



FACULTY OF LAW
Lund University

Hari K. Singh

The Working Group on
Minorities:
In Memoriam

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Professor Gudmundur Alfredsson

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4.3	Special investigative procedures or mechanisms	56
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Summary

As the overall United Nations (UN) machinery embarks on its continuous road of reformation, more particularly as it relates to reforming its Human Rights System, this Thesis sets out to critically examine the effect of this process on one aspect of the latter System: international minority rights. And even more specifically in this regard, the primary focus is on the now-abolished (or as some say “replaced”) Working Group on Minorities (WGM).

Ever since the adoption of the first single instrument on minority rights, that is, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (the “Declaration”) in 1992, the establishment of the WGM in 1995 became the first and only minority rights focal point of the UN. The WGM had worked tirelessly in executing its specific mandate, more specifically to promote the implementation of the Declaration for a total of twelve (12) years. However during this period it has suffered, first a reduction of its mandate, and eventually total abolition. This Thesis is therefore a “eulogy” to the WGM.

It sets out first to emphasize the importance of recognizing the rights of minorities and consequently according due and adequate protection to such rights. This study then proceeds to review the life and times of the WGM by offering a critical evaluation of its strengths, achievements and weaknesses. Moreover, the jurisprudence, considered during the tenure of the WGM, of four (4) treaty bodies are examined for any indication of whether or not, and to what extent, the rights of the Declaration and by extension the work of the WGM have/has been endorsed and promoted. Complementing this is also an examination of the latest reports of three (3) Special Rapporteurs with a similar view. Then later, as the UN Human Rights reform progresses, the mandate and work of the recently established Independent Expert on

Minority Issues (IEMI) come into focus. The intention here is to examine its impact and relationship to the work of the WGM.

This Thesis concludes by introducing the WGM's "replacement", the Forum on Minority Issues (Forum). The discussion proceeds along the line of examining the mandate of the new Forum and attempting to highlight possible setbacks, against the background of the WGM. The primary aim of this discourse is to offer encouragement and possible lessons to the Forum, from the experiences of the WGM.

Quite noteworthy, as a golden thread throughout the Thesis, is that as much as it may seem that the international community is placing additional effort to promote and protect the rights of minorities, it is a sad paradox that the opposite may be true: the international community does not care sufficiently about the rights of minorities. It is contended herein that the very fact that there is just a "Declaration" and not a "Convention" on the rights of minorities should lead one to serious ponderings. Furthermore, the WGM was strategically placed at the very bottom of the hierarchy of the UN Human Rights machinery, and this was an inherent restriction to its effectiveness and efficiency. And as if that is not sufficient a revelation, the new Forum has no voice of its own: it seems to be a mere tool for the IEMI to execute his/her mandate.

However, despite the foregoing, one should not lose hope. Maybe this is just the beginning of the creation of a strong international legal regime for the promotion and protection of international minority rights. Certainly, a strong system is one that has built on its failures and shortcomings. One could only therefore hope that the current regime on international minority rights is the foundation of a long and arduous process that would end with the dream "strong system".

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Abbreviations

Art.	Article
CAT	Committee Against Torture
CEDAW	Committee on the Elimination of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
ConAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ConEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
Doc	Document
ECOSOC	Economic and Social Council
FCNM	Framework Convention on National Minorities
HCNM	High Commissioner for National Minorities
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IEMI	Independent Expert on Minority Issues
ILO	International Labour Organization
MRG	Minority Rights Group International
NGO	Non-Governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Cooperation in Europe
PRSPs	Poverty Reduction Strategy Papers

UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
WGM	Working Group on Minorities

1 From the importance of the recognition and protection of International Minority Rights to the establishment of the Working Group on Minorities

1.1 Historical Background

It is almost an inarguable statement that many States have minorities within their borders. Even though there may not be any definitive scientific data on the subject, it is nevertheless estimated that ten to twenty per cent of the global population comprise minorities.¹ This, translated into actual figures, corresponds to the proposition that between six hundred million and 1.2 billion people are in need of special measures for the protection of their rights. This need for special measures is wholly premised on the fact that minorities are often among the most disadvantaged and vulnerable groups in society. Their members are frequently the sad victims of discrimination, injustice and exclusion from meaningful participation in public and political life.²

It was therefore perhaps these sentiments being harboured by former United Nations Secretary General (UNSG), Kofi Annan that prompted him to once state³:

Most conflicts happen in poor countries, especially those which are badly governed or where power and wealth are very unfairly distributed between ethnic or religious groups. So the best way to prevent conflict is

¹ Joint Statement by MRG, etc to the 6th Session of the Human Rights Council, 18 September 2007, available at <www.minorityrights.org/?lid=2452>, last visited on 1 October, 2007.

² See the *United Nations Guide for Minorities* available at <www.ohchr.org/english/issues/minorities/guide.htm> last visited on 22 October 2007

³ Statement made on presenting his Millennium Report on 3 April 2000 and available at <www.unhchr.ch/minorities/> last visited on 11 September 2007.

to promote political arrangements in which all groups are fairly represented, combined with human rights, minority rights, and broad-based economic development.

As regards ethnic conflicts, some studies have revealed that over seventy one per cent of the total global conflicts are influenced largely by ethnic and/or religious factors.⁴ Besides, as quoted above, a very high proportion of these conflicts arise at least in part, because governments, or government organs, purposefully or inadvertently (by more or less complex policies) discriminate against minorities. As one may be aware, once a particular group is marginalized, it would be forced to resort to “other” measures to successfully compete for the coveted resources of society. Hence, the chances of these internal tensions escalating into more serious conflicts are quite prominent.⁵

To further inform on this subject, Hadden explains that a large majority of the most serious human rights violations during the latter part of the twentieth century were committed during internal ethnic and religious conflicts rather than international warfare.⁶ In fact, the breakup of multinational states like Czechoslovakia, the Soviet Union and Yugoslavia and the fragility of some of the successor states illustrate the challenges posed by the non-recognition or poor protection of Minority Rights.⁷ The Basques in Spain, the Hungarians in Romania, the Turks in Bulgaria and the situation in Northern Ireland are just a few examples cited by Alfredsson to further illustrate the explosiveness of unresolved minority issues.⁸

⁴ Minority Rights Group International, “Why Conflict?” available at <www.minorityrights.org/?lid=483>, last visited on 11 September 2007.

⁵ Tom Hadden, “The Role of the Working Group on Minorities”, paragraph 3. January 26, 2004, UN Doc Symbol: E/CN.4/Sub.2/AC.5/2004/WP.3

⁶ Ibid.

⁷ Gudmundur Alfredsson, “Minority Rights and a New World Order”, in D. Gomien (ed.), *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjørn Eide*, 1993, p. 55

⁸ Ibid.

The fact that continuous marginalization and discrimination against minorities would likely result in conflicts, whether internal or international, is not a modern-day issue and could in fact be traced to the commencement of the First World War. Studies have shown that in 1914 one of the main triggers of the First World War was the series of problems concerning minorities in South-East Europe.⁹ Then, at the conclusion of this War, the world's most influential political leaders assembled to form the League of Nations, whose aim was *inter alia*, to protect the rights of minorities in order to prevent the emergence of future conflicts. Certainly this protection of minority rights led to the more developed protection of even broader and more inclusive categories of human rights by the United Nations (UN) and other international organizations. Sadly however, the number of recent violent conflicts that have a significant basis in ethnicity, culture and language remain alarmingly high.¹⁰ In fact, Baldwin, Chapman and Zoe submit that

“it is the conflicts involving minorities that seem to last the longest and often cause the most bitterness and damage. Just a few examples of minorities involved in conflicts would include: Chechens, Darfurians (for example, Fur), Kurds, Palestinians, Roman Catholics in Northern Ireland, Serbs and Tamils.”¹¹

If one should take a more detailed look at the Darfur example, it would become apparent that the under-development and marginalization affecting all of the tribes in that region have been a longstanding problem. Srinivasan, who seems to have a better grasp at this particular case, writes that

“[S]ince the 1970s, the vulnerability of minorities in Darfur has been exacerbated by ethnic polarization, militarization, desertification and socio-economic crisis. The critical structural conditions for large-scale conflict

⁹ Clive Baldwin, Chris Chapman & Zoe Gray, “Minority Rights: The Key to Conflict Prevention”, p. 4. Copy available on MRG's website: <www.minorityrights.org/download.php?id=174>, last visited on 11 September 2007.

¹⁰ Ibid.

¹¹ Ibid.

have been the government's inadequate and often partisan response to the worsening situation. Resource-based inter-tribal conflicts, a long-standing feature of Darfur, increased ... from the 1970s. Semi-nomadic pastoral tribes sought access to more fertile lands...However, ethnic polarization and militarization increased, especially as Darfur was drawn into the racialized Libya-Chad conflicts that lasted until the early 1990s.”¹²

1.2 Overview of international legal recognition and protection

The above situations and circumstances therefore inevitably drew attention to the inalienable need to adopt special measures to ensure the recognition and protection, as well as the economic, social and cultural development of minority communities.¹³

These “special measures” are essentially two-fold, and initially assumed the broader concept of prevention of discrimination with regard to the political, social, cultural or economic ambitions and secondly, opportunities of minorities. Discrimination has been prohibited in a number of international instruments that deal with most, if not all, situations in which minority groups and their individual members may be denied equality of treatment.¹⁴ More specifically however, discrimination is prohibited on the general grounds of, *inter alia*, race, language, religion, national or social origin, and birth or other status. Important safeguards from which individual members of minorities stand to benefit include recognition as a person before the law,

¹² Sharath Srinivasan, “Minority Rights, Early Warning and Conflict Prevention: Lessons from Darfur”, p. 4. Copy available on MRG’s website, <www.minorityrights.org/download.php?id=102>, last visited on 11 September 2007.

¹³ See *fn 5 supra*, para 4.

¹⁴ OHCHR’s Fact Sheet No. 18 (Rev. 1), Minority Rights. Available at <www.ohchr.org/english/about/publications/docs/fs18.htm> last visited on 11 September 2007.

in addition to the important rights of freedom of religion, expression and association.¹⁵

As regards the specific international legal instruments that seek to prohibit discrimination are the provisions contained in the United Nations Charter of 1945 (Arts. 1 and 55), the Universal Declaration of Human Rights (UDHR) of 1948 (Art. 2) and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966 (common Art. 2). These provisions are further reflected in a number of specialized international instruments, including ILO Convention concerning Discrimination in Respect of Employment and Occupation No. 111 of 1958 (Art. 1), UNESCO Convention against Discrimination in Education of 1960 (Art. 1), UNESCO Declaration on Race and Racial Prejudice of 1978 (Arts. 1, 2, 3), Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief of 1981 (Art. 2), and the Convention on the Rights of the Child of 1989 (Art. 2).¹⁶

It is respectfully submitted however, that the above provisions on non-discrimination may not be sufficient to promote and protect specific rights of minority groups and individuals. Since, non-discrimination measures may be viewed as generic, minorities are therefore guaranteed “special rights”. It is important to remember that these rights are not privileges or tokens but are rather granted to ensure minorities the ability to preserve their identity, characteristics and traditions. It is further respectfully submitted that these special rights seek to complement the basic thrust of non-discrimination provisions, and could be therefore considered a *sine qua non* for the achievement of equality of treatment.

Several international human rights instruments refer to national, ethnic, racial or religious groups and some include special rights for persons belonging to minorities. These include the:

¹⁵ Ibid

¹⁶ Ibid

- Convention on the Prevention and Punishment of the Crime of Genocide (Art. II),
- International Convention on the Elimination of All Forms of Racial Discrimination (Arts. 2, 4),
- International Covenant on Economic, Social and Cultural Rights (Art. 13),
- International Covenant on Civil and Political Rights (Art. 27),
- Convention on the Rights of the Child (Art. 30),
- UNESCO Convention against Discrimination in Education (Art. 5),
- UNESCO Declaration on Race and Racial Prejudice,

and the United Nations Declaration on Minorities, which would be examined in more detail subsequently.¹⁷

Notwithstanding the above enumeration, it must be conceded that the most widely accepted legally binding provision regarding minorities is article 27 of the ICCPR, which states:

“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 the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”.

On this provision, Alfredsson cautions that although it is drafted in the negative stance (“persons ... shall not be denied”), it nevertheless establishes that specific collective goods are now fully within the ambit of the Covenant.¹⁸ This Article grants persons belonging to minorities the right to national, ethnic, religious or linguistic identity, or a combination thereof, and to preserve the characteristics which they wish to maintain and develop. Although Art. 27 refers to the rights of Minorities in those States in which

¹⁷ Ibid.

¹⁸ Gudmundur Alfredsson & Alfred de Zayas, “Minority Rights: Protection by the United Nations”. Human Rights Law Journal, Vol. 14 Nos. 1-2, p. 2

they exist, its applicability is not subject to official recognition of a minority by a State.¹⁹

Furthermore, while Art. 27 does not require States Parties to adopt any specific form of special measures, it requires those States that have ratified the Covenant to ensure that all individuals under their jurisdiction enjoy their rights; this may require specific action to correct inequalities to which minorities are usually subjected.²⁰

While Art. 27 no doubt enjoys the status of being legally binding, it would be remiss if mention is not made of the two crucial articles of the UDHR, that is, articles 21 and 27, relating, *inter alia*, to participation in public and political life and participation in cultural life, respectively. Therefore, while express and direct/positive reference may not be made to the protection of minorities, by legislative interpretation and extension, such rights, albeit in a limited fashion, are also recognized.

1.3 Declaration on Minority Rights

The development of the concept that States have a duty to protect the existence and facilitate the development of minorities as such may be traced to the work of the Conference on Security and Cooperation in Europe, often referred to as the Helsinki Process.²¹ The initial Helsinki Declaration of 1975 was concerned primarily with measures to diminish the risk of conflict between the two main power blocks, but contained additional commitments to democratization and human rights. This “human rights basket” was subsequently developed in the Copenhagen Document of 1990 which made a direct link between the prevention of conflict and the protection of minorities. Participating States were then required to “protect the ethnic, cultural, linguistic and religious identity of national minorities on their

¹⁹ See *fn 14 supra*

²⁰ General Comment No. 18(37) of the Human Rights Committee contained in UN Doc HRI/GEN/1 of September 4, 1992.

²¹ See *fn 5 supra*, para 8.

territory and create conditions for the promotion of that identity” and to take “the necessary measures to that effect after due consideration, including contacts with organizations or associations of such minorities”.²² These include guarantees in respect of the use of minority languages, the provision of education in or through those languages and effective participation in public affairs. The implementation of these commitments is the responsibility of the High Commissioner for National Minorities (HCNM), established within, what is now, the Organization for Security and Cooperation in Europe (OSCE), in 1992. The HCNM has developed a practice of engaging in dialogue with representatives of minorities and their national Governments and encouraging direct round-table discussions between them.²³

Then, in 1992 came the landmark achievement for minorities under the auspices of the UN: the adoption of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities²⁴ (also referred to as the “Minority Rights Declaration”, “Declaration on Minority Rights” and “Declaration”). This Declaration is considered, perhaps, the only UN instrument that comprehensively addresses the special rights of minorities in a separate and single UN document. The adoption of this Declaration gave worldwide recognition to the concept that the effective protection of minorities requires more than just the elimination of discrimination.²⁵ The underlying objective, as set out in the preamble, is to contribute to political and social stability and the strengthening of co-operation among States by recognizing and protecting the existence of minorities and the rights of their members.²⁶ The Declaration reiterates the general principles of non-discrimination and the rights of individual members to practice their religion, use their language

²² Ibid.

