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The protection of minorities:
Problems of Application of Article 27 of
the International Covenant on Civil and
Political Rights and the Identification of
Minorities

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Abbreviations

ECHR	European Convention on Human Rights
FUNAI	National Indian Foundation
ICCPR	International Covenant on civil and Political Rights
UNESCO	United Nations Educational Scientific and Cultural Organisation
UN	United Nations
UNHCR	United Nations Human Rights Committee
UDHR	Universal Declaration of Human Rights
ICEAFRD	International Convention for the Elimination of All Forms of Racial Discrimination

1 Introduction

The concern for the plight of minorities and an attempt to safeguard their interests has been an ideal, which has contributed towards the growth and expansion of international law¹. Although international law primarily operates through the medium of States, and minorities generally have no locus standi, the treatment, which the minorities receive from their States, has occasionally become a matter of international concern. International law, however, has historically found it difficult to deal with the issue of minorities. Like the poor, the weak and the inarticulate, they have, since time immemorial been the natural victims of persecution and genocide². In an age when wars were 'just', religious repression legitimate, and cultural or political dissidence unacceptable, minorities remained the prime target of repression³.

Even in this contemporary period of relative tolerance and rationality, minorities are often subjected to persecution,

¹ The protection of ethnic, religious and linguistic groups is one of the oldest concerns of international law. P. Thornberry, *International Law and the Rights of Minorities* (Oxford, Clarendon Press, 1991), p. 1

² See L. Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven and London, Yale University Press, 1981), pp 11-18; Porter (ed), *Genocide and Human Rights: A Global Anthology* (Washington D.C., university press of America, 1982); L. Kuper, *International Action Against Genocide* (London, Minority Rights Group, 1984); L. Kuper, *The Prevention of Genocide* (New Haven, Yale University Press, 1985)

³ B. Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide* UN Doc .E/CN.4/Sub .2/1985 /6, pp 6-7

discrimination and genocide⁴. The stance of international law remains tentative and extremely cautious, for minorities pose questions of a serious nature, existing in myriad forms with their own social, political, cultural and religious peculiarities. Often transcending national frontiers, minorities are extremely capable of appealing to the sensitivities of their international sympathisers. Most national boundaries are arbitrarily drawn and a number of states contain turbulent factions artificially placed within their borders often cutting across frontiers⁵. Many regions continue to witness a perpetual and infinite struggle between minority groups on the one hand and the State on the other, sometimes to a point whereby the very fabric of the Institution comes under threat.

A consideration of many of the contemporary disputes including those involving the Kurds of Iraq, Turkey and Iran, the Kashmire Muslims and the Sikhs of India, the Tamils of Sri Lanka, the Bihars of Bangladesh, the Tibetans of China, the Catholics of Northern Ireland, the non-Arab Indigenous peoples of the Southern Sudan, the East Timorese of Indonesia and protagonists in civil war in Former Yugoslavia and the Soviet Union, reveals the widespread nature of the conflict.⁶While a

⁴ See references supra n.2; B. Whitaker supra n. 3, 7-10 ,see W. McKean ,Equality and Discrimination under International Law (Oxford , Claredon Press , 1983)

⁵ For an excellent survey see T. Gurr , Minorities at Risk : A Global View Ethnopolitical conflicts (Washington D .C .; United States Institute of Peace Press.1993)

⁶ For an analysis of these conflicts as well as many others see the Minority Rights Group (ed), World Directory of Minorities (London, Minority Rights Group ,1997). Useful sources of information are the sessions of Working Group on Minorities and the working Group on Indigenous Populations..Summaries of the

number governments attempt to hide behind Article 2(7) of the United Nations Charter and take refuge in the ‘citadel’ of State Sovereignty and Sovereign equality, the minorities may take to heart the revolutionary of secession in the name of Self determination .The issue relating to the promotion and protection of the rights of minorities in international law require a thorough consideration. Contemporary international law provides limited rights to minorities, and there remains a strong perception that it affords recognition only to those rights that are capable of being accommodated within the general framework of individual rights. While the right to ‘existence ‘ and to ‘equality and non-discrimination’ may be seen as accorded to members of minorities qua individuals, international law remains inadequate in preserving the cultural, linguistic and religious identity of these groups⁷. The conventional and customary law recognising the rights of minorities is set out in Article 27 of the United Nations Covenant on Civil and Political Rights (ICCPR). Granting minorities a right to defend their special identity, their unique characteristics that distinguishes them from other members of the human family is an important task for human rights. Article 27 of the ICCPR is an inevitable focus for this aspect of minority rights .It is the only expression of the right to identity in modern human

proceedings are provided by the United Nations; See e.g Report of the Working Group on Minorities on its fifth session E/CN.4/Sub.2/1999/ 21.

⁷ See P. Thornberry supra n.1 ; Ermaco, ‘ The Protection of Minorities Before the United Nations ‘(1983)182 Rec. des cours, (iv),25; ‘existing norms on the rights of minorities are limited and inadequate to the task of ensuring the that minorities do not have assimilation or integration forced upon them as a threat to their existence and identity’.P. Thornberry , Self – Determination , Minorities

rights conventions intended for universal application. It is, in fact the first real attempt in the history of international law to provide such a universal right; as such it bears a considerable burden. An extended exegesis of its meaning, in the context of the United Nations Covenant, and of the means for its implementation, is therefore crucial for an appreciation of the extent to which international law accepts the claim of minorities to protect their cultural destiny

In international law, protection of minorities is provided by, amongst others, Article 27 of the ICCPR of 1966 and for purposes of this paper, we are concerned with this article. The article is not the only one in existing international law by which protection is provided for minorities. Others are the ILO Convention No 169 of 1989, the Declaration on the Rights of Persons belonging to National or Ethnic Religious and Linguistic Minorities of 1992, the Declaration on the Elimination of All Forms of Racial Discrimination of 1963 (articles 1 and 2(3)), which is insufficient to be associated with the right to identity because it does not quite deal with ‘ distinction between racial and ethnic groups which are voluntarily maintained ‘. Instead the impression is that it implicitly favours the ultimate assimilation of diverse ‘racial ‘groups as opposed to help them maintain their own identity, and the result is a very tentative endorsement of special measures, promising the members of minorities ‘equal treatment across a broad spectrum of rights⁸’ Another is the

,Human Rights :A review of international instruments’ (1989) 38ICLQ,869, AT P.88

10Ibid. ,P 250 - 259

International Convention on the Elimination of All Forms of Racial Discrimination of 1965, article 1(1) of which supplies the grounds on which discrimination is not allowed and ‘ in a broad fashion is suitable to protect racial , ethnic , and linguistic groups ,’ but it does not deal directly with such groups as minorities ‘ , and Article 1 (4) of which obliges state parties to provide certain special measures to disadvantaged groups, but still does not make such provision directly for minorities ⁹. There is also the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, which is the first post-world war II general convention with ‘ a bearing on minority protection ‘ but although it provides special protective measures for ethnic , religious or linguistic groups , minorities as such are not mentioned - minorities are , however, ‘clearly comprehended by the convention as the natural victims of genocide measures ‘ .¹⁰ Then there is the UNESCO Convention Against Discrimination in Education of 1960, which is important to minorities ‘ in that it deals with the most important general means of preserving the identity of a group’, through education, and has direct provisions in respect of minorities, especially regarding educational activities and education in their own languages¹¹.

In the context of article 27, the Special Rapporteur on Minorities emphasizes the fact ‘that international protection of minorities does not depend on the official recognition of their

⁹ Ibid ., P. 265

¹⁰ Thornberry , P.; supra p 268

¹¹ Shaw , M. N. ,’ The Definition of Minorities in international Law ‘, Dinstein , Y.(ed),p1

existence'.¹²It clearly cannot do so, or else the protection afforded by Article 27 would be nullified by simple legislative inaction on the part of States. While this is correct, it may be acknowledged that 'in practice, the recognition of a minority by a State in which it leaves improves its situation, facilitates the application of the principles enunciated in Article 27 ...and gives the members of the minorities a solid basis for effective protection of the rights guaranteed them at the international level.

In accordance with the opinion on protection of minorities, the wording of Article 27 is formulated in an extremely cautious, vague manner. It leaves many questions opened, for which an answer must be found by way of interpretation. The case law of the Committee in individual communications is only on limited assistance in interpretation.¹³As interpersonal aids, use may also be made of the above-mentioned Caportorti report and the 1992 Declaration on the Rights of Persons Belonging to Minorities .On the other hand little can be inferred from the reservations. Thus far only France has categorically declared with respect to Article 2 of its constitution that Article 27 is not applicable .The Committee declared inadmissible for failure to exhaust domestic remedies a number of communications by Bretonians against France relating to the Bretonian language in schools and public authorities.

¹² Caportorti Report , Add. 1,para.41.

¹³ Art. 27 has thus been affected only in *Lovelace v. Canada*, No 24/1977, *Mikmaq v. Canada*, No 78/1980 , *Lubicon Lake Band v. Canada*, No. 167/1984, *Kitok v. Sweden* , No. 197/1985, and in a number of communications by Bretonians against France .

Members of a minority group often feel that in the clash of cultures, religions or languages it is their will and aspirations which are marginalized, and in this respect the individualistic and universalistic tone of the international law of human rights is deficient. International law which could be related to minorities are not only seen as being attenuated and indirect in nature but there is considerable evidence to suggest that they are largely ineffective in safeguarding whatever rights that are granted to minorities. State practise has varied considerably in relation to the recognition, promotion and protection of the rights of minorities. The differences in State practice are matched by, and are consequent upon the social, political, cultural, religious and regional peculiarities of minorities. Indeed a wide variety of historical, economic, cultural, sociological and political factors have an important bearing not only on the form and nature of claims made by minority groups, but also on the reaction to these demands on the part of the State concerned.¹⁴

The world system today is made up of roughly 190 politically independent States, and it is probable that in the next few years a smaller number of additional countries will gain their independence. Still, there is a logical limit to the number of independent States that the international system would be able to recognize. While some of these countries are truly nation States or national States in the sense that they are made up of only one nation, most of them are multinational or polyethnic States. Only a few States formally recognise their multinational or polyethnic

¹⁴ R.G. Wirsing (ed.), *Protection of Minorities, Comparative Perspective* (New

nature; most of them maintain the fiction of appearing to be monoethnic or uninational States, at best they give only lip service to the ethnic pluralism within their borders¹⁵. The number of nations and peoples that exist in the world is not easy to determine because there are few systematic treatise dealing with these matters, and the United Nations system, which produces statistical information on numerous other subjects, does not carry detailed information on such questions. Educated estimates, mainly on anthropological and linguistic criteria, would place a number of nations, peoples, or ethnic groups at around five to eight thousand, the real figure probably being closer to the latter.¹⁶

Frequently people who share the territory of a State with other ethnic groups are referred to as minorities when they are either less numerous than the other group or groups or when they occupy a subordinate economic, political, or social position in the State, or both. There are numerous criteria used in the definition and classification of minorities, most of which are similar to the criteria that refer to the definition of a 'people,' the distinguishing

York, Pergamon Press, 1981.

¹⁵ Stavenhagen, R, *The Ethnic Question: conflicts, development, and human rights*, 1990 (United Nations University Press)

¹⁶ There are many difficulties involved in identifying and classifying ethnic groups that do not coincide with States. That is why specialists come up with different estimates as to their numbers .For example are Australian Aborigines to be defined as a single people or as a number of distinct groups? Is there one Arab nation or several? Are the German-speaking people to be classified as one nation or as separate entities in different countries in which they live? There is no consensus about these questions, and the answers depend more on political and ideological factors than on scientific ones.

factor being precisely the relationship to the majority or to the dominant ethnic group.¹⁷

The fact remains however that the ICCPR creates binding obligations for those States who become parties to it .If such a State is now faced with fulfilling its obligations in terms of Article 27, the application of the article is hampered by the problems of unclarity of what the obligations are as well as by the lack of a clear definition of the term minority. Through the interpretation of the terms of ICCPR and through State Practice it has become clear what the nature of the obligations in terms of Article 27 is .In the same way, the lack of a universally accepted definition of the term in international law need not stand in the way of application of the article. A definition can however reduce the controversy with respect to the identification of minorities.¹⁸ This is not to say that the existence of a definition will necessarily change the fact that existence of minority is frequently denied, but will make it more difficult to be evasive.¹⁹It has been said, after all, that definitions are not all important, and that the institutions created by international law can survive in spite of the lack of a definition.²⁰The view has been expressed that either no definition of the term or a ‘minimum of a definition, would be a pragmatic

¹⁷ See Francesco Capotorti’s (special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), Study on the Rights of persons.

