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The UN Human Rights Commission met in Geneva in April which was followed by the annual sessions of the Working Group on Minorities. This issue of the Fortnightly carries several papers from the Working Group: Statement by the Chairman at the opening of the second session; Working Paper submitted by Mr Asbjorn Eide on Classification of Minorities and Differentiation in Minority Rights; Report submitted by Mr Jose Bengoa on Education and Minorities; and the Working Paper submitted by Justice Mohammad Sardar Ali Khan on Domicile and Residence Concerning Minorities and Migrant Groups.

It also carries the Introduction, Recommendations and Conclusions from a paper written by Mario Gomez for US Committee for Refugees on internally displaced people in Sri Lanka. In his recommendations he calls for the Sri Lankan government and the LTTE to desist from further acts of violence and to begin good faith recommendations to seek a lasting solution to the conflict and to agree to the assistance of a third party to mediate.

WORKING GROUP ON MINORITIES

AND

INTERNALLY DISPLACED IN SRI LANKA

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U.S. COMMITTEE FOR REFUGEES The People in Between

Mario Gomez

**STATEMENT BY THE CHAIRMAN/RAPPORTEUR
AT THE OPENING OF THE SECOND SESSION OF THE
WORKING GROUP ON MINORITIES**

30 April 1996

Let me first express my thanks to you, Mr. High Commissioner on Human Rights; and also the Assistant Secretary General and members of the Secretariat, for having made this second session possible. Let me also express my thanks to the members of the Working Group, Mr. Bengoa, Mr. Chernichenko, Mr. Ali Khan and Mr. Khalil, for their continued support for my role as Chairperson.

Further, I would like to thank all observers who have joined this working group. The Commission on Human Rights, in its resolution 20/1996, adopted only a few days ago, has called on states, intergovernmental organisations, UN bodies, specialised agencies and non-governmental organisations to participate effectively in the work of this Working Group. I can see from the attendance that this call has been well received. The participation in this working group, like that of the indigenous peoples, is open both to government observers, to specialised agencies and other UN bodies, to regional organisations, to non-governmental organisations, whether international or national, and to individual experts, and I am pleased to see here many who have written extensively on many aspects of minority issues.

While a working group formally consists of five members of the Sub-Commission, one from each of the regions of the UN, the reality is that we will here all work together. It is intended to be a real workshop, in the best sense of the word. We will therefore operate in ways which are more flexible than in normal UN procedures. I shall return to that in a moment. But now some words on the purpose of our work here.

The purpose and mandate of the Working Group

This working group is in search of peaceful and constructive solutions to situations involving minorities. In essence this means to promote peaceful accommodation of the different groups within the national society. I do not have to underline the seriousness of many ethnic conflicts in the recent past. We believe that more could have been done to avoid them; in any case, it is incumbent on us to contribute what we can to the prevention of future violent conflicts between different ethnic or religious groups.

Peaceful means the avoidance of violence, both internally and internationally. In so doing we need to recognise that one of the basic principles of the United Nations is to protect the territorial integrity of states. The Minority Declaration of 1992 itself makes it abundantly clear that it cannot

be construed to permit any activity contrary to the territorial integrity and political independence of sovereign states.

The events over the last decade have demonstrated the serious threats by ethnic conflicts for regional peace, for refugee flows and internal displacement, which are terrible human tragedies and also create great problems for the international community. No wonder, therefore, that we need to emphasise the need for peaceful solutions. The Commission on Human Rights, in its newest resolution quoted a moment ago, expressed its concern over the growing frequency and severity of disputes and conflicts concerning minorities in many countries, and their often tragic consequences.

While the solution should be peaceful, however, this should not be by avoiding the problems involved: the real concerns must be appropriately and fully addressed. The solution to be found must be based on universal human rights. This requires the achievement of equality in the common domain for everyone, so that all can enjoy their human rights without discrimination, but it also requires the promotion of conditions effectively safeguarding cultural pluralism. Practically all societies are multicultural; this should be openly recognised, and this is what the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is all about. You should have that Declaration available at all times in our work here. Here again, we can quote the Commission on Human Rights resolution, stating that effective measures for the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the prevention of peaceful solution of human rights problems and situations involving minorities, and that states have an obligation to ensure conditions under which members of minorities can enjoy their rights.