²³ Ibid.

²⁴ Adopted by the UNGA on December 18, 1992 by GA Res 47/135

²⁵ See *fn 5 supra*, para 9

²⁶ Ibid.

and enjoy their culture as established in article 27 of the ICCPR. The major addition is the positive obligation on all States under Art. 1 to:²⁷

- protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their territory;
- encourage conditions for the promotion of that identity; and
- adopt appropriate legislative and other measures to those ends.

The remaining articles set out in more detail both the duties of States and the rights of members of minorities, individually or in community with others, on specific issues, including but not limited to:²⁸

- effective participation in decisions concerning the minority;
- education in or through their mother tongue;
- the content of minority and majority education; and
- full participation in economic progress and development.

Quite importantly also, is the intent of Art. 8 of the Declaration. This article recognizes that while the Declaration ensures a balance between the rights of persons belonging to minorities to maintain and develop their own identity and characteristics and the corresponding obligations of States, it also ultimately safeguards the territorial integrity and political independence of the Nation as a whole. The Declaration is premised on the principle that the rights contained therein apply fully to Minorities, without any prejudice to other universally recognized human rights those minorities are nevertheless entitled to.

Moreover, Hadden contends that by combining in this way the imposition of duties on states to minorities as such and the formulation of specific rights for their members as individuals in their own right or in community with others, the Declaration supersedes the long-standing and somewhat unhelpful dispute on whether there can be group or communal as opposed to

²⁷ Ibid.

²⁸ Ibid.

individual human rights.²⁹ However, the importance of the rights of members of minorities who wish to assert their rights as individuals rather than as members of a community is recognized by the specific provision that no disadvantage shall result from the exercise or non-exercise of any of the rights in the Declaration.³⁰

1.4 Establishing the Working Group on Minorities (WGM)

It is respectfully submitted that the above detailed provisions in the form of a Declaration are expected to help promote tolerance for ethnic, religious, linguistic and cultural diversity which should consequently contribute to more inclusive and stable national societies and to peace and stability in the international community. Notwithstanding, it could be argued that the Declaration is not without shortcomings, the primary one being the fact that it is adopted without an implementation or monitoring procedure. There is no question that such a procedure is needed for a serious and across-the-board application of the standards contained therein; technical assistance is not going to reach many of the places where more urgent attention is required.³¹

Recognizing these concerns, the human rights machinery of the UN did not hesitate to act accordingly, and in this regard, established a charter-based mechanism on minority rights. To this end, the creation of a Working Group on Minorities (also hereinafter referred to as the “WGM”, “Working Group” and “Group”), was recommended by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 1994/4 of August 19 1994, authorized by the Commission on Human Rights in its resolution 1995/24 of March 3 1995, and endorsed by the Economic and

²⁹ See *fn 5 supra*, para 10

³⁰ *Ibid.*

³¹ Gudmundur Alfredsson, “Minority Rights: A Summary of Existing Practice”, contained in “The UN Minority Rights Declaration” edited by Alan Phillips & Allan Rosas, p. 79

Social Council (ECOSOC) in its resolution 1995/31 of July 25 1995.³² In that resolution, the Council authorized the Sub-Commission to establish, initially for a period of three years, an inter-sessional working group consisting of five of its members to meet each year for five working days in order to promote the rights of persons belonging to national or ethnic, religious and linguistic minorities, as set out in the Declaration and in particular to:³³

- a. review the promotion and practical realization of the Declaration;
- b. examine possible solutions to problems involving minorities, including the promotion of mutual understanding between and among minorities and governments;
- c. recommend further measures, as appropriate, for the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities.

Sadly however, this detailed mandate was reduced in 2005 by the Commission on Human Rights resolution 2005/79, and later abolished/replaced in 2007 by the Human Rights Council.

1.5 Aim and Roadmap of Thesis

Having regard to the foregoing, it is now necessary to indicate that the aim of this Thesis lies in the broader realm of the reform of the United Nations, more specifically as it relates to reform of its Human Rights System, and the latter's efforts to promote and protect international minority rights. Hence, following the adoption of the Declaration on Minority Rights in 1992, the Working Group of Minorities was established in 1995 to primarily promote the implementation of the latter instrument. This Group has, to the day of its abolition, worked tirelessly in pursuit of its mandate until the latter was first reduced and then later replaced. The specific aim of this Thesis is therefore

³² "Protection of Minorities: Report of the Working Group on Minorities on its first session", UN Doc E/CN.4/Sub.2/1996/2, 30 November 1995, p. 3

³³ Ibid.

to critically review the work of the WGM with the aim of formulating lessons for and expectations of the replacing Forum on Minorities.

Already, this first chapter has introduced the importance of recognizing the effective promotion and protection of the rights of minorities, by highlighting the relationship between such non-recognition and the emergence of internal and other conflicts. The Declaration on Minority Rights, that “new” bundle of rights, forms the primary reason for the establishment of the WGM, in that these “new” rights have to be promoted and implemented. This Declaration has been reviewed and summarized to some extent.

The second and third Chapters would seek to examine the strengths and achievements on the one hand, and the weaknesses on the other, of the WGM in order to fully appreciate its work.

Next, the fourth Chapter would examine in detail, the post-1995 jurisprudence of four (4) treaty-bodies as well as the latest reports of three (3) Special Rapporteurs, with the view of ascertaining whether or not, and to what extent, the provisions of the Declaration and by extension the work of the WGM have been endorsed. Possible reasons for these revelations would also be proffered.

The fifth Chapter would then examine the new Independent Expert on Minority Issues (IEMI) and how the work of this mechanism is related to and affected that of the WGM.

The sixth and final Chapter would seek to summarize the foregoing work of reviewing the WGM in a manner that seeks to pay tribute to its endeavours. The new Forum on Minority Issues would also be critically explored and measured against the WGM as a role model. This Chapter would then close by taking a futuristic glance of international minority rights and the possibility for its better protection.

Throughout the Thesis, more specifically in the final Chapter, there would be calls for the international community to place greater emphasis and importance on the rights of minorities, and the possible adoption of a Convention on the rights of minorities.

2 The WGM: Strengths and Achievements

2.1 Birth of the WGM

As previously discussed, the initiative of establishing the WGM was first conceived within the halls of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. It therefore becomes imperative that one examines the instrumental resolution of the Sub-Commission, that is, resolution 1994/4. This resolution essentially expressed strong sentiments of being

“disturbed by the widespread occurrence of violent conflicts in many parts of the world where ethnic or religious hostility is engendered and exploited by one or more of the parties to the conflict”, and

“convinced of the need to ensure equality and non-discrimination between all groups in society and to find peaceful and constructive solutions to minority situations in accordance with international law”.

The Sub-Commission, *via* resolution 1994/4, then took note of the Declaration on the Rights of Minorities and expressed its conviction that the Declaration’s implementation, not in isolation but in conjunction with ICERD and all other relevant international instruments, provides the best guidance for such endeavours.

This resolution then proceeds to express the Sub-Commission’s profound appreciation to former Special Rapporteur Asbjørn Eide for the invaluable suggestions he proffered in a working paper. In the latter paper, Eide recommended a comprehensive programme for the prevention of discrimination and protection of minorities. Eide is also duly praised for his

final report which suggested possible ways and means to facilitate the peaceful and constructive solution to problems involving minorities. The Sub-Commission, in this resolution subsequently and rightfully endorsed the collective suggestions and recommendations of Eide.

In paragraph 6 of resolution 1994/4, the Sub-Commission recommends, as an initial step,

“that the Commission on Human Rights request ECOSOC to authorize the establishment of an inter-sessional working group of the Sub-Commission to examine, inter alia, peaceful and constructive solutions to situations involving minorities...”

As explained earlier, this resolution was subsequently authorized by the Commission on Human Rights in its resolution 1995/24, and endorsed by ECOSOC in its resolution 1995/31.

The Working Group on Minorities was then born in 1995, three years after the adoption of the Declaration on Minority Rights.

Pursuant to General Assembly resolution 60/251, all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights were assumed as of 19 June 2006 by the Human Rights Council. Subsequently, the latter Council decided at its sixth session, that is, the first session of its second cycle that, it would decide on the most appropriate mechanisms to continue the work of the WGM.³⁴

³⁴ Report to the General Assembly on the Fifth Session of the Council, 7 August 2007, UN Doc: A/HRC/5/21, para. 84.

2.2 The working methods and main focuses of the WGM

Quite unsurprisingly, Eide was appointed the WGM's first chairperson. He vehemently lobbied and promoted the Group, whose underlying objective was to provide a regular, formal structure within which the provisions of the Declaration could be promoted and implemented.³⁵ It was constituted as a continuing working group of the Sub-Commission on the Promotion and Protection of Human Rights, with five members drawn from the then current members of the Sub-Commission, one from each of the five regions of the United Nations.³⁶ The WGM had met between Sub-Commission sessions for one week³⁷ each year, normally in May in Geneva.

As outlined in the previous Chapter, the WGM had three primary focuses, which comprised its fixed and formal agenda items. Practically, the sessions of the WGM had assumed two major activities:

- the provision of a forum for representatives of minorities to raise issues at an international level and to seek a response from their Governments, and
- the development of standards and the dissemination of examples of good practice in working papers and reports presented by various Governmental, non-governmental and academic organizations and individuals.

As regards the first major activity alluded to above, a perusal of the session reports of the WGM would reveal that quite a remarkable amount of time was dedicated to the delivery of prepared presentations by representatives of minorities. Usually the latter representatives would have generally been selected, financed and given some advance training by the leading minority

³⁵ Tom Hadden, "The United Nations Working Group on Minorities". *International Journal on Minority and Group Rights* 14 (2007) 285-297 at p. 286

³⁶ Ibid.

³⁷ This was before its mandate was altered by para. 9 of Commission on Human Rights Resolution 2005/ 79, thereby requiring the WGM to meet one session of three consecutive working days annually.

rights NGO, Minority Rights Group International (MRG), in order to make their participation more precise, effective and meaningful. These MRG trainings had assumed the form of workshops conducted during the week preceding the commencement of the WGM sessions. In these workshops, minority representatives had been encouraged and assisted to prepare well structured and coherent presentations detailing their peculiar situations and concerns, and corollary recommendations to the WGM and their Governments. This meant therefore, that a wide range of different minorities have been able to make presentations to the Working Group over the years.³⁸

It is respectfully submitted that the second major thrust of the Working Group could be sub-divided into the initial focus, and secondly the more recent practice. The initial focus was on the preparation and publication of a formal Commentary to the Declaration. On this aspect, Hadden summarises thus:

*“The Commentary was finally adopted in 2001 and provides a valuable guide to the interpretation and application of some of the more general formulations in the Declaration.”*³⁹

As explained by Hadden, the more recent focus of the WGM had been on the presentation and discussion of working papers and conference room papers describing examples of good practice and problems at national or regional levels, and setting out different possible approaches to some of the more difficult and contentious issues.⁴⁰ These papers have generally sought to address certain national and regional situations and standards. Quite importantly as well, there have been presentations on more general and academic studies on issues of political participation, development, autonomy and integration.⁴¹ Hadden himself had been a noted contributor.

³⁸ See *fn 35 supra*, pp. 287-288

³⁹ *Ibid*, p. 288

⁴⁰ *Ibid*.

⁴¹ *Ibid*.

2.3 Strengths and Achievements of the WGM

Founding-father and long-standing Chairperson, Asbjørn Eide, writes of the WGM:

“What makes it unique in the United Nations system is that it has adopted a very flexible approach in order to encourage wide participation in its sessions, particularly by its openness to participation by representation by minorities...the Working Group is a forum in which minorities have full speaking rights and where Government observers are also actively taking part, which in itself can contribute to a constructive dialogue. Similarly, NGOs concerned with minority issues are prominent participants.... An even more special feature of the Working Group is its openness to participation by scholars – researchers in the field of minority rights”⁴²

Having regard to the foregoing statement therefore, it is respectfully submitted that what is considered perhaps the most outstanding achievement of the WGM was its ability, as a forum, to provide a unique opportunity for members of minority communities to raise their concerns at an international level. These minority members, it should be noted, were often considered marginalized and vulnerable, and usually the subject of systematic discrimination and who have been typically excluded from national or local decision-making.⁴³ It should therefore be recalled that the Sub-Commission on the Promotion and Protection of Human Rights, the first major human rights body created by the United Nations, was originally titled “Prevention of Discrimination and the Protection of Minorities”. Sadly however, minority issues were increasingly marginalized until the creation of the

⁴² Asbjørn Eide, “Reflections on the present and future role of the United Nations Working Group on Minorities”. Statement at the Ninth session, 12 May 2003, pp. 1-2

⁴³ See *fn* 35, *supra*, p. 289

WGM, which until 2005⁴⁴ was the only mechanism dedicated to minorities within the United Nations.⁴⁵ The important argument that has to be appreciated at this juncture, it is respectfully submitted, is that the WGM had provided the most appropriate opportunity and consequently presided over crucial dialogues between the representatives of minorities and governments. Besides, if one should examine this strength more closely, it would become evident that the WGM's successes are also premised on the fact that it was readily open to non-ECOSOC NGOs, for many of whom, it was the only channel for putting their issues onto the UN agenda.⁴⁶

Any mid-level to senior Government official would readily attest to a Government's hesitance when it comes to openly addressing minority issues and concerns. Veiled policies and toothless legislation are just a few examples of how most Governments seek to "remedy" their minority concerns. In other words, it is very much easier to address minority and related concerns at the national level by obliquely ignoring them. It is no secret that self-governance and issues of autonomy are not exactly music to the Governments' ears. However to minorities these are issues of "bread and butter". With untold gratitude to the WGM and its transparency, minorities used that forum to draw international attention to their Governments' reticence. But even more importantly than this, the forum of the WGM had been consistently and positively used by these very factions, who would hitherto not directly and forthrightly discuss and remedy their contentions at home, to find constructive and long-lasting solutions to their problems. Cecilia Thompson could not have made a better summary on this point when she writes:

"Indeed, the Working Group represents the only mechanism within the United Nations system which

⁴⁴ That is, before the enforcement of the mandate of the Independent Expert on Minority Issues.