¹⁸ Shaw, M. N., ‘ The definition of minorities in international law’, Dinstein , Y (ed.),supra,p.1

¹⁹ Sigler, J. A., *Minority Rights: A comparative Analysis*, Greenwood Press, London, 1983, p.3

²⁰ Thornberry, P., supra, p.396.

way of dealing with the issue'.²¹One thing that is absolutely certain is that these shortcomings never have the effect of invalidating the law or making it inapplicable .It does however make the application of the law difficult.

We are desirous to investigate the situation of the Protection of Minorities within the context of Article 27 of the ICCPR. The realities of the population compilation of post world war II show immense diversity and problems related to this diversity. This is however an immensely wide subject, and will not be possible to do just to it in a paper of this nature. There are however certain aspects about the protection of minorities that can perhaps be fruitfully investigated in a paper of this nature:

- (1) Whether some minorities can be identified and once again no exhaustive investigation can be done here, of course in order to recognise any minority groups one will have to know what to look for, thus working according to some criteria. This will necessitate an acceptance of certain essential elements of a definition that can be said to already exist. On this basis one finds very clear guidelines in respect of identification of groups eligible for minority status.²² In the absence of a formally accepted definition, this will have to serve as a minimum of a 'definition', as a practical way of dealing with the problem .The essential

²¹ Alfredsson , G. , ' Human Rights, Fundamental Freedoms and the Rights of Minorities , Essential Components of Democracy ' ,Strasbourg Conference on Parliamentary Democracy , Document No. SXB.Conf. (111) 8, 1991, p. 9

²² Alfredsson, G., 'Report on Equality and Non-discrimination: minority rights ' Seventh International Colloquy on the European Convention on Human Rights, Council of Europe Document nr. H/Coll (90) 6, 1990, p. 12

elements of the concept of minorities are in fact known and a nucleus of established criteria exists.²³ We will therefore look for these criteria and then apply them to a population of the State Parties to the ICCPR since State Parties to the covenant are the once who have obligation with regard to minorities of that instrument, aside from obligations which may arise from other texts.

- (2) We shall then turn on to look at policies like nation-building, integration, separation, national unity and other concepts linked to the sovereign national state and demonstrate that these policies are not conducive to the accommodation of minorities and stand in the way of application of Article 27 of the ICCPR. Most States consider, in any case, that the way they deal with minorities within their borders is solely a domestic matter. This is one of the reasons why the UN has been unable to make much headway in this field.
- (3) We shall analyse a population with respect to several aspects and features of different groups that can be identified in a population. One cannot attempt to be exhaustive, but only address some of the more visible and obvious contenders for minority status.
- (4) Finally we shall look at Recommendations on the Effective Participation of Minorities in Public Life.

I will equally like to mention here that in this paper I use the term ‘protection ‘ as a corrective measure. In everyday

²³ Andrysek, O, supra, p. 14 . ,and Shaw , M.N. , Supra ., p30.

language to ‘protect ‘ means to shield from danger , to defend and to strengthen.²⁴ In this sense protection has a preventive rather than a corrective character .In present international law ‘ protection ‘ is primarily connected to human rights. But within human rights law ‘protection’ is often opposed and seen as complementary to ‘promotion’ in which case the above mentioned everyday use of the term has lost its original meaning. According to such a distinction, ‘ promotion ‘ is perceived as a preventive measure and ‘protection ‘as a corrective measure, with protection relying heavily on sanction and court process.²⁵

²⁴ See Chambers 20th Century Dictionary, 1983.

²⁵ Spiliopoulou , Å, A, Justifications of Minority Protection in International Law 1997 (Iustus Foörlag , AB Uppsala 1997),p, 50

2. Definition of the term minority

2.1 The historical background to the lack of a definition

The lack of a definition of the term ‘minority’ has been troubling the international community for a very long time .As early as 1930 the Permanent court of international Justice (PCIJ), in its advisory opinion in connection with the issue of emigration of the Greco-Bulgarian ‘ communities ‘, defined such a community as:

‘ A group of persons living in a given country or locality having a race, religion, language and tradition in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing their children in accordance with the spirit and traditions of their race and mutually assisting one another.’²⁶

In spite of all the efforts made, there is today no accepted general, universal definition or regional definition of the term. This has led some observers to conclude that the failure to formalise a definition is a failure of the will of States, and that, in most cases , states show little real desire to find a definition since they intend to delay the adoption of international documents ,or they wish to

²⁶ PCIJ, Interpretation of the Convention between Greece and Bulgaria respecting reciprocal emigration. Advisory opinion of 31st July 1930 , series B ,No 17, p. 33

narrow the scope of any definition and to exclude groups ‘making trouble’ in their own territory .²⁷

The frustration felt concerning the definition issue is reflected in the doubts expressed by some experts regarding the necessity of a definition. Alfredsson concludes that ‘ it is probably worthwhile to look for an alternative to a comprehensive and globally applicable definition ‘, and he suggests that it would be wise to have ‘ either no definition of the term minority or else a minimum definition, with only a few exclusions and with reliance on self-identification ‘.²⁸ The UN special rapporteur Eide expresses the same view in his report on the Protection of Minorities – possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities .²⁹

This view has been criticised by other writers on various grounds. Sohn asserts that a definition of the term ‘minority ‘is not a question of only theoretical and academic importance. ³⁰It is a practical question, as it is likely to arise in the form of whether a particular group qualifies as a ‘minority’, for instance under the International Covenant on civil and Political Rights in terms of Article 27 .It has already been mentioned that the lack of a

²⁷ Alfredsson describes such behaviour by states as ‘ tactical device ’. G. Alfredsson , Report on ‘ Equality and non – discrimination : minority rights) supra, also cited by Spiliopoulou . A. A, Justifications of Minority Protection in International law, 1997.supra.

²⁸ Id.,p13 see also G. Alfredsson and A. de Zayas , Minority Rights: Protection by the United Nations , in HRLJ, 1993 vol. 14 no 1-2 , pp1-9 , at p3 and the report on the United Nations Technical committee of Experts on Minotities , UN Doc. E /CN.4/1993 /85.

²⁹ UN Doc. E/CN.4/Sub.2/1993/34,para.22

³⁰ L.SOHN, The definition of Minorities, in L. Henkin (ed.) The International Bill of Rights, 1981, p.280.

definition gives States an excuse to refuse the existence of minorities in their own territory.

For yet another reason a definition is necessary, international lawyers and the international community have to communicate over natural and cultural borders, using common terms, which facilitate a meaningful communication .A minimum international definition is therefore necessary. ³¹The paradox is that the more controversial minority protection is, the more we need an accepted definition of ‘minority’.

The League of Nations dealt with the problem of national minorities, but on the whole, the system of minority protection that it tried to establish turned out to be a failure. After second world war, the United Nations again took up the issue , but half-heartedly. The Sub Commission on Prevention of Discrimination and Protection of Minorities has for many years debated the possibility of an adequate definition of minorities .The debates in the Sub Commission of course reflect the differing, and sometimes opposing views of its individual members, the countries they represent, and the ideologies they wield. The most generally widely circulated definition of minorities is the one given by Francisco Carpotorti, special rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, to wit:

³¹ Ermacora add practical arguments regarding the necessity of a definition in the operation of international law,inter alia in cases of resolution of state disputes , and the consideration of massive and gross violations of human rights . F. Ermacora , The Protection of Minorities before the United Nations , in Rdc 1983 , Vol .iv.pp.249-370,at p287

A group numerically inferior to the rest of the population of the State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population , and show only if implicitly , a sense of solidarity , directed towards preserving their culture , traditions , religion or language³².

This definition has not satisfied all the experts of the Sub – Commission, and this UN body is still groping for a definition that it might formally adopt. Regardless of International efforts, States have sometimes defined minorities to suit their own interest, calling them everything from national minorities to minority nationalities, or else they have neglected to define, that is to say to recognise them. As has been mentioned earlier before States have usually been unwilling to accept the existence of ethnic minorities in their midst, particularly when they live by the myth of a single, unified national being identical with the State. AS one author put it,

The lack of a binding definition of minority is a lacuna but not a fatal obstacle to progress. States will doubtless continue to be evasive as previously on the existence of groups. ...While it is possible to deny the existence of minorities, this may only deflect the operation of particular treaties for a time; the definitions have rationality, which is cumulative. The failure to define and recognise is normative, not cognitive .It may be felt that ‘recognition ‘fuels demands: minorities are always likely to

³² Capotorti, The Rights of Persons, par.568

want more than States will concede.³³ Many writers have commented upon the elements of the definitions without essentially departing from the main line of approach. In 1992 the UN Declaration on the rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities was finally adopted, without including any definition. No definition is either to be found in the Human Rights Committee General Comment on Article 27 of the ICCPR.³⁴

The addition of the words ‘ in those states in which ethnic, religious or linguistic minorities exist ‘ in Article 27 of the ICCPR has led some debate as to what constitutes a minority. Some countries have persistently stated the guarantee of equal rights for all in their state renders the notion of minority, in its politico-legal sense, inapplicable to them. For example during the drafting of Article 27, the representative of Brazil expressed the view, apparently shared by many Latin American States, that any minority classification was inapplicable in their context for the following reasons:

*The mere coexistence of different groups in a territory under the jurisdiction of a single state did not make them minorities in the legal sense. A minority resulted from conflicts of some lengths between nations, or from the transfer of a territory from the jurisdiction of one State to that of another.*³⁵

³³ Thornberry, minorities, 4

³⁴ General Comment No 23(50) on Article 27, 1994. The General Comment asserts, however, that persons protected by Article 27 need not be citizens of the State concerned.

³⁵ GAOR, sixteenth session, third committee, paragraphs 8-12, quoted in Thornberry, supra, note 6, at p.154.

Latin American States in general thus considered that immigrants and indigenous peoples could not be considered minorities.

The UNHRC cast aside any lingering doubt on whether non-citizens as a group are excluded from the definition under Article 27, as proposed by Capotorti and others, by unequivocally stating in its General Comment on the position of aliens under the International Covenant on Civil and Political Rights³⁶ that aliens who can demonstrate membership in a numerically inferior ethnic, religious or linguistic community shall not be denied the rights provided in Article 27. This is consistent with the general background to, and the wording of Article 27, as explains one leading scholar:

The United Nations General Assembly, when drafting and adopting Article 27 of the Political Covenant, already opted for an open definition. The third Committee did not accept a proposed Indian amendment aimed at replacing the word ‘persons’ with citizens. Both the travaux préparatoires and a systematic interpretation of the political covenant, which uses the term ‘citizens’ only in Article 25, clearly indicate that Article 27 also applies to aliens.³⁷

³⁶ General Comment 15 (27), UN Document A/41/40, at p.118

³⁷ Nowak, Manfred, ‘The Evolution of minority Rights in International Law’, in Catherine Böllman, Rene Lefeber and Marjoleine Zieck (eds.), *Peoples and Minorities in International Law*, Martinus Nijhoff, Dordrecht, pp.103-118 at 116. See also Bossuyt, Marc (1990), ‘The United Nations and the Definition of Minorities’, in *Plural Societies Research Papers*, vol. Xxi, 129-136, at p.131: If Article 27 contains mainly a negative obligation in the sense that governments are obliged to refrain from interfering with the culture, religion and language of minority groups, a definition becomes almost superfluous. It is also because Article 27 contains essentially only negative obligations that Article 27 may also be applied to aliens and to immigrants ...

To ensure no one misunderstands what should have been fairly clear from the very beginning the United Nations Human Rights Committee finally adopted in 1994 General Comment No. 23 (50) on Article 27 which spells out the exact meaning of a minority under the International Covenant on Civil and Political Rights:

The terms used in Article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion / or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the state party ... A state party may not, therefore, restrict the rights under Article 27 to its citizens alone.

Article 27 confers rights on persons belonging to minorities, which 'exist 'in a state party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine degree of permanence that the term 'exist ' connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practice their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. . Thus migrant workers or even visitors in a state party constituting such minorities are entitled not be denied the exercise of those rights ...The existence of an ethnic, religious or linguistic minority in a given state party does not depend upon

*a decision by the state party but requires to be established by objective criteria.*³⁸

Although the Human Rights Committee did not dwell on which individuals are to be protected under Article 27, it did suggest that not everyone can claim to be entitled to the rights guaranteed to ethnic, religious or linguistic minorities, since ‘the terms used indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and /or a language ‘. Some real and tangible tie must exist between an individual, and one of these categories. In other words a person must demonstrate that he or she ‘ belongs’ to an ethnic, religious or linguistic group. Once again the UNHCR appears to have opted for a no-nonsense, objective approach.