In essence, the task is to ensure that the state is the common home for all parts of its resident population under conditions of equality, with separate identities being preserved for those who want it under conditions making it possible to further develop those identities within the overall framework of human rights. Neither majorities nor minorities should be entitled to assert their identity in ways which makes it impossible for others to do the same, or which leads to discrimination against others in the common domain. A primary task of any state is to ensure the equitable sharing of economic wealth and social benefits of the nation as a whole.

The platform of our work

The platform for our work is the 1992 Declaration on Minorities adopted by the General Assembly in 1994. It should be read in conjunction with other instruments, in particular the Convention on the Elimination of All Forms of Racial Discrimination. The main message of the 1992 Declaration is that the existence and identity of all groups shall be protected and promoted; that the persons belonging to the different groups have the right to enjoy their culture, profess their religion and the use their language, that they are also entitled to participate effectively in the political and economic

life in the state as whole, and that a number of steps should be taken in order to ensure the conditions necessary for these purposes.

In this group we work on the basis of the mandate set for us by resolution 24/1995 of the Commission on Human Rights. It contains three main elements:

- (a) Reviewing the promotion and practical realisation of the 1992 Declaration;
- (b) Examining possible solutions to problems involving minorities;
- (c) Recommending further measures to promote and protect the rights of persons belonging to minorities.

In our work, we need to be aware that many minority issues are dealt with by other UN and regional bodies. Central to it all is the work of the High Commissioner for Human Rights, and we intend to work as closely together as is possible within his mandate. But there are also other bodies addressing minority issues: the treaty bodies such as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination, the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination against Women.

The UNHCR faces many refugee problems which originate in ethnic and group conflicts, and is therefore particularly interested in our work, as we are in their work. Other UN agencies are in various ways faced with minority issues: in particular, the ILO and UNESCO. To make progress it will be essential to cooperate closely with them as well. There are also regional organisations and institutions concerned with minority issues, including those of the OSCE and the Council of Europe, with whom we want to keep in close contact. Of particular relevance for our work is the activity of the OSCE High Commissioner for National Minorities, who has been doing impressive work in defusing tensions and finding peaceful solutions; we need to learn from that experience.

Let me now address our methods of work

First, the documentation that you should draw on includes the agenda¹, the annotated agenda (add.1), as well as the four working papers, prepared by four of the members of the working group: Mr. Ali Khan, Mr. Jose Bengoa, Mr. Stanislas Chernickenko and by myself.

Of particular importance is the annotated agenda. You need to have it at all times, because it will guide our work.

(E/CN4/Sub.2/AC5/1996/1).

We decided already last year that this working group will not be a chamber of complaints about alleged violations of human rights or minority rights. In this working group, we do not and cannot pass judgments on whether the Declaration has been violated. We are not mandated, nor equipped to do that. We cannot provide any redress in individual cases. Other procedures, however, are available both within the United Nations and elsewhere; a fact sheet will be distributed which provides information about the availability of such procedures within the UN human rights system, and how they can be used. There are also collective complaint procedures within ILO and UNESCO, these may in some cases be drawn upon by members of minorities.

The fact that we are not a chamber of complaints does not prevent, of course, that we can here deal with real life situations in any country in the world. On the contrary, we very much want to receive submissions of such real life situations with a view to identifying problems and issues relating to minorities. But we are interested not only in problems but also suggestions for what should be done to solve or reduce the problems. In all of the interventions it should be pointed out which of the articles of the 1992 Declaration are involved. Is it a question of existence and identity? or discrimination? or the right to use one's language? or problems related to education? or effective participation? This will also improve our understanding or how to interpret the provisions of the 1992 Declaration?

We want to encourage a constructive dialogue and mutual understanding between and among minorities and governments. For this is to be possible we need information on real life situations, but as far as possible in an objective, not accusatory way. It facilitates our work. We also want to be informed not only about problems but also about positive experiences, and we are interested in information both from NGOs, Governments and intergovernmental organisations.