⁴⁵ Report of the Working Group on Minorities on its twelfth session, August 24, 2006. UN Doc A/HRC/Sub.1/58/19, p. 21

⁴⁶ "Prevention of Discrimination: Prevention of Discrimination and Protection of Minorities. Written Statement submitted by the Minority Rights Group, a non-governmental organization on the Roster". UN Doc E/CN.4/Sub.2/2003/NGO/33, 16 July 2003, p. 2

allows minorities to have direct access to such an international body and to discuss ways by which these situations could be addressed. Participation of minority representatives ... at the sessions of the Working Group has ... allowed them to meet ... Government officials whom they would most probably never have the opportunity to meet in other circumstances. An example can be provided regarding contacts made by a representative of the Dalit Women in India with the representative of the Indian Government, or a member of the Arab minority in Israel with the Israeli Government. There are thus many instances whereby informal contacts have been made between minorities and Governments concerning the respect of minority rights at country level, and proposals have been made by the Government concerned to improve the situation.”⁴⁷

In addition, and as addressed above, the fact that a significant proportion of the WGM’s agenda had been dedicated to presentations and interventions by representatives of minorities, strongly suggests that they were given a unique learning opportunity. Hadden therefore explains that these minority representatives had been able to learn more about the international standards which their Governments can be called on to apply and in some cases they had been able to engage in direct dialogue with representatives of their own Governments on the application of the provisions of the Declaration.⁴⁸ They also benefited from direct contact with representatives of other minority groups attending the session, and in many cases they had been assisted in developing their knowledge of international standards and procedures and in preparing their presentations in training groups organized in advance of the

⁴⁷ Cecilia Thompson, “The United Nations Sub-Commission Working Group on Minorities: what protection for minority rights?” published in *Human Rights and Criminal Justice for the Downtrodden, Essays in Honour of Asbjørn Eide*, Norten Bergsmo (ed), p. 535

⁴⁸ See *fn 5 supra*, para 12

Working Group sessions by Minority Rights Group International and other NGOs.⁴⁹

The WGM was indeed a forum that strenuously advocated transparency, mutual understanding and an intense interaction among Governments, UN agencies/institutions, minority representatives and civil society at large. All these activities, however, only served, *inter alia*, to highlight the fact that international minority law is encapsulated by ambiguities, and this therefore necessitated further studies, political discussion and norm refinement. An intense dialogue, without the context of the WGM, between, on the one hand all interested parties and on the other, the different institutional hierarchies could likely prove a folly, and begged for a clear framework for reference. It is on this basis, therefore, that

“an enormous ‘norm hunger’ and ‘thirst for knowledge’ surfaced, and subsequently, the members of the Working Group and the broader public were fed more than abundantly with studies and reports. These papers elaborated not only by the members of the Working Group but also by leading scholars in this field who came to participate in the workings of this institution with great enthusiasm.”⁵⁰

The MRG has sought to highlight the practical benefits of minority representatives’ participation in WGM sessions. In 2004, this NGO conducted an impact survey on minorities who had attended these sessions, and the main finding was that their attendance impacted positively on their related NGOs back in their own countries. Such impacts included: initiating dialogue in Geneva with Governments for the first time that was continued back in their home countries, and being taken more seriously following

⁴⁹ Ibid.

⁵⁰ Peter Hilpold, “UN Standard-Setting in the Field of Minority Rights”. *International Journal on Minority and Group Rights* 14 (2007)181-205 at p. 199

attendance at a United Nations meeting. As a result, NGOs achieved changes in their home countries through using contacts made in Geneva.⁵¹

A further advantage of the WGM forum is primarily based on the fact of its openness and also that it is dialogue-oriented. These inherent elements have certainly given minority representatives the opportunity to, for example, raise concerns about their treatment by police and security forces, and subsequently manage to garner some amount of redress. Minorities had also benefited by drawing much-needed international attention to discriminatory practices within various national criminal justice systems. As a consequence there had been frequent discussions on the importance of greater integration of members of minorities in the agencies responsible for law and order and criminal justice. Therefore, with a view to offering guidance for technical assistance, and pursuant to paragraph 74(a) of the Durban Programme of Action, which

“urges States and invites non-governmental organizations and the private sector ... to create and implement policies that promote a high-quality and diverse police force free from racism, racial discrimination, xenophobia and related intolerance, and recruit actively all groups, including minorities, into public employment, including the police force and other agencies within the criminal justice system (such as prosecutors)”,

the OHCHR commissioned a paper for discussion with Governments and other partners on “integration with diversity in policing, security and criminal justice”.⁵² This paper⁵³ was submitted to the Working Group at its twelfth session, with the aim of providing practical guidance and examples of good practices to assist Governments, United Nations officials, NGOs

⁵¹ See *fn 45 supra*, p. 21

⁵² Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”, Report of the Secretary-General on the rights of persons belonging to national or ethnic, religious and linguistic minorities, 22 February 2007. UN Doc: A/HRC/4/109, para. 19

⁵³ UN Doc E/CN.4/Sub.2/AC.5/2006/WP.1

and others in ensuring that agencies of the criminal justice system and law enforcement agencies are representatives of, responsive to and accountable to the community as a whole.⁵⁴

Before discussing yet another advantage of the WGM, one should focus on another of Eide's further statements on the subject:

*“The greatest achievement of the Working Group has been its ability to identify the major issues which have to be addressed in achieving constructive solutions to situations involving minorities.”*⁵⁵

The WGM had consistently focused on the development of more detailed standards and examples of good practice in the implementation of the Declaration. This approach gratefully yielded some benefits. In its attempt to “identify the major issues which have to be addressed in achieving constructive solutions to situations involving minorities”, the WGM had ultimately encouraged new thinking on the often sterile and confrontational issue of self-determination by identifying a wide range of different ways in which minorities may take control of or participate in the management of their own affairs through various forms of regional, functional or cultural autonomy.⁵⁶ The WGM had ensured that sufficient light was shed on the need to combine policies of integration and autonomy in different aspects of minority protection, and to this end, helped to identify different regional and sub-regional approaches to minority protection. It is without doubt therefore, that the WGM had played a positive role in encouraging other United Nations agencies to take account of minority issues in the development of their policies on development and poverty reduction.⁵⁷

In addition to the foregoing, the WGM had recommended and conducted international and regional seminars on education and autonomy and on

⁵⁴ See *fn 5 supra*

⁵⁵ See *fn 35 supra*, p. 3

⁵⁶ *Ibid.* p. 290

⁵⁷ *Ibid.*

particular issues facing minorities globally. Hence, in recognition of this achievement, McDougall writes:

*“In recent years, the [WGM] proposed, and the Sub-Commission endorsed, the idea of holding sub-regional seminars on issues facing minorities; the Office of the High Commissioner for Human Rights has organized three such meetings in Asia: in Chiang Mai, Thailand, in 2002, in Bishkek, Kyrgyzstan, in 2004, and in Kandy, Sri Lanka, in 2004; three in Africa: in Arusha, Tanzania, in 2000, in Kidal, Mali, in 2001 and in Gaborone, Botswana, in 2002; and two in Latin America and the Caribbean: in La Ceiba, Honduras, in 2002 and in Chincha, Peru, in 2005.”*⁵⁸

The WGM had made a formal invited visit to inspect and report on minority protection in Mauritius and Finland. It is on this latter point, it is respectfully submitted, that the WGM had undoubtedly expressed untold ambition and bravery in executing its stated mandate. It is difficult to find in resolution 1994/4 any authority to make country visits. However, the WGM in its determination to explore, expose and understand how different States at different levels of socio-economic development treat with their peculiar minority situations, had conducted the following country visits.

2.4 Country Missions to Mauritius and Finland

2.4.1 Mauritius⁵⁹

The WGM undertook its first country visit to Mauritius from 8 to 10 September 2001, at the invitation of the Government of Mauritius. The

⁵⁸ “Specific Groups and Individuals: Minorities. Report of the independent expert on minority issues, Gay McDougall”. UN Doc: E/CN.4/2006/74, 6 January 2006, para 14

⁵⁹ Effective Promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Report of the Secretary General, 7 August 2003. UN Doc: A/58/255, para 15

objective of the visit was to draw lessons from the experiences of Mauritius with regard to good practices of group accommodation in a multicultural society, as well as to explore integrative and autonomous approaches and practices with respect to minority protection, in particular on Rodrigues Island. Following the visit, the WGM made suggestions and recommendations concerning such issues as the inclusion of the historical and cultural information relating to all communities in school curricula and text books, and the development of further measures to improve the provision of primary schooling in marginalized regions. The WGM also encouraged the future local government of the autonomous region of Rodrigues to exercise caution in the elaboration of development projects so as to preserve, respect and develop the island community's cultural identity.

2.4.2 Finland⁶⁰

With a continuing view to gathering best practices, the WGM undertook its second country visit to Finland in January 2003. Members of the Group met with representatives of Government, various minorities and NGOs. They became familiar with the special autonomy arrangement of the Åland Islands and how it could serve as an example of a measure of conflict prevention or resolution in other similar situations. Information was provided on the legislative, policy and other measures taken at the national level to improve respect for the principles of non-discrimination, tolerance and the rule of law. Several meetings were organized with representatives of the Russian, Roma, Jewish and Tatar minorities, the indigenous Sami, and about 30,000 Ingrians as well as with the Advisory Board for Ethnic Relations, the Ombudsperson, the Sami Parliament and the Advisory Body on Roma Affairs. The promotion and protection of the rights of minorities at the national, regional and international levels were acknowledged as one of the priorities of the Government of Finland, as persons belonging to minorities were more likely than others to suffer discrimination and other

⁶⁰ Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Report of the Secretary General, 6 September 2005. UN Doc A/60/333, para 10

human rights violations. The Working Group's visit was seen as contributing to constructive dialogue with international mechanisms.

2.5 Other Achievement: The Minority Profile and Matrix⁶¹

It would certainly be an unfair evaluation of the work of the WGM if mention is not made of its initiative to construct a special Minority Profile and Matrix. Following its eleventh session the WGM recommended that OHCHR continued to organize the Minority Fellowship Programme and to pay particular attention to the preparation of a Minority Profile and Matrix. The idea of this Profile and Matrix arose from the need identified by the Minority Fellows to better understand the contents of the Minority Rights Declaration, the Commentary on the said Declaration and other international standards and jurisprudence relating to minorities. The Matrix provides an indication as to the information that may be submitted with respect to different principles, rights, duties and purposes of the Declaration. The completion of this Matrix should not only provide an overall picture of the prevailing situation, but also draw attention to the priority issues of concern and suggestions for addressing them.

The Profile and Matrix could also be used by minorities to present information to their own Governments, national human rights institutions and regional organizations. More specifically as regards the Governments, this information could also be a useful source for assisting Governments in developing their policies on minority issues and for raising awareness of these issues in the international community. This would, of-course, require a process for the regular updating of information in the Matrix.⁶²

⁶¹ Reviewing the Promotion and Practical Realization of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Note by the Secretariat, 23 June 2006, UN Doc E/CN.4/Sub.2/AC.5/2006/3, pp. 4-5

⁶² Ibid.

It is expected that the Profile would identify and reflect the dynamics and different views existing within each minority group and for the Matrix to provide, as far as possible, a spectrum of views held within the minority community, the priority concerns and suggestions for solving them.⁶³

2.6 Closing

In wrapping up, this chapter sought to trace the work of the WGM from its birth resolution 1994/4 of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. Primarily, however, the various strengths, achievements and advantages of having such an international minority rights forum as the WGM were explored and lauded. It would be hypocritical for one to ignore the fact that until the advent of the WGM, minorities never enjoyed an international forum at which they can have meaningful and respectful dialogue with their own Governments and the rest of the international community on issues that are inherent to their existence. This is one of its biggest advantages or achievements.

Attention was also drawn to the fact that the WGM has conducted several regional seminars in executing its mandate, but more importantly have been its missions to two countries that enjoy different levels of socio-economic development, and are faced with different degrees of minority situations. What is quite attractive about these country visits is the fact that such eventuality was never contemplated in resolution 1994/4, but the WGM was determined nevertheless to complete this endeavour.

Bearing in mind that a story may not necessarily have just one side but several as does the hexagon, the next chapter would seek to explore the weaknesses of the WGM.

⁶³ Ibid.

3 Weaknesses of the WGM

3.1 Introduction

It is respectfully submitted that in an objective and competitive world even the “perfect” system is subject to criticism, whether constructive or not. No matter how whole hearted and sincere a system or mechanism’s endeavours and objectives are, there is the high likelihood that sections of its “beneficiaries” would bicker, complain and be uneasy. The work of the WGM is no stranger to this jealous and sometimes brutal scrutiny. There is no doubt that it had made tremendous achievements in the promotion and protection of international minority rights. There is no doubt that it had provided minority groups and representatives the rare opportunity to voice their concerns and hold high-level corresponding dialogue at the level of no less than the United Nations. There is no doubt that it had sought to successfully highlight the problems and concerns of minorities throughout the globe either by its regional seminars or its regular annual sessions in Geneva. However, even that noble mechanism had stones thrown at it.

This chapter therefore seeks to critically examine the work of the WGM by addressing real or perceived weaknesses primarily within the context of its mandate (more so prior to its amendment in 2005), but also as these weaknesses relate to its budget, meeting time, and from the perspective of the impacts of external factors.

3.2 Mandate

What is considered to be a glaring weakness of the WGM is the fact that its mandate did not authorize it to function as a complaints body with the power to adjudicate and decide on minority and related issues and concerns. It has been sufficiently addressed in the previous Chapter that the WGM had in practice offered an enviable and effective forum for the discussion of specific situations that either threaten, or are actually faced by minorities.

The WGM had also equally addressed relevant thematic concerns of direct and indirect connection to minorities, by means of, *inter alia*, open dialogues primarily. However, because of the inherent shortcoming in its mandate, it was prohibited from making effective interventions as the particular circumstances may have demanded. Hence, in the Ninth Session of the WGM, the MRG did not hesitate to draw attention to this fact thus:

*“its mandate does not allow it to take action to remedy urgent situations, either regarding individuals or groups. It cannot follow up on the submissions of minority representatives alleging violations, other than by simply forwarding them to the government concerned. It does not make specific recommendations to states based on the allegations of violations that are presented during its sessions.”*⁶⁴

In fact, MRG may not be the only organization or entity to share this view. Hadden readily concurs when he writes:

*“As a body appointed by and reporting to the Sub-Commission on the Promotion and Protection of Human Rights, it is not formally in a position to adjudicate or adopt resolutions on individual situations.”*⁶⁵

One could therefore promptly question the viability and practicality of the WGM if its mandate was inherently restrictive. As argued earlier, the problems of minorities are not recent and hence altogether new so as to take one by surprise. Therefore, what was the essence of mandating the WGM to not practically address minority issues?

⁶⁴ Possible New United Nations Mechanisms for the Protection and Promotion of the Rights of Minorities, Paper prepared by the Minority Rights Group International and presented at the Ninth Session of the Working Group on Minorities. 5 May 2003 UN Doc E/CN.4/Sub.2/AC.5/2003/WP.3, p. 2.

