves, without the blessing first of the Minister and his administrative arm (the DIAND).

"The council's role in representation of the people's wishes, is for the most part, ignored by both senior levels of government. All too often band governments must resort to confrontation, to media events, to expensive lobbying just to get heard.

"... Again, in a government's function of allocation the bands of our experience are for the most part restricted by the Act and the Department's policy to the delivery or distribution of resources as allocated by the Department. Stripped of the authority to operate the fundamental functions of government, current band governments are little more than factotums of federal control." (Quesnel Community Law Centre, Special 20: 168-169).

There have been various attempts at and proposals for rectifying the situation as it now stands. But these have all involved change within the existing framework. The Committee however is adamant in its report that the strait-jacket provided by the Indian Act and the policies of the DIAND must be completely removed and a new start made, founded firmly upon self-government for the First Nations.

Being governed in a manner of its own choosing, having control over its own resources and deciding its own policies and priorities would allow each First Nation to express its own collective identity (the Indian Act makes no allowance for the great diversity among First Nations) and would reverse the trend of dependency and lack of initiative which are the result of federal control of funding and policy-making.

A brief resumé follows of the Committee's recommendations for accomplishing the move to Indian self-government.

Many Indian witnesses asserted that rights implicitly recognised in the Royal Proclamation of 1763 and in the treaties, provide a basis in law for Indian people to

exercise an inherent right to self-government. This was at variance with traditional constitutional interpretation which was that all primary legislative powers were deemed vested in Parliament or in provincial legislatures. However, the Constitution Act 1982 could well have altered this situation by its recognition and affirmation of "existing aboriginal and treaty rights". It may now be that Indian governments have implicit legislative powers that are at present unrecognised. The Committee, however, recommended settling the question once and for all by explicitly stating and entrenching in the Constitution the right of Indian peoples to self-government. Indian First Nation governments would form a distinct order of government in Canada with their jurisdiction defined. Until such constitutional amendment can be made, the Committee recommended that the federal government should introduce such legislation as would lead to the maximum possible degree of self-government immediately. Such legislation should be developed jointly and the First Nations themselves should have the responsibility of selecting a method of designating representatives to negotiate on their behalf. It is important that any such legislation provide a wide and flexible framework to allow for the different needs and goals and aspirations of the peoples of the First Nations. The Committee recommended three such legislative measures:

- 1) The enactment of an Indian First Nation Recognition Act committing the federal government to recognise Indian governments accountable to their people; establishing criteria to be met by any First Nation government wishing to be recognised as self-governing; and elaborating a procedure under which self-government would be accorded.
- 2) Legislation authorising the federal gov-

ernment to enter into agreements with recognised Indian First Nation governments as to the jurisdiction that each government wishes to occupy and concerning funding. Once concluded, these agreements would provide the framework in Canadian law for each particular Indian First Nation, and for them the Indian Act would cease to apply. The Indian Act would, however, remain in force for those bands that wished to continue under it and would provide a legal structure while agreements were being negotiated.

- 3) Legislation under the authority of Section 91 (24) of the Constitutional Act 1867 designed to allow Parliament to occupy the field of legislation in relation to Indians and lands reserved for Indians, particularly where the absence of federal legislation has resulted in the extension of provincial jurisdiction to Indian lands and people. Parliament would then vacate these areas of jurisdiction to recognised Indian governments, thus ensuring that provincial laws would not apply on Indian lands except by agreement of the First Nation governments. With this legislation in place and supported by appropriate agreements, Indian First Nations could be self-governing in areas in which they wish to legislate.

The Committee further recommended that any changes of policy possible under existing law that would enhance self-government and that are acceptable to designated representatives of Indian First Nations be taken without waiting for the enactment of new legislation.

Regarding the scope of powers of the new Indian First Nation governments, the Committee "agrees that full legislative and policy-making powers on matters affecting Indian people and full control over the

territory and resources within the boundaries of Indian lands should be among the powers of Indian First Nation governments.

...
"A first Nation government should have authority to legislate in such areas as social and cultural development, including education and family relations, land and resource use, revenue-raising, economic and commercial development and justice and law enforcement among others. First Nation governments may also wish to make arrangements with the federal and/or provincial governments to continue existing programmes.

The Committee recommended the establishment of "a specialised tribunal to decide disputes in relation to agreements between Indian First Nations and other governments. Its structures, powers and procedures should be jointly decided by the federal government and designated representatives of Indian First Nations".

As First Nation control of Indian lands is the first and most obvious move needed to promote self-government, the Committee recommended that the federal government recognise and entrench in the Constitution, the legal rights of Indian First Nations to the lands, waters and resources of all areas now classified as reserves or in future considered as Indian lands, including the power to decide upon methods of land-holding and land management on reserves.

The Committee further laid heavy emphasis on the just and effective settlement of the many outstanding land claims as a major way of expanding the land and resource base of Indian First Nation governments. It laid down certain basic groundrules as to how this should be accomplished, including adequate financial support to enable First Nation governments to pursue their claims adequately and the institution of a quasi-judicial process in

cases where settlement cannot be reached, thus avoiding the situation where the federal government is both defendant and judge. Existing claims should not be regarded as being superseded by law.