2.2 Criteria for identification of minority

There is no universally accepted definition of the term ‘minority ‘. Such a definition has long been sought in order to establish international standards and to apply them.³⁹ After all, it is useful to know to whom the standards apply and lawyers, of course thrive on definitions. Nevertheless, much of the time it is

³⁸ 6 April 1994, Document CCPR /C/21/Rev.1/ Add.5, at paragraph 5.1 and 5.2.

³⁹ The UN Secretariat has issued a compilation of definition proposals over a 40-year period, in document E/CN.4/1987/WG.5/WP.1. See also Oldrich Andrysek, ‘Report on Definition of Minorities ‘, the Netherlands Institute of Human Rights, SIM Special ,#8, 1989. For a demonstration of the variety of groups , see World Guide of Ethnic Minorities and Indigenous Peoples , edited by Rudolfo Stavenhagen , United Nations University and El Colegio de Mexico , volume 1, 1988 ; and the World Directory of Minorities, supra.

self-evident which groups constitute minorities.⁴⁰ The OSCE High Commissioner has been quoted as saying he knows a minority when he sees one. Alfredsson says he is right.⁴¹

Most of the definition proposals have common components. Add national and international practice, and all the necessary elements of a definition emerge quite clearly. The components of the definition of a 'minority' are certain objective characteristics, self-identification, the numbers and long-term presence on the territory concerned.

The objective characteristics relate to joint affiliation or affinity of the members of a minority as far as national or ethnic origin, culture, language and /or religion are concerned. The requirement appears in many instruments, even in the 1992 Declaration. The reliance on the term 'national minorities' does not change or limit this element; while different interpretations have been attached to this term, it should and is indeed likely to cover the same groups as the international standards.⁴²

The definition must also have a subjective element, as acknowledged in some international instruments and recommended by UN Special Rapporteurs.⁴³ The element

⁴⁰ Alfredsson, G. 'Minority Rights Handbook' Latvian Human Rights Quarterly, Human Rights Institute of the University of Latvia, Faculty of Law

⁴¹ Alfredsson, G. 'Minority Rights Handbook' . Supra.

⁴² Alfredsson, G. 'Minority Rights Handbook' supra.

⁴³ See ILO Convention No. 169 concerning Indigenous and Tribal peoples in Independent Countries which specifies in Article 1, Paragraph 2, that self-identification shall be regarded applies, and the Special Rapporteur Francesco Capotorti in a 1977 Report to the Sub – Commission entitled ' Study on the Rights of Persons as a fundamental criterion for determining the groups to which to which the Convention Belonging to Ethnic, Religious and Linguistic Minorities ' ,

presumably comes in two layers, that is an individual decides whether he / she is a member of a minority, and the group must accept the individual concerned on the basis of the facts and in a non-arbitrary fashion.

It is inherent in the term and almost unnecessary for the purposes of the definition, but a minority group must constitute less than half of the state population, hence the reference to numbers. An actual minority cannot designate and treat the majority as a minority, as occurred in South Africa during the apartheid regime. ⁴⁴A country may be composed of only minorities if no group makes up more than 50% of the population; as a result all groups would be entitled to minority protection.

Perhaps the most difficult component of the definition is the requirement that a minority must have long-term presence in the territory concerned. Refugees, migrant workers, immigrants and other aliens are entitled to human rights, on equal footing and without discrimination (with the exception of certain political rights). Several separate instruments have been adopted to protect aliens ⁴⁵, but they do not immediately achieve minority status. ⁴⁶ At

in document E/CN.4/Sub.2/384/Rev.1 (also available as UN publication with sales nos. E.78.XIV.1 and E.91.XIV), Paragraphs 567-568

⁴⁴ In fact, it can be argued that a minority in a position of domination in all likelihood owes its control to violation of other rights and freedoms, as was the case in former racist regime in South Africa. In such cases the solution is not to restrict the scope of Article 27 but to correct the unacceptable infringement of other rights. More, in the case of apartheid Article 27 been useless to the controlling White Minority since their control of the State machinery in South Africa would have guaranteed rights and privileges far exceeding anything Article 27 entitles members of a minority. See also Varennes de, F. 'Language, Minorities and Human Rights' vol, 45 , 1996, Kluwer Law International.

⁴⁵ See, for example, the UN 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees.

some point, however, the newcomers become minorities .The likely turning point is when the individuals concerned identify more closely with the new territory or Country (where they came from).In other words , we are talking about the time it takes for the offspring to go through the school system , that is one generation or thereabout.

If groups in a given Country meet the definition elements, States do not and should not have a say on the recognition of groups. ⁴⁷The acceptance or non-acceptance by governments is simply irrelevant and non-acceptance should automatically be considered suspect. A State will not be relieved of its responsibility by denying citizenship to members of a group on an arbitrary or discriminatory basis. Calling groups by other names, such as cohabiting nations , nationalities or even aliens , is likewise in sufficient for depriving them of minority protection. In grey areas, delimitation can be left to State Practice, as with the implementation of human rights in general, but such practice is subject to supervision by international organisations in accordance with existing standards and monitoring procedures.

In the context of the definition, it is important to distinguish ‘minorities ‘ from ‘peoples ‘. As with the term ‘minority ‘, there is no universally accepted definition of the term ‘people ‘ .The latter term is now part of many human rights instruments and resolutions, notably those that concern self-determination, natural resources and development. In practice, the term ‘ peoples ‘ has

⁴⁶ For a different and broader point of view, see General Comment No. 23 of the Human Rights Committee, *supra*.

been applied to the populations of territorial or administrative entities, within some sort of acknowledged borders, more often not without regard to ethnic composition and cultural characteristics of the inhabitants. The emphasis is on a geographical entity (colony, occupied territory, old State restored, federal province) rather than a popular entity (nation, ethnic group). Treating minorities and indigenous peoples as groups (and not peoples), even when the groups are large and historically associated with territory, is further evidence of the importance granted by the lawmakers to political units with accepted boundaries. Minorities are as a rule not entitled to the right of self-determination (at least not externally). However the very idea of minority rights, as regulated and pursued by the international community, implies continued sovereignty and territorial integrity of States.

The question of when a person belongs to a minority requires a different answer depending on the type of minority.⁴⁸ Difficulties especially arise in the concrete balancing of the objective and subjective criteria. Association in a religious minority is based on the free decision of the person concerned, which is protected by Article 18(2), and is evidenced by the objective criteria of membership in this religious society. With linguistic minorities, principally decisive is where a person truly speaks the respective language of the minority, at least in private. In their statistics regarding association in one of the minorities

⁴⁷ See paragraph 5.2 of General Comment No. 23 of the Human Rights Committee, *supra*.

recognised by their legal systems, many States here as well look solely at the subjective element of the profession to a linguistic minority. However, the Human Rights Committee is reliant on the objective criteria regardless of national census. In this case as well, the most difficult aspect is the determination of whether a person belongs to an ethnic minority.⁴⁹ In addition to subjective profession and, possibly biological and genetic (racial) features, objective criteria may be employed, such as the name and origin of the person concerned, family ties, use of a minority language, residence, cultural customs, etc.

Possible recognition by the national legal system is only subsidiary significance. This question was the focus of the well-known case *Lovelace v. Canada*.⁵⁰ Sandra Lovelace, a Maliseet Indian of Canadian nationality who was raised on the Tobique Reserve, lost her status as an Indian under Canadian Indian Act and thus her right to live on the reserve on account of her marriage to a non-Indian. Nevertheless, following divorce from her husband, she returned with her children to the Tobique Reserve, where she was protected by other Maliseet Indians against pending expulsion by the authorities. In her communication which alleged violations of various Covenant provisions (Arts. 2, 3, 12, 17, 23, 24, 26, 27), one of the issues

⁴⁸ Cf. Capotorti, supra note 2, at 15; Sohn, supra note, Tomuschat, in FS – Mosler at 964 ff.; Klerk, 1987 NJCM-BULL. At 213 .f

⁴⁹ Nowak, Manfred, supra

⁵⁰ No. 24/1977. cf. Bayefsky, 1982 CYBIL at 244; Ryan, 1981 QLJ at 398 f.; de Zayas, Moller & Opsahl, 1985 GYBIL at 61; Tomuschat, in FS-MOSLER at 965; SIEGHART 378; NEWMAN & WEISSBRODT 69 ff.⁵⁰ Nowak, Manfred, supra

was whether she was a person belonging to the Maliseet Indians .On the basis of national law , she was certainly unable to be considered such at the time her communication was submitted .Nonetheless after a review of objective and subjective criteria , the Committee unanimously answered this question in the affirmative:

Persons who were born and brought up on a reserve, who kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant. Since Sandra Lovelace is ethnically a Maliseet Indian and has only been absent from her home reserve for only a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as ‘ belonging to this minority...

In *Kitok v. Sweden* as well, the issue of membership in the Sami ethnic minority was of central importance.⁵¹ Ivan Kitok, a Sami of Swedish nationality, complained that by way of formal exclusion from the Sami community, he had been denied his ancestral right to reindeer breeding and that his right under Art.27 to enjoy his culture in community with other Samis had thereby been violated. That reindeer breeding was an essential component of the Sami culture was not disputed .To protect both the

⁵⁰ No. 24/1977. cf .Bayefsky ,1982 CYBIL at 244 ; Ryan , 1981 QLJ at 398 f. ; de Zayas ,

environment and the continued existence of the indigenous Sami culture, the Swedish Government attempted in 1971 by way of the enactment of the Reindeer Husbandry Act to restrict the number of reindeer breeders . Sami members who had engaged in any other profession for a period of three years lost their right to breed reindeer, unless they were expressly recognized by a Sami community to be a member again. This provision was applied to Ivan Kitok, even though he had lived without interruption on the territory of the Sami and had maintained firm ties with this ethnic minority. The Committee expressed serious reservations on the Swedish Act, in that it made membership in an ethnic minority dependent on factors other than ‘ *objective ethnic criteria* ’⁵². However, since in the instant case there was an apparent conflict between the protection of the minority as whole and the interest of various members, the Committee saw a reasonable and objective justification in this rule and consequently found no violation of Article 27.

⁵¹ No. 197/1985. Cf. The summary by Nowak, 3/1988 SIM NEWSLETTER 44 ,f Cf .also the discursion by Zwart , 1988 NJCM-BULL.853 ff.

⁵² No. 197/1985 at & 9.7: ‘ It can thus be seen that the Act provides certain criteria for participation in the life of an ethnic minority whereby a person who is ethnically a Sami can be held not be a Sami for purposes of the Act. The Committee has been concerned that the ignoring of objective ethnic criteria in determining membership of a minority, and the application to Mr. Kitok of the designated rules, may have been disproportionate to the legitimate ends sought by the legislation ‘ .

3 THE HISTORY OF MINORITY PROTECTION

3.2 Developments up to World War II

The history of minority protection starts with the efforts during the 17th and 18th centuries to provide some protection to religious minorities in the aftermath of the religious conflicts in Europe ⁵³ The problem of national or ethnic minorities, as distinct from religions, arises only in the 19th century, when nationalism emerges as an ideology and as a compromise to modify the extreme consequences of ethno-nationalist hegemony. There were no general rules or principles in international law for the protection of minorities, but particularistic arrangements were made in the context of some peace treaties when borders were changed.

One further step was taken as part of the post – World War I peace settlements, which led to the most comprehensive transformation of the State system in Europe since the Napoleonic Wars. Ethnic nationalism had been the driving force in the demand for the dissolution of empires , and had been encouraged by the Western powers , in particular the United States under President Woodrow Wilson . In the long run this was to have significance for the area of minority protection.

⁵³ Studies on minorities in international relations and international law are numerous and it would go far beyond this study to list them here. Two works should be mentioned ,however : Inis Claude’s seminal studies on national

The implementation of the principle of national self – determination in central Europe, where a mosaic of different ethnic groups lived interspersed with each other, required a strengthened system of minority protection. For this purpose, a number of minority treaties or unilateral commitments were made. This was still not a general system of minority protection, but applied only to a small number of States, mainly in Central and Eastern Europe. The States, which did participate in such agreements eventually refused to apply them, as they increasingly, became the subjects of popular resentment. Thus, no general minority protection system was established.

Nevertheless, the post-World War I treaties were the forerunner of a more general minority system for two reasons: a) most of the treaties and declarations were modelled on the first one, Polish / German treaty. As a consequence, some general principles emerged out of particular commitment; b) since the League of Nations was entrusted with the task of receiving petitions claiming that minority rights under the treaties had been violated and making decisions in this regard, a case law emerged which had some significance for post – World War II developments.