⁶⁵ See *fn 35 supra*, p. 290

Furthermore, to compound the problem of a restrictive mandate is the fact that the WGM was arguably impotent when it came to promoting more effective and meaningful dialogue between minority representatives and corresponding Governments. Its diplomacy could be improved. Hadden summarizes thus:

“...the Working Group itself has not generally been able to use its influence to encourage more constructive dialogue.... In most cases ... the only formal record of the presentation is a brief summary in the annual report of the Working Group.”⁶⁶

As the discussion of the mandate of the WGM progresses, it is recalled that the second part of its mandate expected it to

“examine possible solutions to problems involving minorities, including the promotion of mutual understanding between and among minorities and Governments”.

Two arguments could be derived from this. First, the most natural means of achieving this aspect of the mandate would be to facilitate and encourage direct dialogue between the representatives of minorities and their corresponding Governments. True, many sessions of the WGM had sought to present the proper opportunity for this kind of direct dialogue. However, the sad result is that most of these opportunities had been soiled and tainted by being transformed into an adversarial scenario: minorities vehemently make, sometimes spurious, allegations of violations of the Declaration and other human rights instruments, and the Government representatives obviously retort in the defensive. What therefore resulted were direct confrontations rather than direct dialogue as the basis for resolving and remedying minority concerns. Such regular occurrence therefore prompted Hadden to write in one of his several papers at the WGM sessions:

⁶⁶ Ibid.

“A public international forum of this kind provided by the annual sessions of the Working Group is not an ideal setting for constructive discussion of minority issues.”⁶⁷

The second argument emanating from this aspect of the WGM’s mandate is grounded in the creation of an expectation: the WGM should as a corollary have been permitted to render a full, frank and detailed examination of particular situations brought to its attention with a view to proposing appropriate policies and measures by the parties involved in those particular situations.⁶⁸ However, in practice what has obtained? Longstanding chairperson of the WGM, Eide, confesses as follows:

“We have not been good enough in doing so, and have justly been criticized by some NGOs for not going into some depth in the examination of particular situations. I would like us to discuss whether we could reorganize our work to become more effective in this regard.”⁶⁹

As if by coincidence, the abovementioned submission of Eide does lead to another weakness: organization of work. When one makes an in-depth study of the sessions and related work of the WGM, it becomes lucid that the structure was as such that presentations by minority representatives were made on a largely consecutive basis. It might be difficult to imagine in what setting such a work structure may prove effective since in reality, there is usually no:⁷⁰

- sustained dialogue;
- reasoned response from the Government concerned;
- considered reaction from the members of the Working Group;
- discussion of the issues.

⁶⁷ See *fn 5 supra*, para. 49.

⁶⁸ See *fn 42 supra*, p. 2

⁶⁹ *Ibid.*

⁷⁰ See *fn 35 supra*

It is respectfully submitted however, that in all fairness to the efforts of the WGM, a “reasoned response from the Government concerned” may not have been elicited since some Government representatives just plainly refused to offer a response. When this ugly feature of “participation” decided to rear its ugly head, then there could obviously have been no dialogue, and in this regard the WGM should be saved from criticism.

On the other hand, as it once again relates to the work structure of the WGM, it had been almost common practice that Governments were not presented with the topics to be discussed at a particular session sufficiently in advance. That quite easily resulted in a situation of minority representatives making their detailed, and often times accusatory presentations, and Governments were taken by surprise. That certainly led to the Government representatives choosing not to respond, since they were not prepared to address such issues in question. There was also the circumstance where Government representatives were willing to respond and endeavoured to seek a reaction from their respective capitals. This process is quite common in the work of most international organizations, but could consume too much time, since the Government representatives in attendance may simply be diplomats and not the national experts on minority issues.⁷¹ What compounded this problem further is the fact that the WGM sessions were held for just a few days annually, and the Group was therefore jealous of its time.

In addition, there is the glaring weakness of the WGM’s inability to conduct effective, if at all, follow-ups on issues and concerns raised at each session. Hadden thus submits:

“...the ad hoc nature of the proceedings at its annual sessions and the fact that at each session representatives of different minorities have generally been present have made it difficult for the Working

⁷¹ See *fn 35 supra* p. 291

Group to ensure that issues raised in one session are followed through in subsequent proceedings.”⁷²

Hadden⁷³ later reassured that OHCHR had attempted on several occasions during the more recent sessions to restructure the presentations to take account of this weakness, but this had not proven wholly effective. More specifically, OHCHR sought to facilitate discussions of different regional or thematic issues, such as the difficulties of nomadic minorities and the problems arising from national development plans.

As regards the practical implementation of the provisions of the Declaration at the national and regional levels, Hadden contends that there has been a consistent lack of much-needed and sustained focus on the development of specific guidelines.⁷⁴ It is certainly without doubt that the WGM had explored various avenues and exercised its energies to ensure that at least a modest effort was channeled to this end. Accordingly, it had consistently requested its members and other regular participants to conduct extensive research and studies and make the corollary presentations on general thematic and regional issues on the subject in question. Those presentations or working papers are all documented as part of each relevant session. In addition to this endeavour, and pursuant to the dictate of Art. 9 of the Declaration, a similar request for the presentation of working papers from leading international organizations, such as the United Nations High Commissioner for Refugees, the United Nations Development Programme and the HCNM of the OSCE, was also made with favourable responses.⁷⁵ Quite unfortunately however, in most cases, there was no system to ensure that the suggestions, recommendations and conclusions emanating from those working papers are adequately, if at all, institutionalized and practiced. Hadden expresses his observation thus:

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

“...these presentations have not been integrated into any specific programme of work and there has not been much opportunity for an interchange of experience or recommendations between the representatives of these international bodies and the representatives of minorities. Those involved have tended to participate in the Working Group only for a few hours to deliver their particular presentation, and have not usually been present to hear the more general presentations by minorities.”⁷⁶

What can therefore be logically deduced from the forgoing is quite revealing: the lack of a programme whose objective is to ensure that the agreed suggestions, recommendations and conclusions are properly adopted, published and circulated among all stakeholders. Hadden therefore draws the picture quite articulately, thus:

“This has meant that much of the valuable work on issues such as the relationship between the right to self-determination and the various forms of autonomy and the balance between policies for integration and policies for separate or autonomous provision has not been effectively followed through or developed into a more tangible or lasting form than the annual reports of the Working Group to the Sub-Commission.”⁷⁷

What may be considered as yet another weakness of the WGM could be the fact that this forum was too open and transparent. Government representatives may be too, what is respectfully submitted as, “shy and embarrassed” to participate in such a forum that would result in the public airing of their poor national programmes and policies for the effective implementation of the Declaration. A “public washing” of such “dirty linen”

⁷⁶ Ibid.

⁷⁷ Ibid.

could hardly foster the all-too-necessary two-way street for frank and constructive dialogue between minority representatives and those of their Governments.

3.3 Budget

Although not explicitly established in its mandate, the Working Group had made two country visits to Mauritius and Finland respectively, at the invitation of those Governments. Such an undertaking was however not within the contemplation of resolution 1994/4 and therefore not within the annual budget of the WGM. Therefore while it may prove very worthwhile and productive to conduct such on-site visits, the WGM did not have a budget for country visits and it was clear that such visits could not have formed a regular part of its work.⁷⁸

3.4 Time

As expressed previously the WGM was established to meet just once a year for a period not exceeding one working week. This could be argued as an inherent constraint to its ability to effectively execute its entire mandate. Such a short period of time for the making of various and extensive presentations and follow-up corresponding responses could only serve as a restriction to effective dialogue between minority representatives and those of the relevant governments.

To compound this issue, its meeting time was further reduced to one session of three consecutive working days annually during the time of the annual session of the Sub-Commission, by Commission on Human Rights resolution 2005/79, paragraph 9. Is the international community therefore really serious about the promotion and protection of the rights of minorities who comprise less than thirty percent of the world's total population?

⁷⁸ See *fn 64 supra*, p. 3.

3.5 External Impacts on the effectiveness of the WGM

Evaluating the viability of the WGM is not confined to its prescribed mandate only. The WGM may have functioned as a model mechanism within the ambit of its mandate but may have failed dismally in the broader scheme of things. Here the discussion advances to how external factors/mechanisms directly affect the effectiveness of the WGM. It is not arguable that the members of the WGM, participating NGOs, scholars, several Government observers, etc had been motivated and to this end worked tirelessly to enhance the promotion and protection of minority rights.⁷⁹ Letschert further explains:

“Each year important topics are discussed, such as the issue of development and minorities as well as autonomy and self-determination, from a practical and theoretical point of view. Each year attempts are made to further promote the implementation of the Minority [Rights] Declaration, by clarifying its content and by proposing to draft a Code of Conduct that would guide states in the implementation process.”⁸⁰

As the process continued, year after year those very suggestions, recommendations and conclusions were made and forwarded to the Sub-Commission on the Promotion and Protection of Human Rights, for onward transmission to the Commission on Human Rights. That latter body, as it then was, was primarily responsible for the practical and other implementation of the outcome work of the WGM. However, as Letschert further explains the former Commission on Human Rights

“seem[ed] to be reluctant to take any real steps forward. This [made] the task of those actively

⁷⁹ Rianne Letschert, “A Review of the 9th and 10th Sessions of the UN Working Group on Minorities”, European Yearbook on Minority Issues Vol. 3, 2003/4, pp. 451-479 at p. 476

⁸⁰ Ibid.

participating in the Working Group sometimes frustrating.”⁸¹

Interestingly, a related argument to the one immediately just mentioned is that those recommendations that were forwarded upwards through the UN institutional hierarchy, could be viewed as repetitive, redundant and over-used, and the Commission on Human Rights may have therefore lost interest in them.⁸² This would have of-course yielded the same result: a reluctance on the part of the former Commission on Human Rights to implement the work of the WGM and therefore resulting in the ultimate ineffectiveness of the Group. It is respectfully hoped that the repetitiveness and redundancy of the recommendations of the WGM were not offered as an excuse for the “lack of interest” of the Commission on Human Rights, since there should have been greater initiative on the latter’s behalf.

Another glaring weakness of the WGM that should not be overlooked is premised on its establishment within the hierarchy of UN institutions. It goes without saying that the WGM was responsible for matters that touched and concerned minority issues and situations. Around the world, thousands of minority groups count hundreds of millions of persons who represent diverse ethnic origins, customs, cultures and languages.⁸³ It may therefore be obvious that the weight of the issues to be addressed by the WGM would be remarkable. Yet, it is respectfully submitted, by its very hierarchical placement, the WGM was forced to obey a chain of command, that is, it reported to the Sub-Commission on the Promotion and Protection of Human Rights, which then reported to the Commission on Human Rights, which further reported to ECOSOC, which finally reported to the General Assembly of the United Nations. This “dwarfing” of its stature could therefore explain the abovementioned arguments under this sub-head, resulting in the WGM’s shortage of effectiveness and efficiency in the manner in which it conducted its business. Such hierarchical placement

⁸¹ Ibid.

⁸² See *fn 50 supra*, pp. 199-200

⁸³ See *fn 7 supra*, p. 56

could also explain why it sometimes seemed that its work was not taken seriously by other related UN agencies and bodies.

It therefore goes to show that while the work of the WGM should not have been easily underestimated, in the broader scheme of things its successes may have been curtailed due to the impacts of lackadaisical interdependent mechanisms.

Further, the contention that the WGM may be affected by external factors could be extended beyond its relationship to the former Commission on Human Rights. As mentioned previously, Art. 9 of the Declaration is of primary importance since it specifically requires that all UN agencies cooperate to ensure the promotion and protection of international minority rights within the context of the Declaration. However, it is argued that there had not been established any systemized form of cooperation between the WGM and these agencies to ensure a continued process of dialogue between minority representatives and those of the corresponding Governments within the context of the Declaration and the WGM sessions.⁸⁴ Had this not been the case, the work of the WGM may have attracted much more praise than it already has.

From the foregoing, one cannot help wonder why there is such a lack of support from and coordination with sister UN agencies. It is respectfully submitted that a possible reason could be that not even these agencies are sufficiently alert of the pressing need to further the promotion and protection of international minority rights.

3.6 Wrapping Up

The initiative and objectives of the WGM were certainly pure as they sought to promote and protect international minority rights. The Group spent twelve tireless years meeting and discussing on the best way to achieve its

⁸⁴ See *fn 5 supra*, paras 46-7

stated aims in resolution 1994/4. However, as mentioned in the Introduction to this Chapter, not even what one might consider a “perfect” mechanism or system is shielded from criticisms.

What this chapter has therefore sought to highlight were the practical shortcomings of the WGM as it functioned during its annual sessions. Such weaknesses have been argued from the perspective of those inherent within its mandate primarily. Other weaknesses such as those of budgetary and time constraints and even how other interdependent agencies and bodies might have affected the effectiveness of the WGM, have been put under the spotlight.

It is respectfully submitted that the sum of the weaknesses alluded to above suggests that had the international community been sufficiently concerned about international minority rights, such weaknesses would have been reduced to the possible minimum.

So far, the strengths and weaknesses of the WGM have been addressed. The next attempt progresses to evaluate and analyze the extent to which the work of the WGM had been supported by four (4) of the treaty-bodies’ jurisprudence, and by three (3) selected Special Rapporteurs.

4 Post-1995 Jurisprudence of the UN Human Rights Treaty Bodies and the WGM

4.1 Introduction

This Chapter seeks to examine selected jurisprudence of the relevant UN Human Rights treaty bodies with the view to discern whether or not, and to what extent, these bodies seek to endorse the work of the WGM, hence the reference to “post-1995”. The latter endorsement could also be in the form of referring to the rights enshrined in the Minority Rights Declaration and their promotion and implementation within the context of the WGM. Depending on the outcome of the research presented herein, explanatory arguments would be proffered.

This Chapter would also endeavour to examine quite briefly, the latest annual reports of three special investigative procedures/mandates with the same view as applied to the examination of the WGM. These mandates are the

- Special Rapporteur on freedom of religion or belief;
- Special Rapporteur on Contemporary forms of racism, racial discrimination, xenophobia and related intolerance; and
- Special Rapporteur on the Situation of Human Rights in Myanmar,

and are selected randomly with some measure of basis on the proximity of their titles to that of the Minority Rights Declaration and present importance. However, one outstanding such special procedure, that is, the Independent Expert on Minority Issues, by its very complementary role to the WGM, would be assessed in a separate Chapter.

In the United Nations human rights system, both individuals and groups⁸⁵ could submit petitions or complaints regarding the violations of the standards enshrined in the major human rights treaties including, the

- International Covenant on Civil and Political Rights (ICCPR),
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ConAT), and
- Convention on the Elimination of All Forms of Discrimination Against Women (ConEDAW).

These complaints or petitions have to be submitted to the treaties' respective monitoring bodies or Committees. It is important to note that these communication procedures are entirely optional.