Now I come to an important point. It is our intention to deal with the issues one by one. We will follow the outline of the annotated agenda, and start with the promotion and realisation of the Declaration at the national level. Therefore the following themes will be examined:

- The measures taken at the national level to ensure the existence and identity of minorities at the national level;
- the rights of members of minorities to enjoy their own culture, which in some cases also requires control of their land;
- the issues relating to language and education, which include the following elements: the right to use one's own language, the right to learn one's own language, the right within the educational institutions to be instructed in one's own language;
- the content of multicultural education, both for majorities and minorities, and its usefulness or otherwise in fostering reciprocal tolerance and understanding;

- the mechanisms by which to ensure effective participation by minorities in both the political and economic life of society, including their possibility of involvement in development planning affecting them;
- the existence and usefulness of national recourse and conciliation machineries, including national commissions or councils, community mediation and other forms of dispute settlement and conflict avoidance;
- exploring ways in which both minorities and majorities can contribute to the harmonious and peaceful development of their country, and the role which can be played by NGOs to achieve the task.
- In order to have a well organised discussion on these issues, I shall seek to stick to one theme at a time. I will therefore not strictly follow a speaker's list but request information on each theme before I move on to the next theme. Throughout my colleagues in the working group and I appeal to you to pursue a constructive line, focusing on ways in which the rights of members of minorities can be better promoted in ways which ensure the peaceful and harmonious development of the national society as a whole.

COMMISSION ON HUMAN RIGHTS WORKING GROUP ON MINORITIES

Working paper

Asbjorn Eide

Summary

In this paper, the problems of definition and the need for classification will be addressed. It is claimed that the rights of minorities depend on their particular nature and situation, which requires a differentiation in rights (Part A, par. 1-6); this is followed by a section on the legal basis for such differentiation in minority rights, examining the 1992 Minority Declaration (Part B, par. 6-13), then presenting a ladder of rights (Part C, par. 14-19) and applying this to a classification of minority and group situations (Part D, par. 20-44). The purpose is to encourage the discussion and adoption of constructive approaches based on the differences in needs and situations, rather than fastening on the difficult issue of abstract definition.

A. The problems of definition and the need for classification.

1. The efforts by the United Nations and its Sub-Commission on Prevention of Discrimination and Protection of Minorities to define minorities have been long and inconclusive. There are some valid reasons why it has been difficult to agree on a definition. Minority situations vary greatly in nature and in needs. If we assume that the same rights shall apply to all groups falling within a chosen definition, and that others shall not have those rights, the definition becomes a source of controversy. The diversity of situations was recognised long ago by the United Nations General Assembly. In one of its first resolutions relating to minorities, adopted in conjunction with the adoption of the Universal Declaration of Human Rights on December 10, 1948,¹ we find the following observations:

considering that the United Nations cannot remain indifferent to the fate of minorities, considering that it is difficult to adopt a uniform solution of this complex and delicate question, which has special aspects in each state in which it arises...

2. The General Assembly therefore decided not to deal in a specific provision on the rights of minorities in the text of the Universal Declaration, but referred to the Economic and Social Council the texts submitted to it, and requested:

¹ [UNGA resolution 217(c) (III)]

the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to make a thorough study on the problem of minorities, in order that the UN may be able to take effective measures for the protection of racial, national, religious or linguistic minorities.

3. Now that the General Assembly, by the adoption in December 1992 of the Declaration of the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities, has determined the framework within which minority issues should be handled, the task is to give appropriate meaning and substance to the rights to be enjoyed, within the very general terms contained in that declaration, by different groups under different circumstances.

4. **Definitions versus classifications**

Classification can serve two different purposes: one is to facilitate definitions by helping to clarify which categories should be inside and which should be outside. This assumes a basic dichotomy in rights: all who are inside have the same rights, all who fall outside do not have those rights. There is, however, a different possibility: to conceive of different sets of rights for different kinds of groups, depending on objective criteria justifying reasonable distinctions. A classification may serve to clarify the different categories of groups which should be entitled to the different sets of rights. I would argue that such a graduated differentiation is the most constructive and also in accordance with evolving practice at the United Nations. This will therefore be further pursued in this paper. Classifications can also help to identify situations which raise particular problems and where special precautions have to be taken. We need to be concerned not only with the rights of groups, but also with the other purposes of the United Nations, including the preservation of international peace and therefore also the prevention of external intervention by kin states in internal affairs of the home states of minorities.