3.3 The New Situation After World War II

At the time of the League of Nations, human rights did not form part of international law. The only instruments

minorities and Patrick Thornberry's text on international Law and the Rights of

available to protect members of minorities from discrimination were the minority treaties discussed above. After World War II , on the other hand , a general human rights system was created , which could be used by all individuals , whether they belonged to minorities or majorities . This was an entire novel feature of international law; some have even argued that it constituted a revolutionary change of international law and relations.

One significant aspect of human rights system established under the United Nations was the strong emphasis on equality of treatment of all human beings. This principle of equality was based on the assumption that all inhabitants of the territory , irrespective of their race , sex , language ,national or ethnic origin are , as stated in Article 1 of the UDHR , ‘endowed with reason and conscience and should act towards each other in a spirit of brotherhood ‘. The problem with the traditional ethno-nationalism of the past was that members of minorities had not been treated as equals; the intention was now to change this. Consequently, it was broadly felt that there was very little need for minority protection arrangements.

3.4 The Hierarchy of Rights and Minority – Relevant Benefits Arising from Universal Human Rights

There has been, since 1948, a hierarchy of human rights whose foundation is the UDHR. The contemporary

Minorities. See consolidated bibliography for full details.

international human rights system was built on the basis of the UDHR; it's an edifice, then that consists primarily of individual human rights.

Of key importance to minorities is the theme of non-discrimination; it runs through the modern human rights system as its main thread, as an essential restraint on the exercise of majoritarian power. The main features of discrimination are distinctions, exclusions, restrictions or preferences on unwarranted grounds such as race, national background, ethnicity, or sex. The essence of non-discrimination follows the principle of equality of treatment, which is violated if the distinction has no objective and reasonable justification.⁵⁴

'Racial discrimination', as prohibited by the international Convention on the Elimination of All Forms of Racial Discrimination (ICEAFRD), is any conduct based on a distinction made on the grounds of genetic or cultural categories, which have no relations either to individual capacities or merits, or to the concrete behaviour of the individual person. Under international law, the definition of 'racial' discrimination explicitly covers discrimination on ethnic grounds. The ICEAFRD obliges States, specifically, to abstain from and to prohibit discrimination on grounds of race, ethnic or national origin in the enjoyment of the right to freedom, peaceful assembly and association (ICEAFRD article 5 (d) (ix)). Consequently there is no doubt whatsoever that

⁵⁴ Alfredsson, G. & Eide, A.(edt), 'The Universal Declaration of Human Rights' 'A Common Standard of Achievement'. Martinus Nijhoff Publishers, 1999; p. 714-716

minorities are entitled to set up their own associations, including NGOs of all kinds.

Some of the opponents to the inclusion of minority rights in the UDHR argued in 1948 that Universal, individual human rights contained in the Declaration would provide the necessary protection of minorities. The representative of United Kingdom asserted that the rights of all minorities were already fully protected in the proposed Declaration and that there was therefore no need for any of the proposed draft provisions on minorities:

...”thus, article 16 guaranteed to them freedom of religion, article 17 freedom of the press and opinion, article 18 freedom of assembly, article 23 the choice of education, article 25 the right to participate in the cultural life of the community , and article 2 expressly protected minorities”.⁵⁵

While subsequent developments have shown that the individual rights contained in the Declaration are not sufficient to protect minorities, those rights are nevertheless essential as part of the platform for their protection. Everyone is entitled to enjoy universal human rights without distinction being made on the grounds of race, language, or ethnic, religious or national origin. Members of minorities, as well as majorities, are entitled to enjoy all ordinary human rights, both in relation to the State and in relation to the organizations set up by the minorities themselves.

⁵⁵ Yearbook of the United Nations 1948-49, p.544. Please note that the final numbering of the Declaration changed after this statement: freedom of the religion and belief became article 18, freedom of opinion and expression became article 19, the right to education article 26, and the provision of cultural rights became article 27. Article 2 remained the same.

Everyone is entitled to freedom of expression and information, in whatever language he/she prefers, which clearly also includes his/her own minority language . Similarly, everyone is entitled to hold and to practise any religion and belief of his /her own choice, within limits set for the purpose of protecting public order or public morals .The right of members of minority to full freedom of association, as well as to freedom of expression and information is of particular importance in assuring that minorities effectively participate in the social, economic, cultural and political life of the larger society. These are rights to which all human beings, therefore also members of minorities, are entitled .The right to freedom of association is provided for in UDHR article 20, CCPR article 22, and ECHR article 11. It is closely linked to freedom of expression and information (UDHR article 20, CCPR article 18 , ECHR article 10) and to freedom of assembly (UDHR article 20, CCPR article 21, ECHR article 11) . Finally , freedom of movement inside a country as well as the right to leave any country and return to one's own is also important for the establishment and maintenance of associations .

Specific minority regulations are supplementary to general, individual human rights. Such minority rights have a dual function, In part; their purpose is to remove any lingering doubts that members of minorities, jointly as well as individually, can make use of general human rights. While such an assumption would follow naturally from a normal reading of general human rights provisions, it has nonetheless been found desirable to be explicit on this point, since some governments have had a tendency to deny to minorities what is freely available to

majorities. International law has been further developed by strengthening the prohibition of discrimination on the one hand and by insisting on the right to pluralism on the other.

3.5 Prevention of Discrimination versus the Protection of Minorities

In 1947, the Sub-Commission started to clarify the meaning of its dual mandate. It defined ‘ prevention of discrimination ‘ as the prevention of any action which denied individuals or groups equality of treatment which they might wish⁵⁶, and interpreted the ‘ protection of minorities ‘as the protection of non-dominant groups which generally wanted equality of treatment, while acknowledging or permitting a measure of differential treatment in order for minorities to preserve their traditional characteristics, if they so desired. According to the mandate, the relevant characteristics were race, nationality, religion and language .

Several limitations on the protection to be accorded to minorities were envisaged, For example, they were to be accorded differential treatment only so long as this did not conflict with the welfare of the community as a whole. The minorities were to owe their individual allegiance to the government of the State in which they lived. Initially, the Sub-Commission held that minority protection should be applied only to nationals (citizens) of the State . Furthermore, if individuals belonging to such minorities wanted to become assimilated with

⁵⁶ Report of the Sub-Commission in 1947, E/CN.4/52 (1947), Sect. V, 13

the majorities, but were prevented from doing so, this would constitute discrimination.

Following the adoption of the Universal Declaration, the Secretariat issued a memorandum,⁵⁷ which was largely endorsed by the sub-Commission in 1947,⁵⁸ elaborating on the relationship between the prevention of discrimination and the protection of minorities. The memorandum emphasized the fundamental differences between the two objectives, and concluded that the two had to be handled very differently.

The term ‘ discrimination ‘ implied any act or conduct that denied equality of treatment to certain individual because they belonged to particular groups. In order to prevent discrimination, some method had to be found to suppress or eliminate any conduct which denied or restricted a person’s right to equality . The protection of minorities, in contrast, consisted of upholding distinctions, which were voluntarily maintained by the group concerned; this, to a large extent, required positive action.

The memorandum referred to the rendering of services, such as the establishment of schools in which teaching would be in the child’s mother tongue. This was required, according to the memorandum, in order to achieve real equality. If the child was not taught in his or her own language, he or she would be discriminated against when compared to the majority who were taught in their mother tongue.

⁵⁷ Definition and Classification of Minorities, Memorandum Submitted by the Secretary General, E/CN .4/sub-2/85 (1950).

⁵⁸ SuB-Commission res.D, in Report of the Sub-Commission in 1950, E/CN.4/358 (1950) , Para. 29-38.

The principles espoused in the memorandum were bound to create political controversy and practical problems. One problem is caused by the conflicting aspirations of many individual members of minority groups; they want differential treatment and equality at the same time. Another is that programmes to protect minorities can become shields behind which discrimination is perpetuated under the pretext of differential treatment. For example in the United States, the Supreme Court finally laid the debate on the ‘separate but equal’ doctrine to rest only in 1954.⁵⁹ In South Africa, the doctrine of apartheid, officially proclaimed in 1948, also purported to provide ‘protection’ to racial groups.

In response to such claims, the Sub-Commission emphasized that only those who desired to preserve their separate characteristics should be granted protection.

One reason many governments are reluctant to accept the existence of minorities on their territory is the fear that they are not fully loyal to the State. While the Sub-Commission in its early discussions stated that members of minorities should owe undivided allegiance to the State in which they lived, the fact remained that international recognition of minority rights might encouraged separatist ambitions, which could then endanger territorial integrity and provoke conflicts among different national groups over access to land and public resources. Thus, the Sub-Commission’s mandate contained the seeds of significant conflict with governments and between different ethnic groups.

⁵⁹ Brown et al. v. Board of Education of Topeka et al.; 347 US 483 (1954)

The initial efforts of the Sub-Commission to advance the protection of minorities, therefore, gave rise to controversies, which nearly paralysed its work in the field. States of the ‘ new world ‘ in the North and South America favoured a process of fusion, and many European States continued to promote assimilation. Some third world countries initially endorsed minority protection as a step towards decolonisation for those territories, which had not gained independence. Later, however, these countries pursued their activities mainly within the decolonisation context in the Fourth Committee of the General Assembly and lost interest in the minority protection approach under the human rights bodies. The Countries of Eastern Europe, however, demonstrated greater interest in minority protection; this is and was probably a reflection of their past and present problems in this regard.

Again in 1949, the Sub-Commission identified three necessary steps in order to carry out the ‘ thorough study ‘ requested by the Assembly under Resolution 217 c (III). These were: a) definition of minorities; b) their classification, according to categories of protection required; and c) collection of information about the situation of minorities.

The Sub-Commission also proposed that a special provision be inserted in the International Covenant on Civil and Political Rights (ICCPR), which was being drafted at the time . The debate in the Sub-Commission on the proposed provision revealed the existence of two broad schools of thought. For the first the minority group itself was the beneficiary of the protection to be afforded, while for the second, the beneficiary was the

individual member of the group. The draft proposed by the Sub-Commission and subsequently adopted by the General Assembly as article 27 of the ICCPR reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language.⁶⁰

This was a substantially weaker approach, in two ways, than that taken by the Sub-Commission at its first session. First, the right was vested in individuals, not groups; second, it imposed mainly passive obligations on States.⁶¹

Universally applicable rules of international human rights law establish equal enjoyment of all human rights and the prohibition of discrimination. Repeated stipulations in the UN Charter (Articles 1 and 2), the Universal Declaration of Human Rights (Articles 1, 2, 7, 10, 16, 21, 23, and 26), and a large number of other treaties and Declarations demonstrate clearly that the rules on equal enjoyment and non-discrimination are fundamental to international, as well as regional, human rights.

In 1989, the Human Rights Committee observed in its General Comment No. 18 on non-discrimination ‘ that the term ‘ discrimination ‘ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is

⁶⁰ Alfredsson, G & Melander , G. ’ A Compilation of Minority Rights Standards ‘ , A selection of texts from international and regional human rights instruments and other documents, Lund 1997, Report No. 24

⁶¹ Alfredsson, G. & Eide , A. ’ The Universal Declaration of Human Rights ’ A common standard of achievement , supra.

based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons , on an equal footing , all rights and freedoms ‘.

The Committee added that ‘ equality ‘ does not necessarily mean identical treatment .In certain instances; groups may be treated differently for purposes legitimate under the Covenant, such as achieving equal rights, if the action is reasonable and objective.⁶²

The ground, on which discrimination is prohibited, may differ from one instrument to another, but the repeated references to race, culture, colour, language, religion, and national and ethnic origins clearly cover situations normally faced by minorities.

⁶² UN Document CCPR/C/21/Rev.1/ Add.1. with reference to paragraphs 7, 8 and 13

4 INDIGENOUS PEOPLES – A SEPARATE TRACK

During the preparation of Capotorti's study on the implementation of minority rights, it became clear that the issues relating to indigenous peoples needed separate attention. The International Labour Organization, (ILO), had already undertaken to combat the discrimination which members of indigenous and tribal groups were facing in the labour market. A distinction emerged between ' minorities ' and ' indigenous peoples '. The main factor distinguishing indigenous peoples from minorities is that the former, unlike the latter, are original inhabitants of the land they presently occupy (albeit it only in part), having lived there since time immemorial. ⁶³The first nations of the Americas, the Inuit of the Circumpolar region, the Sami in Northern Europe, the Aborigines of Australia, the Pygmies in Central Africa, the Maoris of New Zealand and numerous other groups worldwide form part of this category.