With particular reference to the specific Committees, it should be noted that the ICCPR's Human Rights Committee is granted jurisdiction to consider complaints, by the First Optional Protocol to this Covenant. Likewise, the First Optional Protocol to ConEDAW grants the Committee on the Elimination of Discrimination Against Women (CEDAW) the necessary jurisdiction to consider complaints aimed at the implementation of this Convention. On the other hand, the Committees Against Torture and Elimination of Racial Discrimination ("CAT" and "CERD" respectively) are granted similar jurisdiction by Articles 22 and 14 of the respective treaty.

Interestingly and in contrast to the procedure under the First Optional Protocol to ICCPR and article 22 of ConAT, where only individuals subject to the jurisdiction of a State party may submit a communication before their respective Committees, Article 14 of ICERD and Article 2 of the First Optional Protocol to ConEDAW are quite broader and in fact provide that groups of individuals may also submit a claim. This establishment, it is respectfully submitted, bears importance for minorities because not only

⁸⁵ Only where specified by the treaty itself.

individual members claiming to be victims but also minority communities or organizations could submit a communication alleging violations of the various ICERD or ConEDAW provisions. Therefore, in trying to be as accommodating as possible to members of minorities, the Human Rights Committee⁸⁶ has decided that complaints brought by a group of individuals belonging to a minority under the First Optional Protocol to ICCPR are declared admissible only after it is established that each separate individual can be identified as a similarly affected victim.

Most of the individual communications submitted by members of minorities or indigenous peoples are made to the Human Rights Committee. However, in recent years several communications concerning incidents of racial discrimination against ethnic Roma have been submitted before CERD.

4.2 The more specific minority rights protected

With reference to the abovementioned human right treaties, it should be noted that minorities are not only entitled to those minority-specific provisions, but in fact to all of the rights accorded to those who live within the jurisdiction of the State party.

4.2.1 ICCPR

This Covenant protects a wide range of essential civil and political rights and it is the only such treaty that includes a minority-specific provision: Art. 27.

It is respectfully submitted that a cursory glance at this Article would reveal striking similarities with the Minority Rights Declaration as an instrument, and it could therefore be easily concluded that the Declaration is an

⁸⁶ See *inter alia*, *Ominayak v. Canada* (167/1984), ICCPR, A/45/40 vol. II (26 March 1990)

elaborated extension of Art. 27. The thrust of this Article confers a right on individuals belonging to minority groups, and not to minority groups themselves. However, it has a collective element since it is exercised by individuals belonging to a minority “in community with other members of their group”.⁸⁷ This article also recognizes the right to identity whether this identity is cultural, religious and/or linguistic. The Human Rights Committee also noted that despite its negative formulation (“shall not be denied”), Art. 27 requires a State party to adopt positive measures that would protect not only against the acts of the State party itself, but also against the acts of third persons within the State party. It has also suggested that positive measures may be necessary to protect the identity of a minority group and would constitute a legitimate differentiation under the Covenant as long as they are based on reasonable and objective criteria.⁸⁸

The ICCPR also contains other general civil and political rights which could be of particular relevance to minorities. These relate to issues of self-determination, prohibition of discrimination, the right to fair and public hearing, right to privacy, and the right to freedom of thought, conscience and belief.

4.2.1.1 Selected Jurisprudence

Diergaardt et al v. Namibia (760/1997)⁸⁹

One of the issues of relevance in this case concerns the Rehoboth Basters people of Namibia. This particular issue of language rights is premised on the authors’ claim that the lack of language legislation in Namibia has led to a denial of the use of their mother tongue in administration, justice, education and public life. The Committee notes that the authors have shown that the State party has instructed civil servants not to reply to the authors’ written or oral communications with the authorities in the Afrikaans

⁸⁷ Manfred Nowak, “U.N. Covenant on Civil and Political Rights. CCPR Commentary” 2nd Revised Edition, p. 655

⁸⁸ Human Rights Committee’s General Comment 23/50 of 8 April 1994: Rights of Minorities

⁸⁹ ICCPR, A/55/40 vol. II (25 July 2000)

language, even when they are perfectly capable of doing so. These instructions barring the use of Afrikaans do not relate merely to the issuing of public documents but even to telephone conversations. In the absence of any response from the State party the Committee must give due weight to the allegation of the authors that the circular in question is intentionally targeted against the possibility to use Afrikaans when dealing with public authorities. Consequently, the Committee finds that the authors, as Afrikaans speakers, are victims of a violation of Art. 26 of the Covenant.

It is respectfully observed that the issue under discussion above seems well within the realm of the Declaration, more specifically Art. 4(3). However, this reference was not made by the Committee.

Lansman v. Finland (671/1995)⁹⁰

This case concerns the rights of Sami people to enjoy their culture, undisturbed, within the context of Art. 27. The issue under consideration is whether or not the State party's appropriate measures of forestry management, that is, logging methods, choice of logging areas and construction of roads in these areas, constituted a denial of Art. 27 rights. As far as future logging activities are concerned, the Committee observes that on the basis of the information available to it, the State party's forestry authorities have approved logging on a scale which, while resulting in additional work and extra expenses for the authors (members of the Muotkatunturi Herdsmen's Committee), and other reindeer herdsman, does not appear to threaten the survival of reindeer husbandry. That such husbandry is an activity of low economic profitability is not, on the basis of the information available, a result of the encouragement of other economic activities by the State party in the area in question, but of other, external, economic factors. The Committee considers that if logging plans were to be approved on a scale larger than that already agreed to for future years in the area in question or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have

⁹⁰ UN Doc: CCPR/C/58/D/671/1995

to be considered whether it would constitute a violation of the authors' right to enjoy their own culture within the context of Art. 27.

It is respectfully submitted that while the issues raised above seem encapsulated by Art. 2(1)(2), they could also be considered within the context of Arts. 4(5) and 5(1), jointly.

Waldman v. Canada (694/1996)⁹¹

The issue before the Committee is whether or not public funding for Roman Catholic schools, but not for schools of the author's religion, which results in him having to meet the full cost of education in religious schools, constitutes a violation of the author's rights under the Covenant. The Committee held that the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, the Committee concludes that the material before it does not show that the differential treatment between Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there has been a violation of the author's rights under Art. 26 of the Covenant to equal and effective protection against discrimination.

It is respectfully submitted that the primary issue raised above could also be considered within the context of Arts. 4(1) and 5(1) of the Declaration.

Howard v. Canada (879/1998)⁹²

The author is a member of a minority enjoying the protection of Art. 27 of the Covenant and is thus entitled to the right, in community with the other

⁹¹ UN Doc CCPR/C/67/D/694/1996

⁹² ICCPR, A/60/40 vol. II (26 July 2005)

members of his group, to enjoy his own culture. It is not disputed that fishing forms an integral part of the author's culture.

The question before the Committee however, is whether Ontario's Fishing Regulations as applied to the author by the courts have deprived him, in violation of Art. 27 of the Covenant, of the ability to exercise, individually and in community with other members of his group, his aboriginal fishing rights which are an integral part of his culture.

Referring to its earlier jurisprudence, the Committee considers that States parties to the Covenant may regulate activities that constitute an essential element in the culture of a minority, provided that the regulation does not amount to a *de facto* denial of this right.

The Committee recalls that the evaluation of facts and evidence is primarily a matter for the domestic courts of a State party, and in the absence of such evaluation in the present case the Committee's task is greatly impeded. It is therefore not in a position to draw independent conclusions on the factual circumstances to determine whether or not there is a violation of Art. 27.

4.2.2 ICERD

CERD emphasized that according to the definition given in Art. 1(1) of ICERD, the Convention relates to all persons who belong to different races, national or ethnic groups or even to indigenous peoples⁹³, and therefore, it is respectfully submitted, broad enough to perhaps also apply to the rights of persons belonging to religious and linguistic minorities. The Committee has also held that the identification of an individual with a particular race or ethnic group should be based on self-identification.⁹⁴

⁹³ See CERD's General Recommendations Nos. XXIII, XXIV

⁹⁴ See CERD's General Recommendation No. VII

Art. 5 of ICERD stipulates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of a wide range of civil, political, economic, social and cultural rights and freedoms. These rights include the right to equal treatment before the tribunals; the rights to participate in elections, vote and stand for elections; the right to freedom of movement and residence; the right to leave any country and to return to one's country; the right to freedom of thought, conscience and religion; and the right of access to any place or service intended for use by the general public. The latter has been invoked in few complaints submitted by members of ethnic minorities. It is noted that the list of the rights in Art. 5 is not exhaustive.⁹⁵

4.2.2.1 Selected Jurisprudence

Koptova v. Slovakia (No. 13/1998)⁹⁶ concerned two resolutions issued by the Municipal Council of Rokytovce and the Municipality of Nagov in June and July 1997, which forbade Roma citizens who used to live there from entering the villages or settling there. The author of the communication is a Roma and she challenged one of the resolutions before the Constitutional Court. She argued that by maintaining the resolutions in force, the State party violated Arts. 2(a, c); 3; 4(c); 5(d)(i); and 6 of ICERD.

On the merits of the communication, the Committee held that while the wording of the resolutions referred explicitly to Romas previously domiciled in the concerned municipalities, the context of their adoption indicated that other Romas would have been equally prohibited from settling there, and thus found a violation of Art. 5(d)(i) of ICERD. Furthermore while the Committee noted that the contested resolutions were rescinded in April 1999, it recommended that Slovakia should take the necessary measures to ensure that practices restricting the freedom of movement and residence of Romas under its jurisdiction were fully and promptly eliminated.

⁹⁵ See CERD's General Recommendation No. XX

⁹⁶ CERD, A/55/18 (8 August 2000)

It is respectfully submitted that the issues in this case are of germane importance to the rights of minorities and protected by the Declaration, more specifically Arts. 1 and 2(1)(2).

In yet another case before CERD, *Durmic v. Serbia and Montenegro* (No. 29/2003), the author, a man of Roma ethnicity, was refused entry to a club because of his ethnicity. His attempt to enter the club was part of a test conducted by the Humanitarian Law Centre following many complaints about the denial of entry to persons of Roma ethnicity to clubs, restaurants and other public places. The author claimed, *inter alia*, that the authorities' failure to prosecute the owners of the club for its discriminatory practice, as well as to ensure that such practice did not recur, amounted to a violation of Art. 5(f), in conjunction with Art. 2(1)(d) of ICERD.

While the Committee held that the State party "...had failed to establish whether the petitioner had been refused access to a public place, on grounds of his national or ethnic origin, in violation of Art. 5 (f) of the Convention", it did not go on to find a violation of this provision. However, it found a violation of Art. 6 on the grounds that the State party failed to investigate the author's arguable claim of racial discrimination promptly and effectively. The Committee also clarified the scope of Art. 6 by underlining that it provides protection to alleged victims of racial discrimination if their claims are arguable under the Convention. The Committee called the State party to take measures that will ensure that the police, the prosecuting authorities and the courts properly investigate complaints related to acts of racial discrimination.

4.2.3 ConEDAW

Women belonging to minority communities are among the most disadvantaged and vulnerable, and face multiple forms of discrimination. The Convention includes provisions on women's civil and political rights, social and economic rights, equality before the law and family rights.

More specifically, Art. 7 guarantees the right of women to vote, hold public office and exercise public functions,⁹⁷ while Art. 12 requires the elimination of discrimination against women with respect to access to health-care services.⁹⁸ Recognizing that rural women could predominantly be members of minorities, Art. 14 requires the elimination of discrimination against women in rural areas. Next, Art. 16 reiterates that women and men shall be equal in all matters related to marriage and family, including the right to marry freely and only with full and free consent. It also provides that no legal effect may be given to the betrothal or marriage of a child.⁹⁹

4.2.3.1 Selected Jurisprudence

The First Optional Protocol to ConEDAW entered into force on 22 December 2000 thereby enabling the corresponding Committee to consider complaints, petitions and/or communications from individuals or groups. Ever since that time to present, the Committee has considered a total of ten (10) communications. Of primary interest among these is the case of *Kayhan v. Turkey* (No. 8/2005)¹⁰⁰ which concerns the termination of employment of a Muslim woman because she wears the headscarf. The crux of the author's complaint is that she is a victim of a violation by the State Party of Art. 11 of ConEDAW. By her termination, the State party allegedly violated her right to work, right to the same employment opportunities as others, as well as her right to promotion, job security, pension rights and equal treatment. However, the Committee concluded that the author should have put forward arguments that raised the matter of discrimination based on sex in substance and in accordance with procedural requirements in Turkey before the administrative bodies that she addressed before submitting a communication to the Committee. It is for that reason therefore that her communication is deemed inadmissible for not properly exhausting domestic remedies.

⁹⁷ See CEDAW's General Recommendation No. 23

⁹⁸ See CEDAW's General Recommendation No. 24

⁹⁹ See CEDAW's General Recommendation No. 21

¹⁰⁰ CEDAW/C/34/D/8/2005

4.2.4 ConAT

Persons belonging to minorities who have been subjected to torture and other cruel, inhuman or degrading treatment or punishment can submit a communication under Art. 22 of ConAT. Art. 1 provides an extensive definition of “torture”. States parties undertake to take all the necessary measures in order to prevent, in any territory under their jurisdiction, acts of torture or cruel, inhuman or degrading treatment or punishment (Arts. 2 and 16). In addition States parties are also prohibited from expelling or extraditing a person to another State where there are substantial grounds for believing that s/he would be in danger of being tortured: Art. 3. Furthermore, Art. 4 places States parties under the obligation of penalizing all acts of torture. Finally, Art. 14 of ConAT requires States parties to ensure that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.

4.2.4.1 Selected Jurisprudence

The case of *Hajrizi Dzemajl et al v. Serbia and Montenegro* (No. 161/2000) concerned attacks against the residents and the houses of a Roma settlement in the Danilovgrad village, and the subsequent demolition and destruction of the houses by a mob of non-Roma residents. While police authorities were present, they failed to act and did nothing to protect the Roma residents or their property. CAT found that the burning and destruction of the Roma houses constituted acts of cruel, inhuman or degrading treatment or punishment. It also underlined that the nature of those acts was further aggravated by the fact that some of the complainants were still hidden in the settlement when the houses were burnt and destroyed and the fact that those acts were committed with a significant level of racial motivation. It held that the acts referred to by the complainants were committed with the acquiescence of public officials and constituted a violation of Art. 16(1) of the Convention. It was also held that the investigation conducted by the authorities failed to satisfy the requirements of Art. 12 because, despite the participation of several hundred non-Roma residents in the events and the

presence of police forces during the events, no person nor any member of the police forces had been tried by the domestic courts. The Committee held that the investigation conducted by the authorities did not satisfy the requirements of Art. 12. It also found that the absence of an investigation and the authorities' failure to inform the complainants of the results of the investigation constituted a violation of Art. 13. Finally, it held that the failure of the State party to enable the complainants to obtain redress and to provide them with a fair and adequate compensation violated Art. 6.

It is respectfully submitted that the issues raised above, though shocking, seem to fit squarely within the context of Art. 1 of the Declaration: the existence of minorities.