5. **'Minorities' versus 'minority situation'.**

Numerically, a minority is a group numbering less than half of the total population in the country. This, however, does not mean that it finds itself in a minority situation. In some circumstances, that particular minority operates or might operate in alliance with another group to form a coalition which dominates a third minority. It is that third party minority, therefore, which finds itself effectively in a minority situation; the other two do not. It is necessary, therefore, to distinguish between 'minorities' and 'minority situations'. It is only by closely examining the minority situations that we can recognise which rights would be appropriate in order to remedy a particular situation. This requires not only definitions but also classifications.

6. We should recognise that different minority situations require different kinds of rights, and that therefore the most important issue is to classify the minority situations according to needs, rather than to look for one general and abstract definition. A contribution to such a classification will here be made.

B. International legal basis for the differentiation of minority rights.

7. The main international instruments with a global scope regulating the rights of persons belonging to minorities, are the International Covenant on Civil and Political Rights (ICCPR) Article 27, and the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities. This working group has the 1992 Declaration as its basis. A brief review of the rights and obligations contained in it might be of some help.

8. **Existence and identity: Protection and promotion (Article 1)**

The existence and the national or ethnic, cultural, religious and linguistic identity of minorities shall be protected by states within their territories, and states shall encourage conditions for the promotion of that identity. Under Article 1 (2) states are required to take appropriate legislative and other measures for this purpose.

9. **The rights of persons belonging to minorities (Article 2)**

Article 2(1) essentially contains the rights already found in ICCPR Article 27: to enjoy one's culture, to profess and practice one's religion, and to use one's language, along and in community with others. Article 2(2) of the Declaration introduces rights of participation, which may differ widely, depending on the circumstances in which minorities find themselves, but shall be exercised in a matter not incompatible with national legislation [Article 2(3)]. Under Article 2(4) persons belonging to minorities have the right to establish and maintain their own associations, and under Article 2(5) they have the right to maintain contacts with other members of the groups, including contacts with across frontiers with citizens of other states with whom they are related by national or ethnic, religious or linguistic ties.

10. **Exercise or abstain, without being subjected to discrimination or disadvantage (Article 3).**

Article 3 provides that the rights listed in Article 2 and other rights of minorities may be exercised individually as well as in community with other members of the group without any discrimination and that no disadvantage shall result for any person belonging to a minority as a consequence of the exercise or non-exercise of the rights contained in the Declaration.

11. **Obligation of states**

Article 4 lists measures to be taken by states in favour of persons belonging to minorities. Firstly, they shall take measures to ensure that such persons, as well as anybody else in society, can fully and effectively enjoy their human rights and fundamental freedoms without any discrimination and in full equality before the law. The basic principle of equality and non-discrimination among all members of society, including the protection of members of minorities from any kind of discrimination, is the foundation on which the other the state measures in favour of members of minorities must be built. At the same time, the state shall abstain from giving privileges for members of minorities which are not available to other members of society.

12. Under Article 4(2), states shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and develop their culture, language, religion, traditions, customs etc. Article 4(3) deals with the opportunities of minorities to learn their mother tongue or to have instruction in their mother tongue, and Article 4(4) calls on states, where appropriate, to take measures in the field of education to encourage knowledge of the history, traditions, language and culture of the minorities within their territory. Finally, under Article 4(5) states should consider appropriate measures so that persons belonging to minorities may participate in the economic progress and development of their country.

13. **Minorities and development planning (Article 5)**

Under Article 5, due regard for the legitimate interests of persons belonging to minorities shall be taken into account when national policies and programmes are planned and implemented. Similarly, programmes of co-operation and assistance among states should be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

C. The ladder of rights

14. Against this background we can observe a ladder of rights depending on the background, situation and circumstances of the minorities as well as the nature of the particular minority.
15. **The common basis: Protection by universal human rights, equality and non-discrimination.**

Everyone is entitled to the enjoyment of human rights without discrimination. On that basis, members of all minorities have the right to enjoy equal treatment with members of the majority. This foundation is common to all. Many minority problems arise solely from the discrimination of their members in civil, political, economic or social matters. When such discrimination is rectified, many minority situations would disappear. By 'everyone' is normally understood every person lawfully within the territory and subject to the jurisdiction of the state concerned (ICCPR Article 2). Only to a very limited extent can distinctions be made between citizens and others lawfully residing in the country concerned. While only citizens have an unequivocal right to vote and to be elected, and the right to return to one's country is normally restricted only to citizens of that country, the other rights in the Universal Declaration and the Covenants can normally be claimed by all residents, whether citizens or not. In addition, special groups are also covered by special instruments: refugees by the Convention relating to the Status of Refugees. In the future, migrant workers might also be covered by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, though the convention is not in force and the low number of ratifications make it difficult to predict if and when it will turn into force. However that may be, it should be borne in mind non-citizens to a large extent are covered by the ordinary human rights instruments.