In many parts of the world, indigenous peoples have been disposed of their original lands and resettled in places with different environmental conditions. This has meant their being deprived of such basic resources as water and natural food, as well as the loss of their sacred lands and sites. Such forced removal has disrupted the lives of indigenous peoples destroying their social and legal orders in the process, and often leading to

⁶³ Alfredsson, G. & Eide, A. ' The Universal Declaration of Human Rights ' , A Common Standard of Achievement, *supra*, p.624.

hunger, disease , despair and death .Indigenous peoples have been marginalized in the States where they live and frequently subjected to severe discrimination.

Apart from the concern with individual human rights, including the protection of the right to life and the preservation and continued practise of traditional culture and religions, the indigenous peoples place great emphasis on collective land rights, local autonomy, and self-determination. In particular the right to self-determination causes severe dispute, partly because its content is unclear. Some understand it as providing a unilateral right to secession, something governments are not ready to accept. Many indigenous peoples would be satisfied, with a degree of territorial autonomy in the regions, which have remained their habitat and where they form the majority.

In 1989, the ILO, Convention No. 169 on Indigenous and Tribal peoples in Independent States was adopted. This convention uses the term ‘ peoples ‘.⁶⁴ The expression is strongly preferred to ‘ population ‘, the term used in the 1957 Convention (No.107). During the drafting of the ‘ new’ Convention (No. 169), governments initially resisted the use of the term ‘ peoples ‘ due to the fear that it would be used to assert the right of peoples to self-determination. The compromise found by the ILO was to employ the word ‘ peoples ‘, but to include a disclaimer in Article 1 (3) to the effect that: ‘ its use shall not be construed as having

⁶⁴ The definition is given in Article 1(2) of the Convention. The full text is found in the Compilation of International Instruments, Alfredsson and Melander 1997, pp471-486. In the UN official language, the concept used is ‘ indigenous populations ‘, while in the present chapter indigenous peoples is used. This is deliberate.

any implications as regards the rights which may attach to the term under international law ‘.

Indigenous and minority-specific rights and measures set forth in international instruments are intended to make sure that persons belonging to minorities enjoy the same rights as everyone. History teaches us that equal enjoyment under the law and the prohibition by law are not enough; equal enjoyment must in fact be achieved as well by way of preferential treatment so that the groups and their members enjoy a position comparable with majority. Special rights and measures do not constitute privileges; they are rooted in the rule of equal enjoyment just as is non-discrimination.

In its interpretation and application of Article 27 of the Covenant on Civil and Political Rights, the Human Rights Committee as the treaty monitoring body has produced important case law and General Comment No. 23 whereby culture has been given very broad contents.⁶⁵ These encompass the material base necessary for maintaining and developing indigenous ways of life as a requisite for cultural survival, including such activities as reindeer herding, fishing, and hunting. These rights will often require positive legal measures of protection for ensuring effective enjoyment by the groups and their members.

Individual and group rights with individual and group access to dialogue forums and petitions are essential for the

⁶⁵ See , for example , Communication No 197 /1985 (Kitok v. Sweden) , views adopted on 27 July 1988, Communication No. 167 / 1984 , (Bernard Ominayak , Chief of the Lubicon Lake Band v. Canada) , views adopted on 26 march , 1990 ; and Ilmari Länsman et al. Finland , in UN document CCPR/ C/ 52/ 511/ 1992 .

satisfaction of indigenous and minority needs and, by extension, for the prevention of violent ethnic conflicts. International law is made by States and will take care of their interests, but group concerns must not be left out. Dislikeable as the word loyalty might be in human rights context, one could refer to it, if at all, as a two-way street in State-group relations. With the State as the stronger party, it must demonstrate that loyalty by scrupulously respecting indigenous and minority rights. When historical, geographic and demographic circumstances are taken into account, the standards must be applied objectively and consistently.

On the other side of the coin, indigenous peoples and minorities must have to respect human rights in line with the principle of universality, to the degree they possess autonomous or customary jurisdiction or control over their own members and others affected. Rules concerning the administration of justice, groups should respect representative leadership and sex equality whenever they exercise such control.

Group rights must of course also be exercised in a manner consistent with international law, for example with regard to territorial integrity and national unity, the maintenance of international peace and security, and the peaceful settlement of disputes.⁶⁶ There is also reason to increasingly introduce human rights into security debates, including the Security Council.

⁶⁶ It must be noted that collective rights under international human rights law come in two types, group rights and peoples' rights, with the right of external self-determination attached only to the latter category.

For correcting widespread discrimination, the responsibility for implementation of human rights rest with States. Constitutional and legislative guarantees, access to independent and impartial courts and the availability of other remedies are as crucial for indigenous rights as for other human rights. Another domestic step needs highlighting, Indigenous peoples and minorities always learn about the majority culture and language, but a two-way street is required. Education about the minority must reach the majority, and human rights education must reach everybody.⁶⁷

⁶⁷ Alfredsson, G. ' The Rights of Indigenous Peoples with a Focus on the National Performance and Foreign Policies of the Nordic Countries ' , in *Zeitschrift fur ausländisches* Nr. 2 1999.

5 Policies contrary to the application of Article 27 of the ICCPR

The ideals of national unity, manifested by a centralization of power, a common language, culture and religion, fundamental to the self-determination of the States, tend to express themselves in intolerant attitudes, and repression of those who were perceived as ‘ others ‘. Unity in this context seems to correlate with exclusiveness and there is a natural necessity to regulate some of its consequences. Having no policy or neglecting minorities is a policy in itself, and can be devastating. Approaches taken by States vary from the good to the atrocious: from self –determination , promoting partnership and reconciliation , pluralism , autonomy , strategies of integration , neglect , discrimination , assimilation , forced assimilation , segregation and slavery to policies in essence genocidal to which the inappropriate term ‘ ethnic cleansing ‘ may or not be applied . The object for good or ill of these orientations may be the colour-visible or invisible minorities, indigenous peoples or communities, religions and sects, language groups, imagined enemies of the State , etc.⁶⁸ For pragmatic as well as humanitarian reasons , international law has been a protective instrument , because the minorities question never contained itself entirely within national boundaries . Minorities in some States were majorities in others,

⁶⁸ World Directory of Minorities, Edited by Minority Rights Group International 1997, page 696.

and the later States might assert interest in their co-nationals or co-religionists. That the pragmatic and the humanitarian co-exist can be seen in the Universal Declaration of Human Rights, the standard bearer of rights in the present age; the Declaration recites in its preamble that ‘ it is essential ...if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression , that human rights should be protected by the rule of law.’

Here we will concern ourselves on policies, which are contrary to the aims and purpose of Article 27 of the ICCPR. Minority groups always ask for a variety of demands, which is matched by a variety of policies of the State. ‘ Assimilation ‘ ‘integration ‘ and separation are terms that follow in the present context .A subtle account of the spectrum of State policies was outlined in the United Nations Study on Racial Discrimination in the political, economic, social, and cultural spheres. ⁶⁹ Assimilation is described as being based on the idea of the superiority of the dominant culture, (aiming) to produce a homogenous society by getting groups to discard their culture in favour of the dominant one. There is a willingness on the part of the dominant group to accept the members of others groups, but this is contingent, as a condition sine qua non, upon their accepting its culture .⁷⁰ On the other hand, integration, which from the point of view of groups, is a more ‘ benign ‘ policy, is described as ‘ a process by which diverse elements are combined

Öffentliches Recht und Völkerrecht , Max – Plank- Institute ., Sonderabdruck aus Band 59.⁶⁹ UN Sales No. 71.xiv.2

⁷⁰ Ibid . para. 370

into a unity while retaining their basic identity. There is no insistence upon uniformity or elimination of all differences, other than the difference of each component groups, which would *disturb or inhibit the total unity*⁷¹. The report notes that integration can easily become assimilation, and the words in italics indicate that it may generate its own restrictive characteristics for groups wishing to retain their identity. Integration seeks ‘ (1) to eliminate all purely ethnic lines of cleavage; (2) to guarantee the same rights, opportunities and responsibilities to all citizens, whatever their group membership ‘. Such an official State policy might be intolerant of individuated laws for particular minorities in the State. Assimilation needs to be distinguished from fusion whereby two or more cultures combine to produce another which is different from the parent cultures . Fusion reflects the equality of cultures as a process and a result.⁷² The concept of pluralism has a similar egalitarian face; it is a policy ‘ aims at uniting different ethnic groups in a relationship of mutual interdependence, respect and equality, while permitting them to maintain and cultivate their distinctive ways ‘⁷³ In multiethnic societies, such a policy symbolizes diversity and unity or diversity within unity. The element of separateness in pluralism needs to be distinguished from a policy of segregation. Segregation may be defined as a policy ‘ based on the belief in the superiority of the culture (which) aims at keeping certain ethnic groups separate,

⁷¹ Ibid . para.373-7

⁷² Ibid. Para. 380.

⁷³ Ibid .para. 379

unmixed, and ranked in a hierarchical position.⁷⁴ It is imposed by a dominant majority (or, in the case of South Africa during the apartheid regime, a dominant minority) rather than chosen by the groups subjected to it.

The urge to build nation-States resulted in the absence of a developed and a balanced political set-up, often resulted in the forced assimilation of populations, sometimes bordering upon active persecution and genocide. Minorities, in this struggle, have been a prime victim; their often artificial union to the State, their ability to attract trans-national sympathisers, and their irredentist stance in failing to give into the demands of the majority have raised suspicions on the part of modern governments. There is no shortage of examples; the case of the ‘ Jaffna ‘ as well as Indian Tamils of Sri Lanka, the Indian and the Chinese Communist of Malaysia, the Panthans , Baluchis and Sindhis of Pakistan , and the Indigenous peoples in the Chittagong Hill Tracks of Bangladesh , the Tibetans of China , the Asian population of Kenya and Uganda and many others instantly spring to mind.⁷⁵

Assimilation also involves other processes, which have attained distinct labels. These include acculturation and amalgamation. Acculturation refers to cultural assimilation of the minority group , in which the minority adopts the culture , including the language , customs and beliefs , of the majority . Amalgamation refers to the biological blending of the minority with the majority through intermarriage (as well as formalized

⁷⁴ Ibid. Para. 366-7

sexual relationships). In the final stages crisis of identity arise between the first and second generations of the minority group. The stage of ‘ second-generation difficulties ‘ emerges because the children are true cultural marginals⁷⁶ in that they are both the minority and the majority culture, finally integrated into neither. There have been many divergent interpretations on the concept of assimilation, and perhaps its utility as a concept can be challenged. It certainly cannot be thought of as unitary. In some instances it means that the minority group merges into the majority and loses its own distinct identity. In other instances it means that the minority and the majority form a new hybrid . In still other applications, it means that the minority retains much of its identity and distinctiveness, but shares an equal status in the society with the majority, without prejudice and discrimination. Each of these definitions of assimilation has acquired different names. The first is called Anglo conformity; the second is the melting pot; and the third is called cultural pluralism.⁷⁷ In a pluralist system, distinctly separate institutions for minorities are recognised and provided for, with the objective of ensuring the realisation of their autonomous development.

Among the principal problems facing minorities and indigenous peoples in the world is the question of educational and

⁷⁵ Rehman, J. ‘ The Weaknesses in the International Protection of Minority Rights ’ Kluwer Law International , The Hague / London / Boston . (2000), p. 186.

⁷⁶ See Robert E. Park, ‘ Human Migration and the Marginal Man ‘ *American Journal of Sociology* 33 (1928) , pp. 881-93 ; and also sighted by Dworkin A. G. & Dworkin R. J. ‘ The Minority Report ‘ *An Introduction to Racial, Ethnic, and Gender relations*, (3rd ed.), 1999. pp. 135.

⁷⁷ Dworkin , A , G. & Dworkin , R . J. ‘ The Minority Report ‘ , *supra*

cultural policies by the governments. Traditionally, in most nation-States, such policies intend to promote the assimilation of ethnic minorities into dominant ethnic model, but some countries have faced the difficulties involved by designing policies to accommodate the needs of different ethnic groups. The first issue, of course, is language. Linguistic minorities (in Cameroon, India, Spain, Belgium, Canada, and countless other countries) demand respect and status for their languages, which are essential element in the ethnic and cultural identity. This requires adequate solutions to questions such as the official or legal status of a minority language or languages used in schools and other educational institutions, as well as in the mass media.