4.3 Special investigative procedures or mechanisms

4.3.1 Special Rapporteur on the freedom of religion or belief

Initially, the Commission on Human Rights had appointed, by resolution 1986/20, a Special Rapporteur on religious intolerance. However, this title was modified to the current title in 2000. The post is currently held by Ms. Asma Jahangir, who is mandated to, *inter alia*:

- examine incidents and governmental actions in all parts of the world which were inconsistent with the provisions of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and to recommend remedial measures for such situations;
- continue to apply a gender perspective, *inter alia* through the identification of gender-specific abuses, in the reporting process, including in information collection and in recommendations;

- respond effectively to credible and reliable information that comes before her; and
- continue to seek the views and comments of Governments concerned in the elaboration of her report.

In her latest report to the Human Rights Council, Ms. Jahangir concluded, *inter alia*, thus

*“...[T]he right to freedom of religion or belief is a fundamental human right which is guaranteed by various international legal instruments In her framework for communications ... the Special Rapporteur compiled the international human rights standards concerning freedom of religion or belief, including those referred to in Human Rights Council resolution 4/10.”*¹⁰¹

It is respectfully submitted that the *Freedom of Religion or Belief* seems to be seamlessly weaved into the *Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, and that persons facing religious discrimination are members of a religious minority. It is therefore almost impossible to explain why the Minority Rights Declaration does not find even a footnote listing among the abovementioned international human rights standards or instruments.

4.3.2 Special Rapporteur on Contemporary forms of racism, racial discrimination, xenophobia and related intolerance

By its resolution 1993/20, the Commission on Human Rights appointed a Special Rapporteur on contemporary forms of racism, racial discrimination

¹⁰¹ “Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Report of the Special Rapporteur on freedom of religion and belief, Asma Jahangir”. UN Doc: A/HRC/6/5, 20 July 2007, para. 49

and xenophobia and related intolerance. By subsequent resolutions, the Commission specifically requested the Special Rapporteur, currently Mr. Doudou Diène, to, *inter alia*:

- examine in accordance with his mandate incidents of contemporary forms of racism, racial discrimination, any form of discrimination against Blacks, Arabs and Muslims, xenophobia, negrophobia, anti-Semitism and related intolerance, as well as governmental measures to overcome them;
- make the fullest use of all additional sources of information, including country visits and the evaluation of mass media, and to elicit the responses of Governments with regard to allegations;
- in close consultation with Governments, relevant organizations of the United Nations system, other intergovernmental organizations and non-governmental organizations, to present further recommendations concerning human rights education with a view to preventing actions giving rise to racism and racial discrimination, xenophobia and related intolerance;
- present concrete recommendations on specific measures which could be taken at the national, regional and international levels, with a view to preventing and eradicating problems within the purview of his mandate.

In Mr. Diène's latest report to the Human Rights Council, it is recommended that Governments fully abide by their obligations concerning both freedom of expression and freedom of religion, as prescribed in the pertinent international instruments.¹⁰² While specific articles of only the ICCPR were mentioned, the hesitance to name other "pertinent international instruments", whether or not of either hard or soft law nature, could easily be equated with a poor regard for such instruments as the Minority Rights Declaration.

¹⁰² "Racism, racial discrimination, xenophobia and related forms of intolerance: follow-up to and implementation of the Durban Declaration and Programme of Action." UN Doc: A/HRC/6/6, 21 August 2007, para. 76

4.3.3 Special Rapporteur of the situation of human rights in Myanmar

This procedure was created in the early 1990s because of, *inter alia*, the growing seriousness of the situation of human rights in Myanmar, including reports of torture and arbitrary execution, detention of persons for political reasons, the restrictions on the exercise of fundamental freedoms and the imposition of oppressive measures directed in particular at ethnic and religious minorities. The General Assembly also, *inter alia*, urges the Government of Myanmar to ensure full respect for human rights and fundamental freedoms and the protection of the rights of persons belonging to ethnic and religious minorities.¹⁰³ The current mandate-holder is Mr. Paulo Sérgio Pinheiro.

In Mr. Pinheiro's latest report to the General Assembly, he recalled joining with five other special procedures of the Human Rights Council, including the Independent Expert on Minority Issues, in publicly urging the Government of Myanmar to eliminate discriminatory practices against the minority returnees in the northern Rakhine State. Mr. Pinheiro and his colleagues reiterated the important role of minority rights in promoting equitable development, peace and stability, as enshrined in the Minority Rights Declaration.¹⁰⁴ While it is enlightening that such reference is made to the Declaration, such hope is nevertheless diminished as it does not find endorsement in the final Recommendations.

4.4 Revelation

As mentioned previously, the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is the only single United Nations instrument addressing exclusively the rights of persons belonging to minorities. However, though this is the case, minority

¹⁰³ "Resolution adopted by the General Assembly. Situation in Myanmar." UN Doc: A/RES/47/144, 1 March 1993

¹⁰⁴ "Situation of human rights in Myanmar." UN Doc: A/62/223, 13 August 2007, para. 55

rights are also recognized in several core international human rights instruments including the ICCPR (most remarkably Art. 27 thereof), ConAT, ConEDAW and ICERD. As elaborated previously, the purposes of the Declaration are to, *inter alia*, recognize plural identities and promote inclusive and stable societies. Several of the Declaration's provisions reaffirm and emphasize the right to effective participation of persons belonging to minorities and the corresponding duty of States to ensure the effective participation of minorities in decisions affecting them. The United Nations has seemingly met the challenge of setting out the rights of persons belonging to minorities. Thus, the former Commission on Human Rights, whose special procedure mandates are now under the purview of the Human Rights Council, focused attention on efforts to raise further awareness and promote the implementation of those rights and on the establishment of mechanisms for promoting and protecting those rights, by primarily through the work of the Working Group on Minorities.

But is establishing the WGM an end in itself regarding the promotion and protection of international minority rights as enshrined in the Declaration? Is the WGM the only forum by which such ends could be achieved? This chapter has thrown the spotlight on two crucial avenues through which awareness of the Declaration and by extension, the work of the WGM could be promoted: the primary focus is on the treaty bodies and secondarily three of the special investigative procedures. It is conceded that for the purposes of this Thesis not all the relevant minority-related case law could have been traversed. However, the selected few that have been examined are sufficient to conjure up stark images as it relates to the promotion of the Declaration and more importantly, the work of the WGM.

True, the treaty bodies are confined to implementing and enforcing the rights prescribed by the relevant treaties. True, complainants and petitioners are also constrained to couch their issues within the context of an alleged breach of one of the provisions of the relevant treaty. And true, the treaty

bodies in formulating their decisions are confined to basing their *ratio decidendi* on operative articles of the relevant treaties.

However, it is respectfully submitted, what is not true is that the said treaty bodies are not precluded from making *obiter dicta* references to corresponding international minority rights as contained in the Declaration. Similar references could have been made to the work of the WGM as a sister forum at which solutions to minority-related problems could be sought. While it may not have been highlighted for each of the cases examined above, the specific minority rights alleged to the various treaty bodies to have been breached are almost the exact rights enshrined in the Declaration. Yet, however, the treaty bodies did not find it necessary to make the relevant analogy.

One of the seminal arguments of Chapter 3 is that the work of the WGM is hindered by an inherent lack of cooperation from other mechanisms and/or fora within the wider UN Human Rights System. Is it therefore the case that the treaty bodies are so far disconnected from other fora such as the WGM, that essentially share the same ultimate ideals, that is, the promotion and protection of human rights?

In examining the three chosen special investigative procedures or mechanisms, it is hoped that some amount of endorsement of the Declaration and/or the WGM would have been proffered. These mandates are held by international human rights experts in their independent capacity, and therefore not readily subject to political influence. However, as is revealed above in their latest reported recommendations to either the Human Rights Council or even the General Assembly, neither the Declaration nor the WGM managed to claim any fame.

It is respectfully submitted that yet another reason for the above revelations could be that international minority rights is not given the requisite importance within the UN Human Rights System, and as a consequence,

throughout national systems. This may not necessarily be an unrealistic proposition considering that hierarchically speaking the WGM was placed almost at the bottom of the pyramid: it reported to the Sub-Commission on the Promotion and Protection of Human Rights, which reported to the Commission on Human Rights, which further reported to ECOSOC, which finally reported to the General Assembly. This could also affect the amount and sincerity of efforts employed to promote the importance of the recognition and corollary protection of international minority rights within the said UN Human Rights System. The ultimate result is therefore obvious: the treaty bodies prefer to rely solely on the material provisions of the relevant treaties in question, than alluding to additional standard-setting instruments and fora.

But what about the Special Rapporteurs? Regarding the ones examined, do they not feel a responsibility to emphasize and promote international minority rights? This omission to refer to the Declaration and/or the work of the WGM could easily lead one to question whether or not, and to what extent, these Special Rapporteurs are fully aware of this instrument and mechanism. It is sincerely hoped that international minority rights would very soon assume its rightful position of importance in the UN's human rights agenda if the international community is sufficiently committed to an early cessation and eventual elimination of international conflicts. What makes this revelation even sadder is the fact that around the world, thousands of minority groups count hundreds of millions of persons who represent diverse ethnic origins, customs, cultures and languages.¹⁰⁵ This is certainly a significant population that requires proper recognition and protection. The UN Human Rights System obviously seems to have its work outlined but is unfortunately not brave enough to take the bull by its horns.

Without intending to repeat the arguments tendered in Chapter 3, one cannot help but question the viability of Art. 9 of the Declaration which requires that all UN agencies and bodies cooperate to ensure the adequate promotion

¹⁰⁵ See *fn 7 supra*, p. 56

and protection of international minority rights. Do the treaty-bodies not amount to such UN agencies and bodies and bear the Art. 9 obligation? And, are the Special Rapporteurs exempt from this obligation as well?

4.5 Conclusion

This chapter sought to examine the treaty bodies and some of their case law related specifically to minority rights protection, with the view to discerning whether or not, and to what extent, endorsement is given to the Minority Rights Declaration and the work of the WGM. Lesser emphasis is however placed on the latest reports of the three of the special investigative mechanisms.

What seemed to have been revealed is startling. Quite largely and quite unfortunately, there does not seem to be any reference to either the Declaration and/or the work of the WGM. While several reasons could be proffered, it is respectfully submitted that the ultimate one is simply that the international community, more specifically the UN Human Rights System places little importance on the recognition, promotion and protection of international minority rights. In other words, little importance is placed on the promotion and protection of the human rights of over twenty percent of the world's population.

5 The Independent Expert on Minority Issues and the Working Group on Minorities

5.1 Why an IEMI?

Having examined selected jurisprudence of four (4) treaty bodies and the latest reports of three (3) Special Rapporteurs, to ascertain whether or not, and to what extent, they have endorsed the work of the WGM, the focus is now turned to a more detailed examination of yet another mechanism and its impact on the WGM. In fact, this is perhaps the next and second (to the WGM) only such mechanism that is/was solely mandated to recognize, promote and protect the rights of minorities. This is the Independent Expert on Minority Issues.

As is probably evident at this stage, the importance of recognizing and according due and adequate protection to the rights of minorities cannot be overstated. One can readily cite the preamble to the Declaration on Minority Rights which equates such recognition and protection to political and social stability. However, even with the adoption of this Declaration and the invaluable work of the WGM in, *inter alia*, promoting the rights enshrined in this instrument, ethnic and religious tensions have nevertheless escalated. This unfortunate increase is reflected by a plethora of UN resolutions and recommendations that call for more effective action in addressing situations involving minorities.¹⁰⁶ Considering that there was no specific body mandated as a special procedure or investigative mechanism to address these minority issues, it was automatic that the WGM was faced with such responsibility and as a corollary assumed the role as the UN's minority-specific focal point.

¹⁰⁶ Minority Rights Group International, "Minorities and Conflict Prevention: The Case for a Special Representative", available at <www.minorityrights.org/download.php?id=39>, last visited on 31 October 2007.

However, as the sessions of the WGM progressed, it was soon apparent that this body was perhaps not the most effective forum, and there arose, therefore, the need for a complementary mechanism: one that could, *inter alia*, produce rapid, responsible and constructive handling of minority issues.¹⁰⁷ In other words, it was recognized that the mandate of the WGM lacked certain characteristics as it specifically related to the prevention of ethnic-related conflicts.

Foremost among these inadequacies is the fact that the WGM's mandate denied it the authority to properly, if at all, follow up on the submissions of minority representatives who allege violations, other than by simply forwarding them to the Government concerned.¹⁰⁸ Moreover, even when these allegations were sent to the Governments, they were not accompanied by specific recommendations to which the States in question were expected to respond to and comply with. Having such a mechanism therefore made the end result obvious: the WGM was unable to take effective action to remedy urgent situations, either regarding individuals or groups.¹⁰⁹

One may readily concede that previous experience coupled with present fears contribute to the contention that an area in which a minority-specific mechanism would provide a particularly effective input is in early warning and conflict prevention, which aims at defusing tensions that are likely to spark imminent conflicts.¹¹⁰ This, it is respectfully submitted, was one of the primary inadequacies of the WGM: its inability to function as an early-warning mechanism to prevent minority-related conflicts. The WGM itself has been humble enough to recognize this shortcoming and had entertained suggestions and discussions on this subject from as early as its Seventh Session. At that Session,

“[V]arious non-governmental organizations, minority representatives and scholars had requested that the

¹⁰⁷ Ibid.

¹⁰⁸ See *fn 64 supra*

¹⁰⁹ Ibid.

¹¹⁰ See *fn 106 supra*.

Working Group consider recommending the establishment of the mandate of a special rapporteur on minorities Such a mechanism was viewed as complementary to the work of the Working Group....”¹¹¹

Furthermore and subsequently, the Secretary-General, not oblivious to the relevant concerns and in his report on the rights of persons belonging to minorities to the 58th Session of the Commission on Human Rights, emphasized that:

“...there is growing recognition that the promotion and protection of the rights of persons belonging to minorities contributes to the stability of States. Likewise, the view has been gaining ground that the effective protection of the rights of persons belonging to minorities is an essential element of efforts to prevent conflict.”¹¹²

It is not the intent of this Chapter to critically analyze the present conflict prevention mechanisms of the UN, but from the foregoing Chapters, it should be evident that the mandate of the WGM was not designed to address these issues, especially that of early-warning, not least because of its severely limited meeting times. Moreover, the fact that the WGM enjoyed a hierarchical position equivalent to that of the base of a pyramid¹¹³ further compounded the problem of it functioning as an early-warning mechanism, much less an effective one at that. However, without intending any repetition of arguments already posited in Chapter 3, it should be noted that the poor state of coordination and communication among the organs of the

¹¹¹ “Prevention of Discrimination and Protection of Indigenous Peoples and Minorities. Report of the Working Group on Minorities on its seventh session”. UN Doc: E/CN.4/Sub.2/2001/22, 22 June 2001, para. 150

¹¹² “Rights of persons belonging to national or ethnic, religious and linguistic minorities: Report of the Secretary General”. UN Doc: E/CN.4/2002/91, December 2001, para 10

¹¹³ That is, it reports first to the Sub-Commission on the Promotion and Protection of Human Rights, which then reports to the Commission on Human Rights, which then reports to the Economic and Social Council, which finally reports to the General Assembly.