The Committee hoped that claims settlements, Indian control and development of their land base, new arrangements for resource revenue-sharing and other long-term entrenched financial arrangements would in due course provide Indian First Nation governments with assured funding. In the interim, grants would be necessary and are justified. The Committee recommended that these take the form of direct grants to all Indian First Nation governments recognised by the federal government as being accountable to their people.

They should be sufficient to enable Indian First Nation governments to correct any serious deficiencies in community infrastructure and to begin economic development by setting goals, defining strategies and acting to realise their potential. The Committee further recommended that one-time funding be made available to Indian bands to assist them in developing their governments.

The Committee recommended that the federal government and designated representatives of Indian First Nations jointly appoint and fund an independent secretariat to provide a neutral forum for conducting negotiations. Further, in view of the past history of bad relations between the DIAND and the First Nations it recommended that a new Ministry of State for Indian First Nation Relations be established to manage and coordinate the federal government's relations with Indian First Nation governments. Ministerial responsibilities would include the duty to promote the interests of First Nations. A corresponding phasing out of the programmes of DIAND should be started and completed within five years. In addition,

the Committee supported the principle of establishing an independent officer to monitor and report to Parliament on official action affecting First Nations as well as the setting up of an advocacy office under Indian auspices and federally funded, to enable the office to represent Indian First Nation interests in legal disputes

affecting their rights.

The report of the Committee has been published and will no doubt be the subject of much discussion in Canada. Whether or not these far-reaching recommendations are accepted, the fact that they should have been made by a Parliamentary Committee is of more than local interest.

The Dark Side of Trees

The truth burns
so they turned
their faces away
from the sun . . .

When small liberties
began to fray . . .
When their constitution
was being chipped away
When their newspapers
were shut down . . .
When their rule of law
was twisted round . . .
When might became right
and their friends
were carried off screaming
in the pitch of night . . .

They chose silence
feigned blindness
pleaded ignorance.

And now when the shadow
of the jackboot hangs
ominous over their beloved land
they walk as zombies
unable to distinguish right from
wrong from right
their minds furred with lichens
like the dark side of trees.

The truth burns
so they turned
their faces away
from the sun . . .

Cecil Rajendra

from *Hour of Assassins and other Poems*
(Bogle — L'Ouverture Publications,
141 Coldershaw Road, Ealing London W13 9DU)

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States of Emergency – Their Impact on Human Rights

A comparative study by the International Commission of Jurists, 1983.

Available in english (ISBN 92 9031 019 X). Swiss Francs 40 or US\$ 19.50, plus postage.

This 480-page publication contains detailed studies on states of emergency in 20 countries during the 1960s and 1970s, a summary of the replies to two questionnaires sent to 158 governments, and an analysis of this material by the staff of the ICJ, followed by a set of recommendations. The country studies on Argentina, Canada, Colombia, Eastern Europe (Czechoslovakia, German Democratic Republic, Hungary, Poland, USSR, Yugoslavia), Greece, Ghana, India, Malaysia, Northern Ireland, Peru, Syria, Thailand, Turkey, Uruguay and Zaire are based on papers prepared by experts, mostly from the countries concerned. The two questionnaires related to the law and practice under states of exception, and administrative detention. The concluding chapter of general observations and conclusions is followed by 44 recommendations for implementation at international and national levels.

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Rural Development and Human Rights in South East Asia

Report of a Seminar in Penang, December 1981.

*Published jointly by the ICJ and the Consumers' Association of Penang (CAP)
(ISBN 92 9037 017 3).*

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Ways in which human rights of the rural poor can be adversely affected by processes of maldevelopment are illustrated with a wealth of detail in this report. The 12 working papers on such topics as land reform, participation in decision-making, the role and status of women and social and legal services are reproduced in full along with the important conclusions and recommendations of the seminar.

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Human Rights in Islam

Report of a seminar in Kuwait, Geneva, 1982, 95 pp.

*Available in english (ISBN 92 9037 014 9) and french (ISBN 92 9037 015 7),
Swiss Francs 10, plus postage.*

The purpose of this seminar was to provide a forum for distinguished moslem lawyers and scholars from Indonesia to Senegal to discuss subjects of critical importance to them. It was organised jointly with the University of Kuwait and the Union of Arab Lawyers. The Conclusions and Recommendations cover such subjects as economic rights, the right to work, trade union rights, education, rights of minorities, freedom of opinion, thought, expression and assembly, legal protection of human rights and women's rights and status. Also included are the opening addresses, a key-note speech by Mr. A.K. Brohi and a summary of the working papers.

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Civilian Administration in the Occupied West Bank

by Jonathan Kuttab and Raja Shehadeh. An analysis of Israeli Military Government Order No. 947, 44 pp. Published by Law in the Service of Man, West Bank affiliate of the ICJ.

Swiss Francs 8, plus postage.

This study examines the implications of the establishment of a civilian administrator to govern the affairs of the Palestinian population and Israeli settlers in the West Bank. Questions of international law and the bearing of this action on the course of negotiations over the West Bank's future are discussed.

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