An even more complex issue relates to cultural policies by governments in relation to ethnic minorities. It is claimed that education should not only be bilingual , but also intercultural ; that is , that minority cultures should receive their due place not only in the educational system but also in the image or model of the ‘ national culture ‘ . This view point is not often accepted by the governing elites, particularly in the younger third world states whose purpose is to promote ‘ national integration and unity ‘ and who may feel that strengthening minority cultures creates obstacles to such an aim, and moreover may further political demands for autonomy or even secession. A similar position is held by governments in certain countries that have been formed by successive historical waves of immigrants from different parts of the world and that insist on the assimilation or ‘ melting-pot ‘ model that requires immigrants to divest themselves

of their original cultures and adapt to the dominant language and cultural model.⁷⁸

The idea that freedom of expression requires not only official recognition or other measures by the state to promote a particular language, but rather a policy of linguistic non – intervention in private affairs, would seem to have gained respectability and growing acceptance both internationally and in national legislation. However, there continues to be many examples worldwide where States have imposed restrictions on the private use of language. Just a few years ago the Bulgarian Communist Government banned the use of the Turkish language in public.⁷⁹ The situation in Turkey seems to have improved slightly since the interdiction to speak Kurdish in private or in street, with ensuing heavy prison sentences, has been lifted. As was pointed out in a report to the Council of Europe⁸⁰, there are also other restrictions prohibiting Kurdish in public meetings, public buildings, radio, and television etc.

⁷⁸ Stavenhagen , R. ' The Ethnic Question ' , Conflicts , Development , and Human Rights .United Nations University Press , 1990; pp142-143.

⁷⁹ The Protection of Ethnic and linguistic Minorities in Europe (1993), John Packer and Kristian Myntti (eds.), Institute for Human Rights, Åbo Akademi University, Åbo Finland, at p. 71: The policy (which the authorities insisted was 'voluntarily ' complied with by the Turks) dictated that all Turkish names had to be changed, and the use of the Turkish language in public was to be banned. Those who refused were denied their salaries, travel within the country, and administrative and judicial services ...According to a popular joke, the Turkish language became the most expensive language in the world, because calling someone by a Turkish name cost a fine of 5 leva (the daily salary), and a short dialogue cost 50 leva. See also de Varennes , F. in ' Language , Minorities and Human Rights ' Martinus Nijhoff Publishers , 1996 . pp. 49.

⁸⁰ See ' The situation of Human Rights in Turkey ' (1992), in Human Rights law Journal, vol .13, No.11-12, 464- 480.

In Algeria, the prohibition on writing Arabic in anything other than Arabic script (article 2) or on showing movies in any language other than the country 's official language (Article 17), the banning of any commercial or other signs in any language other than Arabic, except in designated tourist areas (Articles 19 and 20), as well as the general prohibition on the use of non-Arabic languages at conferences or public (Articles 9 and 18), contained in la Loi du 16 janvier 1991 portant generalisation de l'utilisation de langue arabe, are also in conflict with current international and national understanding of the aims and purposes of Article 27 of the ICCPR.

In February 1994, in order to protect the French language, France passed legislation, which provided for restrictions on the use of 'foreign ' languages, in even private affairs. On the 29 July 1994, the French Conseil Constitutionnel handed down an opinion which clearly vindicate the reasoning of the United Nations Human Rights Committee: any attempt by the State to regulate private use of language is unacceptable violation of freedom of expression.⁸¹ The fact has been noticed by the Human Rights Committee; ' Some State Parties who claim that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities ' (e.g. France⁸², Turkey , India , to name only a few)

⁸¹ See de Varennes , F. ' Language , Minorities and Human Rights ' supra .

⁸² The example of France, so far as the recognition of minorities is concerned, is the most telling. Numerous cases submitted by French citizens of non-French ethnic origin (e.g . Bretons or Corsicans) to the Committee under Article 27, were uniformly dismissed by the Government of France under the pretext that ' in the light of article 2 of the ' constitution of French Republic , ... article 27 of the

when they deny both minority rights and the existence of minorities as such. The stance of the government of India is representative of the position taken by a number of States. The reference to ethnic minority (in article 27) ‘ does not apply to Indian Society ‘, reads the country report submitted to the UN by Special Rapporteur A. Eide (as a reply to the questionnaire he sent out before hand). Why? Because India, thinks Article 18 of the ICCPR which ‘ deals with the right to freedom of thought , conscience and religion ‘ is of greater ‘ importance to India , which comprises people belonging to different religions , faiths and beliefs ‘. The said aspects of ethnic identity are taken care of by the Article 29 of the Indian Constitution, which reads:

Covenant is not applicable so ‘ far as the ‘ Republic ‘ is concerned ‘ . Article 2 of the French constitution stresses the famous (and very much – historically – French) egalitarian principle , which ‘ shall ensure the equality of all citizens before the law , without distinction of origin , race or religion ‘. When the Human Rights Committee requested France to submit the periodic report under article 40 of the Covenant , it expanded on the egalitarian rationale for denial of minority rights :

‘ Since the basic principle of public law prohibit distinctions between citizens on the grounds of origin, race, or religion, France is a country in which there are no minorities and, as stated in the declaration made by France, article 27 is not applicable as far as the Republic is concerned.’ See 27 Documents CCPR / 22/ Add.2 and CCPR /C / 46 / Add .2. There was nothing left for the Human Rights Committee but to recognise its ‘ incompetence ‘ in the cases of e.g T. K v. France and M.K. v. France – ‘ to consider complaints directed against France concerning alleged violations of article 27.’ Moreover, in S.G. v. France; G. B. v. France; R. L. v. France; and C. L. D. V. France (communication No. 439 / 1990), the Committee observed that France’s declaration is ‘ tantamount to a reservation and therefore precludes the Committee from considering the complaints against France alleging violations of article 27 ‘. Only Committee Member Rosalyn Higgins, in an individual dissenting opinion, argued that the French declaration need not be equated with a reservation, and that the Committee was competent to examine the Article 27 claim.

‘ Any section of the citizens residing in the territory of India having a distinct language, script or culture of its own shall have the right to conserve the same.’

‘ No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds of religion, race, caste or language ‘.

‘ The Indian constitution provides suitable protection to linguistic minorities to establish and administer educational institutions of their choice ‘⁸³

The short lesson that comes out of this experience is something like this: all the motive power in all of the movements of the States Parties during the drafting of Article 27 was the instinct of states -, and status quo preservation. States deliberately wished to adopt rules and procedures that would maximize the chances of the political status-quo survival (or preservation), All the obstruction came from attempting to rely on something else than status quo. All the attempts at bridging the differences of opinions and claims proved to be half-hearted and ineffective. The provision (article 27) has not provided either enforcement with temper , or conciliation with dignity .It could not strengthen the hand of a ‘ minority ‘ representative in advancing claims for the minority but only- for the protection of the ‘ minority ‘ members of a State.

⁸³ See India, CCPR / C/ 37 / Add. 13, cited in Eide , A, Possible ways and means of Facilitating the Peaceful and Constructive solution of Problems Involving Minorities and also cited by Skurbaty , Z. in ‘ As if peoples mattered ‘ A Critical Appraisal of ‘ Peoples ‘ and ‘ Minorities ‘ from the International Human Rights Perspective and beyond . Martinus Nijhoff Publishers (2002).

Another instructive case of language policy is Indonesia, where 600 languages and dialects are spoken, the largest of which, such as the Javanese languages, are spoken by 50 million people, while some of the other languages are spoken by only a few hundred thousand people.

During the colonial period, the dominant language was, of course Dutch. The Malay language took second place, which was the lingua franca in South-East Asia for more than a thousand years. The leaders of the anti-colonial struggle recognised that they would only be successful if they could be united into a single social and cultural, and especially political force. That was the decisive meaning of the oath of the youth in Indonesia in 1928 for *one country, one nation and one language*, all called Indonesia. It is significant that the Javanese population, consisting of 25 million, gave up their languages in favour of the Indonesian national language, which was for them a foreign language. A number of socio-cultural factors intervened in the establishment of another more or less foreign language as the official language of the country. Currently pupils in Indonesian schools have to learn and utilise the Indonesian language from the first year on. If necessary the teacher is allowed to use the local language, which helps him in his communication with his pupils. In this process, specialists foresee that the other, smaller Indonesian languages, will tend to disappear, and even Javanese and Sudanese, spoken by many millions, are declining in importance, since all laws and official pronouncements, all newspapers, magazines, and books, all education from primary

school until university are in the Indonesian language .⁸⁴The Javanese and Sudanese languages could well be developed into modern languages, according to scholars, but ‘ in this phase of Indonesian social, cultural and especially political life, which emphasizes the unity of the country and its people, such a development is out of the question ‘.⁸⁵

In Ethiopia whose government declared itself officially to be Marxist-Leninist, the different languages spoken in the country are vehicles for the dissemination of scientific socialism. The different cultures are respected to the extent that they are politically useful for the dominant group. Other countries have also developed the concept of cultural revolution, such as Cameroon, Zaire, and Bolivia (and of course China many years earlier) .⁸⁶In Ethiopia ideological centralism is taken almost to extremes, and its effects on minority cultures can be mortal.

In other African countries, respect for minority cultures is officially proclaimed, despite the desire for national unity. Thus in Cameroon, the cultural and artistic movement is expected to be committed to the ideals proclaimed by the ruling party in order to strengthen national unity, and at the same time the respect for pluriculturalism and bilingualism as a factor enriching national unity is recognized.⁸⁷

⁸⁴ Stavenhagen , R. ' The Ethnic Question , Conflicts , Development , and Human Rights ' supra ,pp 152.

⁸⁵ Takdir, Alisjahbana, ' The Problem of Minority languages ' .

⁸⁶ Stavenhagen, R. Supra.

⁸⁷ Unesco Report on cultural policy in Cameroon (1975) cited in ' The Ethnic Question ' supra. pp154.

Assimilation and integration are not the only policies with possible effects on the condition of minority status. There is also separatism. Separatism is based upon the assumption that there can be no satisfactory co-existence between majority and minority groups within the context of a single society. Separatism thus means the formation of a geographically distinct nation-state for a minority group. The majority might thrust this separatism upon the minority group, or the minority itself might initiate it. Separation imposed by the majority is an extreme tactic.⁸⁸

At least two basic forms of separatism have been observable in the last century. The first type has occurred after the collapse of the colonial empires ., The indigenous people , newly powerful , expel the last remnants of colonialism, including the Europeans and the mixed-race peoples who were born of Europeans and native parents . Under such circumstances, such domination does not lead to assimilation of the minority into the majority, but to imposed separatism by the new majority. There may also occur the expulsion of weaker minority groups who had lived in the colony .The emergence of new nations in the African continent has been followed by the departure of many Europeans and the expulsion of numerous Asians. Independence for Guyana in South America was followed by large-scale departure of mixed race peoples known as the Guyanese coloured, who had served the British as petty bureaucrats and as a buffer between the small white majority and the African and Asian minorities.⁸⁹

⁸⁸ Dworkin, A, G. & Dworkin , R. J. ‘ The Minority Report ‘, supra pp143

⁸⁹ Dennis H. Gouveia , ‘ The Coloreds of Guyana , ‘ in *Blending of Races* , ed. Gist and Dworkin , pp. 103 -19

A second form of imposed separatism involves either deportation of the minority to its former homeland or restriction of the minority to isolated, semiautonomous reservations encapsulated within the territory of the majority. The first form may arise in order to prevent warfare between minority and majority, whereas the latter may be a final outcome after warfare. When the latter type occurs it is often initiated by a desire to exterminate the minority, because the minority is either in the way of the majority or serves no function for it. This is done usually with a very small and / or weak minority. Of course the two examples can be found in American history as the White-imposed ‘ Back to Africa ‘ movements and the establishment of reservations for Native Americans.⁹⁰

When the minority group initiates separatism, it frequently takes the form of a nationalist movement. Essien-Udom offered a definition of such nationalism:

The concept nationalism ... may be thought of as a belief of a group that it possess, or ought to possess, a country; it shares, or ought to share, a common heritage, language, culture, and religion; that its heritage, way of life, and ethnic identity are distinct from those of other groups. Nationalists believe that they ought to rule themselves, and shape their own destinies, and that they therefore should be in control of their social, economic and political institutions.⁹¹

⁹⁰ Dworkin , A . G. & Dworkin, R. J. ‘ The minority Report’ supra.