UN Human Rights System presented particular problems for the adequate promotion and protection of international minority rights.¹¹⁴

It was therefore not long after, that the Sub-Commission on the Promotion and Protection of Human Rights endorsed the recommendations of the WGM to consider the possibility of appointing a Special Representative on minority issues, and that regional organizations explore the possibility of establishing institutions similar to the HCNM of the OSCE.¹¹⁵

The advantages of establishing a Special Representative on Minorities were lauded at every appropriate forum for reasons not least among which is the fact that it would fill a nagging void not met by the WGM. It was contended that such a mechanism specially mandated to analyze developments and patterns in situations involving minorities, and provide early warning when such situations are likely to escalate and threaten national and/or international peace and security – would certainly strengthen the UN’s conflict prevention capabilities and contribute to an effective UN minority protection system.¹¹⁶ More specifically, and it is respectfully submitted, unlike the WGM, a Special Representative would provide, for example, the OHCHR, with accurate, timely and unfiltered information and enable attention of a developing crisis to be drawn to the Human Rights Council.¹¹⁷

Finally, once a Special Representative on Minorities is appointed, the UN would have taken yet another remarkable step in sending a strong signal that safeguarding the protection, rights and welfare of minorities worldwide is an important issue, and this would consequently ensure that more effective action is taken to address situations that have profound effects on the prospects for durable peace, security and development.¹¹⁸

¹¹⁴ See *fn 108 supra*.

¹¹⁵ See *fn 106 supra*, Sub-Commission Resolution 2001/9 and WGM 7th session report E/CN.4/Sub.2/2001/22

¹¹⁶ See *fn 106 supra*.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

5.2 Establishment of the IEMI

Therefore following a considerable amount of lobbying mainly by NGOs, coupled with the growing need for an early-warning mechanism within the UN Human Rights System to monitor minority situations globally, the former Commission on Human Rights finally yielded. In 2005 it adopted Resolution 2005/79, paragraph 6 of which requests the United Nations High Commissioner for Human Rights to appoint an independent expert on minority issues for a period of two years, with the mandate to:

- “(a) promote the implementation of the Declaration on ... Minorities, including through consultations with Governments, taking into account existing international standards and national legislation concerning minorities;*
- (b) identify best practices and possibilities for technical cooperation by the [OHCHR] at the request of Governments;*
- (c) apply a gender perspective in his or her work;*
- (d) cooperate closely, while avoiding duplication, with existing relevant United Nations bodies, mandates, mechanisms as well as regional organizations;*
- (e) take into account the views of non-governmental organizations on matters pertaining to his or her mandate.”*

On 29 July 2005, the High Commissioner for Human Rights appointed Ms. Gay J. McDougall, an independent expert on minority issues. Pursuant to paragraph 7 of the said resolution, the independent expert is required to submit annual reports on his/her activities to the then Commission (but now Human Rights Council) including recommendations for effective strategies for the better implementation of the rights of persons belonging to minorities.

5.3 Scope of the IEMI's Mandate

5.3.1 Guiding International Legal Rules¹¹⁹

The IEMI in her maiden report to the Commission on Human Rights outlined, *inter alia*, the general scope of her mandate. In this outline, she expressly stated what she considers to be the international legal rules that would circumscribe her work. Foremost among these, and as a direct requirement of her mandate, is the Declaration on Minority Rights. Furthermore, a definite tool of indispensable advantage is the Commentary to the Declaration which was adopted at the tenth session of the WGM. This Commentary provides useful guidelines for interpreting the provisions of the Declaration and its manner and ambit of application.

Of further importance is the collection of rights guaranteed in all the other leading human rights conventions since these apply equally to members of minority groups. For example, the principle of non-discrimination in the enjoyment of human rights is expressed in the Charter of the UN, UDHR and provided by customary international law as well. However, quite crucial and resounding is this principle's codification in the ICERD, ICCPR, ICESCR, CRC and ConEDAW. Also of particular importance to minorities is the principle of participation, without discrimination, in the public sphere, as guaranteed more specifically by both the ICCPR and the ICERD.

However, the IEMI would specifically rely heavily on Art. 27 of ICCPR and Art. 30 of CRC, which directly relate to minority rights within the context of each convention.

Moreover, what seems to be praiseworthy is the fact that the IEMI has indicated that she would not confine herself to the international legal rules within the sphere of the UN System, but would also refer to, and take guidance from existing regional human rights instruments, as appropriate. Such regional standards include the African Charter on Human and Peoples'

¹¹⁹ See *fn 58 supra*

Rights, the European Convention on Human Rights and the Inter-American Convention on Human Rights. Emanating from these standards and systems are useful jurisprudential learning, which could certainly offer valuable regional perspectives on the treatment of minority issues and could be applied to minority-related situations extra-regionally. Even further valuable guidance could be gleaned from standards relating specifically to minority rights and non-discrimination which include the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM) and the Copenhagen Document of the OSCE.

5.3.2 Main areas of concern¹²⁰

The IEMI has identified four broad areas of concern that relate to minorities globally, and these are generally premised on the Declaration and other relevant international standards relating to minority rights:

- (a) protecting a minority's existence, including through protection of their physical integrity and the prevention of genocide;
- (b) protecting and promoting cultural and social identity, including the right of individuals to choose which ethnic, linguistic or religious groups they wish to be identified with, and the right of those groups to affirm and protect their collective identity and to reject forced assimilation;
- (c) ensuring effective non-discrimination and equality, including ending structural or systemic discrimination; and
- (d) ensuring effective participation of members of minorities in public life, especially with regard to decisions that affect them.

Very often, claims made by minorities generally involve calls for respect for their identity, language, religion and cultural practices, and protection and promotion of their identity in law and in practice. These claims may involve territorial issues or assertions that they have the right to establish and maintain free and peaceful contacts across national frontiers with citizens of,

¹²⁰ Ibid.

and those resident within, other States who have similar ethnic, religious or linguistic affiliations. It is important to recall therefore, that on this question, the Declaration focuses, *inter alia*, on the obligations of States to ensure the protection of the identity of minorities and ensure their effective participation in public life. This may at times be accomplished most effectively by extending territorial or non-territorial autonomy to minority groups, or by the decentralization of some authority through such autonomy, and true, such arrangements may not always provide the most effective means of ensuring rights within minority communities.

The IEMI would also execute her mandate on the basis of the collective nature of minority rights. This premise is important for the promotion and protection of minority identity and visibility, for the informed collective participation of these groups in decisions that affect their rights and resources, and for securing collective claims to linguistically and culturally appropriate education, land and other shared assets. While the Declaration examines rights that may be claimed by individual members of minority communities, those claims would often require the State to ensure the existence or identity of the group as a whole.

Taking these various considerations into account, the independent expert would focus her work on national, ethnic, religious, linguistic and cultural groups whose generally non-dominant positions within their societies demand protection to allow them to exercise their rights to the fullest.

5.3.3 Approach to main areas of concern¹²¹

Given the appreciation of the extent of the work demanding attention with respect to minority issues, the independent expert believed it is important to focus her work on three broad strategic objectives that would promote the broader goals of minority inclusion in society and minority protection within the broader United Nations system. These three objectives are:

¹²¹ See *fn 115 supra*.

- (a) to increase the focus on minority communities in the context of poverty alleviation and development;
- (b) to increase the understanding of minority issues in the context of ensuing stable societies; and
- (c) to mainstream the consideration of minority issues within the work of the United Nations and other important multilateral fora.

It should be emphasized however that the identification of these three objectives does not preclude the independent expert from addressing other issues or concerns of emergency as they arise. Rather, it is intended to shape the contours of her work under the mandate, and to respond in a definite way to some of the most important global concerns in the areas of minority inclusion and protection.

5.4 Relationship to and Impact on the WGM

Having regard to the foregoing exposition on the establishment of the IEMI, it is now necessary to recall paragraph 9 of Commission on Human Rights resolution 2005/79 which commends the role of the WGM and decides that the latter should focus its work on interactive dialogue with relevant non-governmental organizations and on conceptual support of, and dialogue with, the independent expert, who shall participate as an observer. This dictate is perhaps the cornerstone of the relationship between the IEMI and WGM and would be assessed under the following two sub-heads.

5.4.1 IEMI's Methods of Work¹²²

The IEMI has readily conceded to the indispensable accomplishments of the WGM. To this end therefore, she has acknowledged the high calibre of work achieved by the WGM and placed great value in such work and practices, which provided for unique dialogue with minority groups themselves and

¹²² Ibid.

even fostered constructive dialogue between Governments and minority groups. Being a new and distinct, but yet related special procedure mechanism, it seems automatic that the IEMI has drawn considerably on information and studies from other bodies, primarily the WGM, in order to identify and group together some of the concerns that are being raised consistently within minority communities in all regions. She has worked collaboratively, as far as possible, with the WGM with a view to avoiding duplication by taking advantage of the differences in their mandates and identifying the best methods of creating synergies. Her work would be informed by the conceptual framework on issues involving minorities, which has been so ably developed by the WGM.

The independent expert had since participated in all relevant expert seminars and conferences to promote the Declaration, including the annual sessions of the WGM. She has encouraged public attention to the issues and her work, and promoted policy-oriented research and dialogue including with regard to specific matters.

5.4.2 Main accomplishments of the IEMI¹²³

There have been so far, several noteworthy achievements of the IEMI that impacted either directly or indirectly on the spirit and intent of the WGM. Foremost among these and following the revelation of certain crucial issues of concern to the Haitian national minority living in the Dominican Republic, the independent expert had joined the *Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance* and the *Special Rapporteur on the human rights of migrants* in sending a letter to the Government of the Dominican Republic concerning the situation of Haitians residing there, but did not receive a response. She subsequently, during September and October 2005 held consultations with representatives of minority communities in Bangladesh.

¹²³ Ibid.

Moreover, and with newer information of grave concern reaching the UN Human Rights System on Myanmar, the independent expert, on 2 November 2005 joined the

- Special Rapporteur on violence against women, its causes and consequences,
- Special Rapporteur on the situation of human rights in Myanmar,
- Special Rapporteur on the promotion and protection of the right of freedom of opinion and expression,
- Special Rapporteur on the question of torture,
- Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,
- Special Rapporteur on the sale of children, child prostitution, and child pornography, and
- Special Rapporteur on trafficking in persons, especially women and children,

in submitting a communication to the Government of Myanmar. The Independent expert and Special Rapporteurs provided Myanmar with various questions to respond to.

More specifically regarding the IEMI's work in collaboration with the WGM is that from 2-4 November 2005, she participated in an expert seminar hosted by the said WGM and OHCHR in Chincha, Peru, which focused on people of African descent in the Americas region, entitled "Strategies for the inclusion of people of African descent in programmes to reduce poverty, especially to achieve the Millennium Development Goal 1".

Regarding the IEMI's later work, her second report¹²⁴ reveals an in-depth study on the question of the incorporation of minority concerns into strategies for achieving poverty reduction. In that report, the independent expert indicates that minorities are often neglected or excluded from efforts to achieve the Millennium Development Goals and therefore urges

¹²⁴ "Report of the Independent Expert on Minority Issues, Gay McDougall". UN Doc: A/HRC/4/9, 2 February 2007

Governments, in the contexts of country reporting on the Goals and in Poverty Reduction Strategy Papers (PRSPs), to provide a detailed examination of the situations of minority groups and statistical data that help to reveal the status of minorities in relation to other groups.¹²⁵ This study, it is respectfully submitted is particularly commendable since it was part of the deliberations conducted by the WGM. The IEMI has therefore only sought to add emphasis and elaboration on the urgency of this concern.

In addition, as part of her work, the IEMI would seek to integrate minority concerns into citizenship issues, promote the mainstreaming of minority concerns in the work of the UN and devote greater attention to the situation of women and children belonging to minorities. Additionally, the independent expert has conducted missions to Hungary and Ethiopia in the execution of her mandate. And as would be appreciated by the advocates of the WGM, the IEMI intends to study, and when appropriate, take initiatives on the specific minority situations previously brought to the attention of the WGM by minority representatives and Governments.¹²⁶ Therefore with the abolition of the WGM one is nevertheless assured of the continuity of its thrust to promote and protect the rights of minorities within the context of the Declaration, *via* the IEMI.

5.5 Conclusion

Having regard to the foregoing therefore, it seems evident that the new mandate of the IEMI has given greater exposure to minority issues. Her programme and ambitions seem hopeful, systematic and extensive. Quite satisfactorily and seemingly inevitably the IEMI's mandate has drawn on the conceptual groundwork undertaken by the WGM, by reaffirming the need to focus on minority issues in the context of poverty alleviation, social

¹²⁵ "Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled 'Human Rights Council'. Report of the Secretary-General on the rights of persons belonging to national or ethnic, religious and linguistic minorities". UN Doc: A/HRC/4/109, 22 February 2007

¹²⁶ Ibid.

inclusion, stability, etc, thereby more actively foraying into the more “modern” spheres of minority issues and concerns.

Therefore, it is respectfully submitted, it seems as though the IEMI is in much better stead to actively and directly reach out to minority situations and concerns unlike the WGM. This is perhaps the most glaring difference between these two bodies: the IEMI is more active and direct while the WGM was passive and indirect.

From the foregoing it seems that the working methods of the independent expert are filling some of the gaps in the protection of minority rights identified in past reports submitted to the Commission on Human Rights¹²⁷ as well as those gaps not being met by the WGM in the promotion and protection of international minority rights. Besides, what is certainly not escapable is the fact that with the IEMI, the previous and incomplete studies and recommendations of the WGM would be led to fruition. If the above assertions lack accuracy the revelation that the IEMI and the WGM are/were two peas of the same pod may not.

However, one could nevertheless, and quite justifiably question how exactly the IEMI would seek to improve the international community’s sentiment towards international minority rights. Her mandate is created to promote the Declaration on Minority Rights. But therein lies the problem: a *Declaration* and not a *Convention*. Does the IEMI intend to campaign for the “evolution” of this instrument, and if so, how and when?

¹²⁷ Ibid.

6 ... And finally...

6.1 Introduction

It is recalled that following the dissolution of the League of Nations, the legal basis for the promotion and protection of the rights of minorities was replaced by two basic norms: the Charter of the United Nations and the Universal Declaration of Human Rights. These instruments were founded, *inter alia*, on the protection of individual human rights and freedoms and the principles of non-discrimination and equality. Quite importantly, the notion was that if the non-discrimination provisions were effectively implemented, special provisions for the rights of minorities would therefore be redundant. However, it was very soon evident that further measures were in fact needed to effectively protect persons belonging to minorities from discrimination, etc, and also to promote their identity. To this end, special rights for minorities were elaborated and measures adopted to supplement the non-discrimination provisions in international human rights instruments.¹²⁸

As has been noted with emphasis earlier in this Thesis, the importance of recognizing and according due promotion and protection of the rights of minorities throughout the world, cannot be overstated. One may therefore find much comfort, as a minimum, in the various endorsements of this need in important fora. Take for example the 2005 World Summit Outcome, thus:

*“the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to political and social stability and peace and enrich the cultural diversity and heritage of society”.*¹²⁹

¹²⁸ See *fn 14 supra*.