16. **The right to separate identity**

The minimum requirement in this regard is found in ICCPR Article 27, reiterated in the Minority Declaration Article 2(1). It must now be considered to form part of customary international law. The right of any person, in community with other members of the group to profess and practice one's own religion, follows already from UDHR Article 18 and ICCPR Article 18. The right to use one's own language, follows already from the general right to freedom of expression and information in UDHR Article 19 and in ICCPR Article 19. Article 27 of the ICCPR and Article 2(2) of the Declaration helps to clarify these rights. The minimum obligation of states is therefore to respect the right of members of minorities to use their language, enjoy their culture and profess and practice their religion. According to Article 1 of the Declaration of 1992 states shall go beyond this minimum by protecting the existence and identity of minority groups and encourage conditions for the promotion of that identity. Under Article 4 they shall take a series of vaguely defined steps,

as appropriate to the circumstances. It should be one of the tasks of this working group to explore the nature and content of constructive arrangements which are made or could be made for this purpose, such as a comparative exploration of constitutional and legislative provisions regarding the existence and identity of minority groups.

17. **Education**

One issue central to language and identity is the right to receive at least primary education in one's own language or mother tongue, even if such education is gradually supplemented and even supplanted at higher levels by education in the national language or one of them. When the number of persons using a minority language is substantial, the next level of language rights is to be entitled to address public officials (in courts, administration and elsewhere) in one's own language and to receive the response in that language. Again it would be useful for the working group to explore the different sets of arrangements for education and its relationship to the varieties in minority situations.

18. **And beyond: The ascending scale of comprehensiveness**

Two sets of concerns are important for the minorities on preserving and developing their identity: the existence and preservation of a material basis to sustain their livelihood, and the use of constructive organisational, legal and administrative structures in the relations between the state and the minority concerned. It is desirable, i.e. that the working group compares arrangements in different societies for the effective participation of minorities at the local and national level. Rights beyond the mere minimum could be listed on an ascending scale of comprehensiveness: the right to organise private schools, the right to receive public subventions for schools run by the minority, the right to control taxation for activities run by the minority, the right to be consulted regarding decisions, projects and programmes affecting the minority (including development co-operation, the right to make such projects and programmes dependent on free and informed consent, the right to control natural resources in regions in which the minority live, and ultimately, and in exceptional cases, the right to local territorial autonomy.

19. Autonomy on a territorial basis, an distinct from cultural autonomy, is highly controversial and also gives rise to serious security problems for the state concerned, in particular when the territorial minority is ethnically linked to the majority of a neighbouring states. Such situations, which in earlier history has caused severe tension, require great caution. There is, of course, no right for minorities under international law to territorial autonomy, but in particular circumstances it may be found constructive in the relations between the centre and the local group. The problems may be much less difficult where indigenous peoples are concerned: in the present draft on the rights of indigenous peoples, submitted by the Sub-Commission to the Commission on Human Rights, Article 31 provides for "the right to autonomy or self-government in matters relating to their internal and local affairs,

including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions."

D. Minority and group situations: Applications rights and obligations.

20. Migrant workers, aliens and minorities

Controversies surround the question whether migrant workers should fall within definitions of minorities. When we look at the needs rather than at abstract definitions, it is not so difficult. Should minority protection, even at its minimum level, be reserved only to citizens, or should it extend also to other permanent residents, or even further, to all persons residing in the country concerned even temporarily? This has been one of the major issues of controversy in past efforts to define minorities.