⁹¹ E. U. Essien-Udom , Black Nationalism . A Search for an Identity in America (Chicago: University of Chicago Press, 1962)

The migration of European Jews to Palestine after World War II to found the nation-state of Israel suggests that even in this century minorities can form new societies. However, such action also involves the displacement of numbers of people who previously occupied the territory. Four wars in little more than a quarter of a century and the Palestinian refugee question point to the fact that the formation of new nation-states with the displacement of existing groups creates new minorities and new hostility.⁹²

Assimilation and separatism represent two polar types, which can be theoretically heuristic and even empirically plausible. However, they can never be seen as a final outcome. If by that phrase we mean a stable relationship that will never again change, we can assuredly say that will never happen. Human society is dynamic. Final resolutions for one generation are only the starting point for new resolutions for the next generation. If, on the other hand, we wish to speak for short run, we can assume that there will continue to be individual and personal mobility of racial, ethnic, and gender individuals. This has been the trend, accompanied by less significant gains, and in some instances losses, for the groups as a whole.

⁹² Dworkin A. G. & Dworkin R. J. 'The Minority Report' *supra*.

6 Analysis of a population and the application of the criteria to minority

The complexity of the situations about minorities highlights the relative sparsity of international standards, which reveal themselves as schematic and short on specifics. The open nature of the principles and norms should not lead to an underestimation of the potential of human rights law to act as a guide to good conduct, to evaluate and judge the rightness of the local treatment of minority and indigenous groups in their States. Scanning the mass of material one is struck by the variety of group types. Minorities can be scattered throughout a territory, settled compactly in particular regions, historic or new to a State, nomadic or sedentary, citizens or non-citizens of the State, have kin-States or non. The various countries where such minorities are situated may treat the groups differently according to their situation – a distinction permitted by international law provided it conforms to principles of non-discrimination, equality and proportionality. Beyond this, international law provides only a platform of rights , it has not moved far in the direction of individual rights for these different group types⁹³ . UN practice is the most ‘ open ‘ in its recognition of minorities, paying little

⁹³ There was, for example, a substantial discussion of classification and categorisation of minorities at the second session of the UN Working Group on Minorities in 1996, initiated by Prof. Eide , the Chairman of the Group.

attention, for example, to the citizen/ non-citizen distinction made by some States in the application of minority rights.⁹⁴

A related issue concerns what kind of community we are dealing with. Is a people, a minority, a religious community, an ethnic community, or a group formed on the basis of free association as political or activist groups. Among the international standards on minority rights is that which insists that a State cannot deflect the application of standards by misnaming or deliberately undercounting minorities or indigenous peoples.⁹⁵ The existence of a minority is a question of fact, not a question of law.⁹⁶ On the whole, international law does not offer definitions of minorities; principles suggest that facts can still be respected in the absence of a definition – a ‘scientific’ exercise the positive effects of which can easily be exaggerated.

In the course of our understanding of minority rights, we may be struck by the significance of names. Names can be disputed among States – as evidenced by the contest between Greece and (the former Yugoslav Republic of) Macedonia. In the world of ethnic groups, the preferred name of a group is sometimes contested by others,⁹⁷ sometimes as part of the oppression of a group, or as an element in a political contest. Pejorative names can be used to point out a minority and

⁹⁴ See the entries of Estonia and Latvia in ‘World Directory of Minorities’ Edited by MRG supra, PP 220 & 226

⁹⁵ See Stavenhagen, R, The Ethnic Question: supra, on the question of statistical ethnocide.

⁹⁶ See General Comment No 23 of the Human Rights Committee, on Article 27 of the CCPR. Supra.

stigmatise them in some way. In rare cases the pejorative name is reclaimed and taken up as an emblem of identity. In some other cases, members of the group have many views on an appropriate name, and views change.⁹⁸ The naming of names is also related to the fundamental right to identity, the conjoined twin of the right to existence. It is only a short step from suppressing a name to suppressing those who value it

If we want to find out if there are groups that may answer to the description of minorities, or fulfil the requirements for minority status according to the criteria that we accept for the purpose of this paper, then we will have to venture into a specific country and test the population or parts of it to the criteria and see what we come out with. For this reason we turn to Brazil which equally presents a complex situation as to the fate of minorities and one of the countries that took part in the drafting of Article 27 of the ICCPR.

Unlike most Latin America, the Portuguese colonized Brazil. Initial relations with the indigenous populations were friendly but colonists eager to exploit trade in wood and sugar soon provoked conflict. The massacre and slavery, which almost exterminated the coastal Tupi, initiated a pattern repeated over the next 500 years. Rival colonial powers, France and the Netherlands, exploited existing hostilities between indigenous

⁹⁷ The term 'Roma' for that ethnic group is contested by the Romanian Government, which prefers 'Gypsy' on the grounds of (alleged) confusion between 'Roma' and 'Romania'.

⁹⁸ See World Directory on Minority, edited by MRG, *supra*, on the various expressions of view in the section on central and Southern Africa on San / Basarwa / Bushmen.

groups .In the early nineteen century, Brazil increased its traditional exports of cotton, sugar and coffee encroaching still further on indigenous lands. A reported eighty-seven indigenous groups were exterminated in the first half of the twentieth century through contact with expanding colonial frontiers .⁹⁹

Brazil now has 197 forest-dwelling indigenous groups, including Yanomani, Tukano, Urueu-Wau-Wau, Awa, Arara, Guarani, Nambiquara, Tikuna, Makuxi, Wapiaxana and Kayapo (all of which have a total population of about 254,000, (0.16%) living either on reservations or in one of four national parks. Besides its large Afro-Brazilian population there are also significant Japanese and Jewish Minorities. Simply not enough information is available to this author to describe all these groups, and also it would be impossible to deal with this at any length in a paper of this nature. The above list are the main groups that can be identified in the population and it is very possible that many of these groups may further be subdivided into many other groups but the extent of these divisions are however not known, and we are left with what can be called the cultural or ethnic mainstream. Brazilian policy in general is to assimilate all populations of foreign origin in the Brazilian ‘ melting pot ‘. Those unable to express themselves in the national language are banned from voting. ¹⁰⁰This reflects the widely held view among ‘countries of immigration ‘, particularly in the Americas, that the classic ‘ minorities question ‘, as applied mainly to Europe, has no relevance to their contemporary situation. During the drafting of

⁹⁹ See World Directory of Minorities, Edited by MRG, supra, pp 69

Article 27 of the ICCPR the representative of Brazil, after describing briefly the history of minorities treaties and the League of Nations system, stressed the need for careful definition of the term ‘ minority ‘. He argued that the ‘ mere coexistence of different groups in a territory under the jurisdiction of a single State did not make them minorities in the legal sense. A minority resulted from conflicts of some length between nations, or from the transfer of a territory from the jurisdiction of one State to that of another ‘ . Therefore, Brazil and the other American States ‘ did not recognize the existence of minorities on the American continent ‘.¹⁰¹ Subject to such explanation, Brazil was willing to vote for the draft article. In effect, the Brazilian delegate said that the article, which he approved as a piece of draftmanship and supported for inclusion in the Covenant, bound other States not Brazil.¹⁰²

The 1988 Brazilian constitution, guarantees indigenous forest peoples rights to inhabit their ancestral lands, though not their legal right to own it ; it made no provision for land reform.

After the decimation of the local indigenous population in the seventeenth century an estimated 3,650,000 African slaves were imported to Brazil’s first capital Salvador da Bahia. Urban slave labour differed from plantation life; slaves were not passive victims of the system and many escaped to found their own *quilombos* or ‘ republics ‘. Africans preserved their cultural heritage and religions despite the lack of a common

¹⁰⁰ Ibid

¹⁰¹ GAOR, 16 th Session, 3rd Committee, 1103 rd, paras . 8-14

language. Brazilian Portuguese was richly influenced by the speech of the African peoples, and a few Afro-Brazilian vocabularies developed. African religions survive in Brazil today. Brazil did not abolish slavery until 1888. Initially the Portuguese authorities promoted miscegenation as a population policy in under populated regions. But fearing to become a black nation, Brazil subsequently opened its country to white immigrants, who were given preference to black people in jobs , housing and education. The Portuguese attitude towards miscegenation is often offered as proof of their open mindedness on race and the term ‘ people of colour ‘ has also contributed to the myth of racial democracy’.

Racism is, however, an issue of importance in Brazil; although in law all Brazilians enjoy equality, and racial or colour discrimination is a criminal offence, for many years advertisement for jobs included the phrase ‘ boa aparencia ‘ (good appearance) , meaning that only light-skinned people need to apply. By the time of the 1980 census Brazilians had coined 136 terms to define them and avoid categorisation with those of a darker skin colour. The policy of miscegenation was intended to stress the importance of assimilating the African into the broader *mestica* society. Despite their distinctive ethnicity and religion, Brazil’s estimated 65-120 million people of African ancestry (65 million was the official 1991 census figure), including *caboclos* (people

¹⁰² Thornberry , P. ‘ International Law and the Rights of Minorities ’ supra , pp 154. Brazil ratified the ICCPR on the 24th January 1992.

of mixed Afro- and indigenous ancestry) , are not officially recognised as a minority.¹⁰³

Afro-Brazilian religions constitute powerful sources of inner strength, enabling believers to reaffirm their African identity .A loose association of Roman Catholic saints with African deities, rather than syncretism, Candomble is central to the lives of many Afro-Brazilians. Umbanda, along with Pentecostalism, is one of the fastest growing religions in Brazil today .The music, dance and lyrics of samba are also rich with the history and experience of Afro-Brazil.

Many Brazilians of colour themselves accept the myth of non-racialism in Brazil, yet others are becoming aware of the degree to which their cultural, religious, socio-economic and political identities have been suppressed. Many hundreds of black consciousness and civil rights organisations are actively at work today. While some Afro-Brazilians see racism as primarily a cultural problem to be solved through the development of black identity, others believe the struggle against racism must seek to change economic, social and political structures .¹⁰⁴

Yanomami are one of the largest groups (est. 9,000) of hunter gatherers living in the Amazonian rain forest of Roraima and Amazonas States which straddles the Brazil-Venezuela border. Since the illegal invasion of their lands by *garimpeiros* an estimated 20 per cent have been exterminated through disease. A

¹⁰³ World Directory of Minorities, Edited by MRG. Supra. Pp70

¹⁰⁴ Davies, D. J. (ed.) , Slavery and Beyond : The African Impact on Latin America and the Caribbean , Wilmington , DE , Scholarly Resources , Jaguar Books , 1995 ; Vieira , R. M. ; ‘ Brazil ‘ , in MRG (ed.) , No Longer Invisible : Afro-Latin Americans Today , London , Minority Rights Publications , 1995 .

national campaign by national and international support groups in 1991 resulted in the signing of a presidential decree in creating an indigenous ‘ park ‘ , which covered all Yanomami, lands in Brazil. Nevertheless, in August 1993 international attention was again focussed on the region following the slaughter of 16 Yanomami of the village of Haximu by *garimpeiros* in the territorial dispute prompted by the miners’ attempt to exploit the rich mineral deposits of Yanomami land.

Tukano are river – dwelling agriculturalists living on the Upper Rio Negro . A number of government proposals regarding demarcation of their land has resulted in a 75 per cent reduction of ‘ indigenous areas ‘ proposed by FUNAI (The National Indian Foundation). Land close to the Colombian border on which Tukano have been carrying out small scale, environmentally sound gold mining operations is recognised by FUNAI as belonging to Tukano but is now wanted for strategic defence purposes by the military.

Urueu-Wau-Wau, are hunter-gatherers in the state of Rondonia. Since 1981 their population has decreased dramatically to less than 1,000. Besides conflicts with invading settlers and miners, it is estimated that more than half the population has fallen victim to diseases introduced by outsiders. In 1991, one of the largest deposits of tin in the world was discovered in this already intensively mined area which has recently been invaded by gold miners expelled from Yanomami lands.

Arara were first contacted in a series of violent encounters during the construction of the Trans -Amazonian highway in the 1970s. Contacted Arara are forced to live in three

villages and FUNAI have allowed fundamentalist missionaries to come in, bringing rapid and profound changes in the Arara way of life .