¹²⁹ “2005 World Summit Outcome: Resolution/Adopted by General Assembly”, UN Doc: A/RES/60/1, 12 September 2005, para 130.

However, this *dictum* only serves to reiterate similar broad-based postures assumed in previous statements of global commitment such as those of the Millennium Declaration¹³⁰ and the Durban Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.¹³¹

The foregoing propositions seem to constitute a golden thread that underscores the underlying needs to recognize and protect the rights of minorities. Especially beginning in the 1990s, with the global escalation of severe conflicts involving minorities, these needs were only more strongly validated. Eide and Letschert in their most recent joint study,¹³² have analyzed this issue and concluded that there are fundamentally three major considerations that sustain the evolution of international minority law. These are the need to:

- ensure full enjoyment of human rights for everyone, including persons belonging to groups that otherwise might face exclusion or discrimination in society;
- ensure the preservation and evolution of cultural pluralism or diversity in society. A combination of these two considerations points also to the need to ensure respect for the identity of individuals belonging to minorities, and to prevent the humiliation of individuals because of negative stereotyping of any given minority; and
- preserve or strengthen peace and security, both nationally and inter-regionally.¹³³

It is therefore respectfully submitted that once these needs, either singularly or collectively, are not satisfied, society is likely to be engulfed in chaos and

130 “United Nations Millennium Declaration: Resolution/Adopted by the General Assembly”, UN Doc: A/RES/55/2, 13 September 2000, para 25

131 “Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August – 8 September 2001”, UN Doc: A/CONF.189/12, 30 October 2001, para. 172

132 Asbjørn Eide and Rianne Letschert, “Institutional Developments in the United Nations and at the Regional Level”, *International Journal on Minority and Group Rights* 14 (2007) pp. 299-332 at pp. 299-300

133 Ibid.

fragmentation. It therefore simply goes to show that the importance of the recognition and protection of international minority rights cannot be over emphasized.

6.2 Overview of matters addressed

The aim of this thesis lies in the broader realm of the reform of the United Nations, more specifically as it relates to reform of its Human Rights System, and the latter's efforts to promote and protect international minority rights. Hence, following the adoption of the Declaration on Minority Rights in 1992, the Working Group of Minorities was established in 1995 to primarily promote the implementation of the latter instrument. This Group has, to the day of its abolition, worked tirelessly in pursuit of its mandate until the latter was first reduced and then later replaced. The specific aim of this Thesis is therefore to critically review the work of the WGM with the aim of formulating lessons and expectations for the replacing Forum on Minorities.

6.2.1 Life of the WGM

In order to achieve the specific aims of this Thesis numerous developments in the promotion and protection of international minority rights have been examined. The establishment of the WGM as a charter-based mechanism has been explained. In its creating resolution, the WGM was initially established for a period of three years as an inter-sessional working group consisting of five of the Sub-Commission's members to meet each year for five working days. Without intending to repeat the details previously addressed, the primary objective of this Group was to promote the rights of persons belonging to national or ethnic, religious and linguistic minorities, as enshrined in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, but more particularly to:

- a. examine possible solutions to problems involving minorities, including the promotion of mutual understanding between and among minorities and governments; and

- b. recommend further measures, as appropriate, for the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities.

Sadly however, this detailed mandate was reduced in 2005 by the Commission on Human Rights resolution 2005/79, operative paragraph 9 of which seeks

“to amend the mandate of the Working Group with a view to its holding one session of three consecutive working days annually during the time of the annual session of the Sub-Commission, focusing its work on interactive dialogue with relevant non-governmental organizations and on conceptual support of, and dialogue with, the independent expert, who shall participate as an observer”.

The unfortunate toll on the life of the WGM continued later when the Human Rights Council was established in 2006. To this end, operative paragraph 6 of General Assembly resolution 60/251¹³⁴ sought for the new Council to assume and review the role of the WGM. Further steps were taken in June 2007 when the Human Rights Council met at its Fifth Session, and agreed that when the said Council would meet again at its Sixth Session, it would decide on the most appropriate mechanisms to continue the work of the WGM.¹³⁵

6.2.2 Times of the WGM

It would be remiss if the work of this Group, as previously examined, is not lauded. Primary among its many strengths and achievements is the fact that the WGM symbolized the only mechanism within the United Nations system which allowed minorities to have direct access to such an international body and to discuss ways by which their situations and concerns could be addressed. In addition, participation of minority

¹³⁴ “Human Rights Council: Resolution/Adopted by the General Assembly”, UN Doc: A/RES/60/251, 13 September 2005

¹³⁵ See *fn 34 supra*.

representatives by both ECOSOC and non-ECOSOC accredited, at the sessions of the Working Group had allowed them to meet Government officials whom they would most probably never had the opportunity to meet in other circumstances. It would be hypocritical for one to ignore the fact that until the advent of the WGM, minorities never enjoyed such an opportunity, and also the fact that both Government officials and the minorities themselves have attested to the invaluable gains from such an opportunity. This Thesis has also revealed a certain daringness inherent in the WGM. Even though not contemplated by its mandate, it had conducted two country visits to enlighten itself and the rest of the world, of best and other practices employed by these countries to meaningfully address their peculiar minority-related issues. Moreover, the WGM had conducted numerous “outreach” regional seminars and workshops to better educate Government officials and minority groups of means and methods to peacefully resolve and avoid related conflicts, among other subjects.

Certainly, the WGM was not without criticism, and the third Chapter is therefore dedicated to addressing these. Most of these short-comings however seemed to be inherent in the very mandate of the WGM. Quite notably, the very fact of the hierarchical placement of the WGM speaks volume to the value placed, by the international community, on its objectives: it reported first to the Sub-Commission on the Promotion and Protection of Human Rights, which then reported to the Commission on Human Rights, which further reported to the Economic and Social Council, which body finally reports to the General Assembly. This arrangement only added validity to the argument that international minority issues within the UN Human Rights System are not highly prioritized. The WGM therefore naturally suffered as a consequence. Another glaring weakness of the WGM was the fact that it was unable to conduct follow-ups on issues and concerns raised during its sessions. This was mainly due to the *ad hoc* nature of its annual sessions and also that at each session different minority representatives were present. Besides, all the WGM could have done was forward these issues to the Government in question; it could not demand a

response. This is also related to the fact that it was not a complaints body, but primarily served as a venue for a meeting of the minds of minority rights stakeholders. Other weaknesses were addressed such as those relating to the WGM's budget, its severely restricted meeting times, and even more relevant, impact of external and interdependent agencies and bodies. A prime example of the latter point was the inherent insolence of the Commission on Human Rights to promote the recommendations of the WGM.

The fourth Chapter sought to examine the treaty bodies and the work of a few selected investigative special procedures to ascertain if at all, and to what extent, the work of the WGM is being or has been promoted. Selected jurisprudence post-1995 were examined from the Human Rights Committee, CERD, CAT, and CEDAW. In addressing the jurisprudence, it was conceded that the various treaty bodies were not expected to base their decisions on any minority right enshrined in the Declaration or advocated by the WGM, since they are only mandated to enforce those rights in their respective treaties. However, it was difficult to comprehend the lack of enthusiasm or “judicial activism” to make *obiter dicta* references to similar rights established in the Declaration, and by extension as advocated by the WGM. A similar discovery was made when the latest reports of the three selected Special Rapporteurs were examined. It was expected that these independent experts on international human rights may have been more forthcoming and pointed to minority rights from the Declaration. It was however surmised that the reason for this seemed to be that, again, international minority rights do not enjoy the much-needed priority within the UN Human Rights System. In other words the specific human rights of over twenty percent¹³⁶ of the world's population do not seem to find the necessary prominence on the international community's agenda.

Having briefly glanced at the work of just three special investigative mechanisms, Chapter 5 sought to examine the most recent and deliberate

¹³⁶ See *fn 1 supra*.

one relating to international minority issues: the IEMI. This mechanism was created after heavy lobbying by primarily NGOs, but even the WGM had started discussions aligned with the establishment of this mechanism. The IEMI is a very recent procedure and its mandate is currently held by Ms. Gay J. McDougall of the USA. So far, she has presented only two annual reports, first to the now defunct Commission on Human Rights and secondly to the Human Rights Council. Remarkably, what is evident from this Chapter is that the new mandate of the IEMI has given greater exposure to minority issues. Her mandate has drawn on the conceptual groundwork undertaken by the WGM, by reaffirming the need to focus on minority issues in the context of poverty alleviation, social inclusion, stability, etc. From the foregoing it seems that the working methods of the independent expert are filling some of the gaps in the protection of minority rights identified in past reports submitted to the Commission on Human Rights¹³⁷ as well as those gaps not being met by the WGM in the promotion and protection of international minority rights. What is certainly not escapable is the fact that with the IEMI, the previous and incomplete studies and recommendations of the WGM would be led to fruition.

6.3 The Forum on Minorities *vis-à-vis* the WGM: Lessons?

The above exposition on the evolution of the *Life of the WGM* paused at a crucial juncture: the Sixth Session of the Human Rights Council. At this Session, the Council decided to replace the former WGM with the new **Forum on Minority Issues**. In order to examine how this Forum could benefit from the work already done by the WGM and consequently draw possible lessons from it, it becomes necessary to examine the material and relevant operative paragraphs of its enabling resolution.¹³⁸ In essence, the Council has decided

¹³⁷ Ibid.

¹³⁸ “Forum on Minority Issues”, UN Doc: A/HRC/6/L.11, 28 September 2007

“1. ... to establish a forum on minority issues to provide a platform for promoting dialogue and cooperation on issues pertaining to persons belonging to ... minorities, which shall provide thematic contributions and expertise to the work of the independent expert on minority issues.[fn] The Forum shall identify and analyse best practices, challenges, opportunities and initiatives for the further implementation of the Declaration on ... Minorities; ...

3. that the Forum shall meet annually for two working days allocated to thematic discussions; ...

5. that the independent expert on minority issues shall guide the work of the Forum and prepare its annual meetings, and invites him/her to include in his/her report thematic recommendations of the Forum and recommendations for future thematic subjects, for consideration by the Human Rights Council ...”. [My emphasis]

One principal element that seems to have been carried through from the WGM to the Forum is that of an open and a transparent forum for constructive dialogue among a broad spectrum of minority rights stakeholders, more specifically Government representatives. It is recalled that it is on this basis that the WGM had registered its most outstanding achievement in promoting the implementation of the Declaration on Minorities. Moreover, like the WGM, the Forum is expected to “identify and analyse best practices, challenges, opportunities and initiatives for the further implementation of the Declaration”. Is one to therefore expect dedication to conducting regional seminars on minority issues and even country visits? These would certainly not be unwelcome gestures and are therefore highly encouraged. Certainly, the mandate of the IEMI alone is not

sufficient to adequately address the problems faced by over twenty percent of the world's population who are members of minorities, and it is to this end therefore that the new Forum is welcomed.

Another element of the new Forum that is worthy of praise is its openness to a broad and seemingly unlimited array of minority rights stakeholders, regardless of their ECOSOC status. As noted earlier, it is through this unique and generous accommodation that representatives were able to meet their respective Government officials who would have otherwise been inaccessible. This certainly augers well for constructive dialogue. It is therefore respectfully submitted that in this regard, the Forum has an excellent role model: the WGM.

On the other hand, what seems to be a somewhat “unflattering” outcome is the fact that the new Forum seems to lack the much-needed independence as previously enjoyed by the WGM. In fact, a cursory glance at its mandate above readily reveals that it seems to be just a mere accessory to the mandate of the IEMI. First of all and in summary, the Forum has to provide thematic contributions and expertise to the work of the IEMI; the latter IEMI shall guide the work and prepare the annual meetings of the Forum; and most alarmingly, the IEMI and not the Forum, reports to the Human Rights Council and makes thematic recommendations. Could it therefore be viably argued that establishing the Forum as such a controlled creature, is remedying the ills of the WGM? Certainly the blatant disadvantage of the WGM's hierarchical placement is not remedied. At least, one can argue, the WGM produced its own reports and made its own recommendations, and theoretically, these were forwarded eventually to the General Assembly. Could the Forum even envisage such an opportunity? This arrangement undoubtedly bridles the opportunity of the UN Human Rights system to create a breakthrough mechanism for the promotion and protection of international minority rights. At this juncture it is strongly recommended that the Human Rights Council revisit the Forum's mechanisms and seek to make amends. It may not be a folly to suggest that the Council request the

Forum's chairpersons to report directly to the Council after the close of each Forum session. This "report" could be oral and/or written in nature, but in addition to the IEMI's. However, there should be some opportunity for a direct encounter with the chairperson of the Forum and the Council. Such an arrangement would undoubtedly offer more of the much-needed visibility and prominence to international minority issues. Did the story of the WGM not have morals?

The meeting time allotted to the Forum is a *déjà vu* experience. The WGM was already heavily criticized for allocating such little time (one working week) to addressing such issues and concerns of prime international importance. How well the Forum manages this hurdle would be revealed with time. What may be suggested, however, is that the Forum keeps a constant and uninterrupted but informal exchange or dialogue with the main stakeholders, and reserve its meeting time for addressing more major and urgent issues.

6.4 Hope for the future?

When one is writing on international minority rights and decides to ponder on "hope for the future", it becomes almost inevitable to ask: Why just a Declaration on minority rights and not a Convention? Are the world's political leaders fearful of empowering their people with specific human rights? It has been definitively established that there is an uncanny but sure nexus between the cause of international conflicts and the poor promotion and protection of international minority rights. Certainly the international community has not turned a blind eye on achieving social peace and security. The Declaration on Minority Rights, it is respectfully submitted, should therefore only be viewed as a mere starting point, and not an end in itself.

The WGM has undoubtedly charted a novel course in the promotion and protection of international minority rights. True, it had its shortcomings, but

these were inherent and in other words foisted on it from its creation, for perhaps the same reason(s) that there is no Convention but a Declaration on minority rights. However, all is not dim and the UN Human Rights System should be praised for its lack of reticence: technically the WGM is not abolished but replaced. This is done against the background of a recently established special investigative procedure on minority issues: the IEMI. Certainly “many hands make light work” and it is therefore hoped that these two mechanisms would work tirelessly and collaboratively to continue raising awareness of the dire need to recognize and protect international minority rights.

One recurring theme that seems to have evolved from this “eulogy” to the WGM is that the international community does not place sufficient importance on the recognition, promotion and protection of international minority rights. Starting with a mere Declaration to a lowly-ranked WGM and now to a controlled Forum on Minority Issues, the IEMI seems to be the main mechanism to date, to change this outlook.

Let the WGM rest, but let not its lessons. The baton is passed on...

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