Excluding the period 1941 – 50, Japanese migration to Brazil has continued uninterrupted since 1908. By the 1980s it had reached 750.000. Prior to 1914, the majority of Japanese immigrants were contract labourers. Later, efforts were made to establish agricultural colonies. Many also worked on coffee plantations. Although they have been the subjects of popular protest in the past, Japanese and their descendents have blended well into the Brazilian scene; trends in social mobility, industrialisation, and urbanization contribute constantly to this process. First generation immigrants (Issei) generally , and second (Nisei) and third generation (Sansei) in rural areas , remain Japanese in spirit and loyalty and consciously resist any racial and cultural losses . Mixed marriages among Issei are almost unknown.¹⁰⁵

Brazil's Jewish population of about 100,000 (0.6%) lives mainly in Sao Paulo, Rio de Janeiro and Porto Alegre. Since 1945, Jews have served in all areas of Brazilian, economic and military life. Anti – Semitism has never been a major social problem in independent Brazil.¹⁰⁶

Tapeba and Tremembe from the northern coast were between the first to be colonised and ‘ acculturated ‘. Their struggle for identity has had to be undertaken from the suburbs of

¹⁰⁵ Tigner, J.L., ' Japanese immigration into Latin America: a survey ', *Journal of Interamerican Studies and World Affairs* , col. 23 , no4, 1981, pp. 457-82

Fortaleza. In 1993 the court ruling which expelled Kaiowa and Nandevi Guarani from the state of Mato Grosso do Sul to make way for cattle ranchers was overruled by a regional tribunal; it recognised their original right to land and ruled that FUNAI should demarcate it. In 1994 this had still not been carried out and the groups were reported to be returning to their lands in spite of death threats from bandits hired by local farmers. More than 150 Kaiowa have committed suicide in the past decade.¹⁰⁷

The above demonstrates the ethnic complexity of Brazil. What we have described so far are the main groups that can be identified in the population. Racial, social, cultural and religious differences are powerful factors at play in the inter-group relations in this plural society. The groups tend to regard each other and treat each other as belonging to racially distinct groups because of the profound social, biological and cultural differences among them. Racism has long been an issue of importance in Brazil. Yet many Brazilians take pride in denying its existence and portraying Brazil as the world's melting pot, a model of racial equality, harmony and opportunities for all. Many Brazilians of African ancestry, however, are aware of the degree to which their cultural, religious, socio-economic and political identities have been suppressed. There is thus a serious discrepancy between the usual portrayal of racial matters in the country and the reality as experienced in the lives of millions of Afro-Brazilian people.¹⁰⁸ It

¹⁰⁶ 'Brazil' in *Anti-Semitism World Report 1995*, London, Institute of Jewish Affairs, and New York, American Jewish Committee, 1995.

¹⁰⁷ *World Directory of Minorities*, Edited by MRG, *supra*, pp72.

¹⁰⁸ *Afro-Latin Americans Today, No Longer Invisible*, Edited by Minority Rights Group, 1995. pp. 19

has perhaps rightly been argued that a concealed form of apartheid operates in Brazil.

Brazil can be described as a multi-religious country. There are important divisions in this regard among Christians (majority Roman Catholic, also Pentecostal), Afro-Brazilian religions (Candomble , Umbanda,) , Judaism , indigenous religions . Earlier traditional forms of worship, however, still exist and a large part of the population adheres to traditional animistic beliefs. It should be noted that not one of the religious groups are homogenous in themselves either. African religions survive in Brazil today and give testimony to the strength of Brazil's African heritage and to the powerful sense of solidarity among Africans brought to the country. They felt a need to forge a new culture that would be their original response to the difficulties of the new environment in which they were forced to live.¹⁰⁹

Furthermore, another legitimate distinction that emerges is that of language. The linguistic situation of Brazil is equally complex and the diversity is immense, The official language of Brazil is Portuguese, but there are various indigenous minority languages. Simply there is not enough information available to this author as to number of indigenous languages currently in existence in Brazil .So far we can conclude that clearly there are several ethnic groups in Brazil, that there are different religions being followed and many different languages being spoken. The question now is if these groups or any of them or any compilation of them can be regarded as minorities and as

¹⁰⁹ Ibid, pp 28

such would be entitled to the protection provided for in international law under Article 27 of the ICCPR.

When it comes to the self-identification of groups in Brazil we can note that the different cultures assert themselves loudly to differing degrees. This would already indicate awareness of differences. This self-identification, this feeling of being a Brazilian, exists in spite of the diversities of the groups. Africans who came to Brazil in fetters preserved their cultural heritage and religions despite the lack of a common language among them.¹¹⁰

Despite a degree of democratisation over the past decade, and some loosening of its traditionally rigid structure, Brazilian society is likely to remain sharply divided for many years to come. Meanwhile Afro-Brazilian activists, and those who share their aspirations, envision a process whereby the inequalities of life chances in their country, which affect indigenous and white as well as black Brazilians, may be reduced, to the benefit of all. For this to happen, State and federal governments must come to understand that a polarized society is a violent one, and that the healing of Brazil's historic inter-ethnic wounds requires a new openness about racial issues, whose reality must be faced.

¹¹⁰ Ibid, pp25

7 Recommendations

The effective participation of minorities in public life is an essential component of a peaceful and democratic society. Experience has shown that, in order to promote such participation, governments often need to establish specific arrangements for minorities. These recommendations aim to facilitate the inclusion of minorities within the State and enable minorities to maintain their own identity and characteristics, thereby promoting the good governance and integrity of the State.

These recommendations build upon fundamental principles and rules of international law, such as respect for human dignity, equal rights, and non-discrimination, as they affect the rights of minorities to participate in public life and to enjoy other political rights and the rule of law, which allow for the full development of civil society in conditions of tolerance, peace, and prosperity.

When specific institutions are established to ensure the effective participation of minorities in public life, which can include the exercise of authority or responsibility by such institutions, they must respect human rights of all those affected.

Individuals identify themselves in numerous ways to their identity as members of a minority. The decision as to whether an individual is a member of a minority, the majority, or neither rests with that individual and shall not be imposed upon her or him. Moreover, no person shall suffer any disadvantage as a result of such a choice or refusal to choose.

When creating institutions and procedures in accordance with these recommendations, both substance and process are important. Governmental authorities and minorities should pursue an inclusive, transparent, and accountable process of consultation in order to maintain a climate of confidence. The State should encourage the public media to foster intercultural understanding and address the concerns of minorities.¹¹¹

7.2 Participation in decision-making

7.2.1 Arrangements at the level of the central government

States should ensure that opportunities exist for minorities to have effective voice at the level of the central government, including through special arrangements as necessary. These may include, depending upon circumstances:

- a) Special representation of minorities, for example through a reserved number of seats in one or both chambers of parliament or in parliamentary committee; and other forms of guarantee in the legislative process.
- b) Formal or informal understandings for allocating to members of minorities cabinet positions, seats on the supreme or constitutional court or lower courts, and

¹¹¹ The Lund Recommendations on the Effective Participation of National Minorities in Public Life . Published by the Foundation on Inter-Ethnic Relations , September 1999, named after the Swedish City of Lund in which the experts last met and completed the recommendations . Among the experts were jurists specialising in relevant international law , political scientists specialising in constitutional orders and elections system , and sociologists specialising in minority issues , Specifically , under the Chairmanship of the Director of the Raoul Wallenberg Institute , Prof. Gudmundur Alfredsson .

positions on nominated advisory bodies or other high-level organs;

- c) Mechanisms to ensure that minority interests are considered within relevant ministries, through, eg; personnel addressing minority concerns or issuance of standing directives ; and
- d) Special measures for minority participation in the civil service as well as the provision of public services in the language of the minority.

7.2.2 Elections

Experience demonstrates the importance of the electoral process for facilitating the participation of minorities in the political sphere. States shall guarantee the right of persons belonging to national minorities to take part in the conduct of public affairs, including through the rights to vote and stand for office without discrimination.

The regulation of the formation and activity of political parties shall comply with the international law principle of freedom of association. The principle includes the freedom to establish political parties based on communal identities as well as those not identified exclusively with the interests of a specific community.

The electorate system should facilitate minority representation and influence. Where minorities are concentrated territorially, single member districts may provide sufficient minority representation .Proportional representation systems , where a political party's share in the national vote is reflected in

its share of the legislative seats , may assist in the representation of minorities. Some form of preference voting, where voters rank candidates in order of choice, may facilitate minority representation and promote inter-communal cooperation . Lower numerical thresholds for representation in the legislature may enhance the inclusion of national minorities in governance.¹¹²

7.2.3 Arrangements at the regional and local levels

States should adopt measures to promote participation of minorities at the regional and local levels such as those mentioned above regarding the level of the central government. The structures and decisions-making processes of regional and local authorities should be made transparent and accessible in order to encourage the participation of minorities.

7.2.4 Advisory and consultative bodies

States should establish advisory or consultative bodies within appropriate institutional frameworks to serve as channels for dialogue between governmental authorities and minorities. Such bodies might also include special purpose committees for addressing such issues as housing, land , education , language , and culture .The composition of such bodies should reflect their purpose and contribute to more effective communication and advancement of minority interests.

These bodies should be able to raise issues with decision makers, prepare recommendations, formulate legislative and other proposals , monitor developments and provide views

¹¹² The Lund Recommendations, *supra*

on proposed governmental decisions that may directly or indirectly affect minorities . Governmental authorities should consult these bodies regularly regarding minority-related legislation and administrative measures in order to contribute to the satisfaction of minority concerns and to the building of confidence. The effective functioning of these bodies will require that they have adequate resources.

7.3 Self – Governance

Effective participation of minorities in public life may call for non-territorial or territorial arrangements of self-governance or a combination thereof. States should devote adequate resources to such arrangements .It is essential to the success of such arrangements that governmental authorities and minorities recognized the need for central and uniform decisions in some areas of governance together with the advantages of diversity in others.¹¹³

Functions that are generally exercised by the central authorities include defence, foreign affairs, immigration and customs, macroeconomics policy, and monetary affairs. Other functions, such as those identified below, may be managed by minorities or territorial administrations or shared with the central authorities. Institutions of self-governance, whether non-territorial or territorial, must be based on democratic principles to ensure that they genuinely reflect the views of the affected population .

¹¹³ The Lund Recommendations , supra.

7.3.1 Non-Territorial Arrangements

Non-territorial forms of governance are useful for the maintenance and development of the identity and culture of minorities. The issues most susceptible to regulation by these arrangements include education, culture, use of minority language, religion and other matters crucial to the identity and way of life of minorities.

Individuals and groups have the right to choose to use their names in the minority language and obtain official recognition of their names. Taking into account the responsibility of the governmental authorities to set educational standards, minority institutions can determine curricula for teaching of their languages, culture, or both. Minorities can determine and enjoy their own symbols and other forms of cultural expression.¹¹⁴

7.3.2 Territorial Arrangements

All democracies have arrangements for governance at different territorial levels. Experience shows the value of shifting certain legislative and executive functions from the central to the regional level, beyond the mere decentralisation of central government administration from the capital to regional or local offices. Drawing on the principle of subsidiary. States should favourably consider such territorial devolution of powers, including specific functions of self-government, particularly where it would improve the opportunities of minorities to exercise authority on matters affecting them. Appropriate local, regional or

¹¹⁴ The Lund Recommendations, *supra*

autonomous administrations that corresponds to the specific historical and territorial circumstances of minorities may undertake a number of functions in order to respond more effectively to the concerns of these minorities .¹¹⁵

Functions over which such administrations have successfully assumed primary or significant authority include education, culture, use of minority languages, environment, local planning, natural resources, economic development, local policing functions, and housing, health, and social services. Functions shared by the central and regional authorities include taxation, administration of justice, tourism, and transport. Local, regional, and autonomous authorities must respect and ensure the human rights of all persons, including the rights of any minorities within their jurisdiction.

7.4 Guarantees

7.4.1 Constitutional and Legal Safeguards

Self-governance arrangements should be established by law and generally not subject to change in the same manner as ordinary legislation. Arrangements for promoting participation of minorities in decision-making may be determine by law or other appropriate means.

Arrangements adopted as constitutional provisions are normally subject to a higher threshold of legislative or popular consent for their adoption and amendment. Changes to self-

¹¹⁵ Ibid

governance arrangements established by legislation often require approval by a qualified majority of the legislature, autonomous bodies or bodies representing minorities or both. Periodic review of arrangements for self-governance and minority participation in decision-making can provide useful opportunities to determine whether such arrangements should be amended in the light of experience and changed circumstances.¹¹⁶

7.4.2 Remedies

Effective participation of minorities in public life requires established channels of consultation for the prevention of conflicts and dispute resolution, as well as the possibility of ad hoc or alternative mechanisms when necessary. Such methods include:

- a) Judicial resolution of conflicts, such as judicial review of legislation or administrative actions, which requires that the State possess an independent, accessible, and impartial judiciary whose decisions are respected; and
- b) Additional dispute resolution mechanisms, such as negotiation, fact finding, mediation, arbitration, an ombudsman for minorities, and special commissions, which can serve as focal points and mechanisms for the resolution of grievances about government issues¹¹⁷.

¹¹⁶ The Lund Recommendations, *supra*.

¹¹⁷ The Lund Recommendations, *supra*

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