21. The Human Rights Committee, in its General Comment on Article 27, has concluded that the rights under ICCPR Article 27 shall be enjoyed also by non-citizens, even by those who are only temporarily in the country concerned. This view has not met unanimous acceptance. It is necessary to remember the language used by the Human Rights Committee:

5.2 Article 27 confers rights on persons belonging to minorities which 'exist' in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanance that the term 'exist' connotes. Those rights simply are that individuals belonging to minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion, and speak their language. Just as they need not be 'nationals' or 'citizens', they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the State party, they would also for this purpose, have the general right, for example, to freedom of association, of assembly, and of expression. The existence of an ethnic, religious, or linguistic minority in a given state party does not depend on a decision by that state party but requires to be established by objective criteria.²

22. The Committee can thus be seen to distinguish between the weaker aspects of the minority rights, which apply to everyone within the territory, and the stronger rights which apply only to groups whose minority situation justify additional rights. For indigenous peoples,

² General Comment of the Human Rights Committee 23, fiftieth session, 1994 Report, Vol.1, GAOR, Forty-ninth Session, Supplement No. 40 (A/49/40, pp.107-110).

the Human Rights Committee has interpreted Article 27 to require positive measures including the protection of the material basis for their culture.

23. While it is reasonable to assume that, for substantial and long-standing groups having co-inhabited with the majority from the time of independence, there must be a right to education in their own language or at least education of their own language, at public expenditure, there can be no assumption that every new, immigrating group is entitled to the same. They may be entitled under minority rights law to set up their own supplementary education, at their own cost, but not necessarily to have that education publicly funded.
24. Clearly, recent immigrants, also those who are not citizens, are entitled to use their own language between themselves and in communication with anyone willing to communicate in that language. They cannot be considered entitled to use that language in their encounter with public officials, though for different reasons (due process of law) anyone may be entitled in criminal cases to have the free assistance of an interpreter if he or she cannot speak the language of the court [ICCPR Article 14(3)(f)].
25. Similarly, recent immigrants are entitled to practise their own religion alone or in community with others. The only measures of limitation that can be set are those which apply to the practise of any religion, including the majority religion: measures which protect public safety, order, health or morals or the fundamental rights and freedoms of others.
26. If, in line with the conclusions drawn by the Human Rights Committee, Article 27 is not limited to citizens and not even to permanent residents, it is clear that migrant workers can form part of minority groups and as such enjoy minority rights, though not of the strongest versions. Migrant workers are not as such minorities, but the different groups among them may form part of particular minorities. To illustrate: Muslim migrant workers may form part of the Muslim minority within a particular country. Spanish-speaking migrants may form part of the Spanish (or Lattino) minority in a given host country, whereas Chinese migrants to the same country may form part of the Chinese minority in that country. However, a graduated scope of rights may be justified: as voluntary immigrants, they cannot expect that the same degree of public funding will be given to the preservation of the culture from which they came, as that which will be given to those groups which have co-inhabited the country over generations.

27. **Classification by quantity**

As noted, not all groups constituting less than half are in need of particular minority rights. Sometimes they coexist with other sizeable groups, none of which alone constitute majority of the total population; in such cases, they may balance each other and none of the groups require particular minority rights. Some minorities are large, others are intermediate and some very small. Some differentiation of rights depending on the size of the group appears to be justifiable. A large group may be entitled not only to use its own language, but also to have education in its own language and to use its language in relations with officials. For practical reasons, very small groups may not be entitled to enjoy all of these rights, but might enjoy some of them.

28. **Groups living compactly together (in territorial contiguity with each other) versus dispersed groups**

In some situations, a minority constitutes nearly the whole population in a geographically distinct part of a country, or at least the largest part of the population in that geographical region. Within that region, the minority may be entitled to particular rights, particularly in the field of education and the use of language, which they cannot demand outside that territory, and which can also not be demanded by dispersed groups. Many degrees of difference can be found between on the one hand those who totally dominate a particular region, and those who are totally dispersed. It is understandable, and justifiable, to make use of contiguity, for practical reasons.

29. **Minority situations arising from the ethnic or cultural orientation of the state**

Distinctions can justifiably be made between minorities living in states which are mono-ethnic or mono-cultural in orientation, and those who are explicitly multi-ethnic or multi-cultural in orientation. An example of the latter can be found in multi-linguistic or multi-cultural federal states like Switzerland or India, which have developed balanced approaches to its different ethnic and linguistic groups. In national societies oriented towards one dominant ethnic, linguistic or cultural group, the minorities are particularly eager to seek special measures for the maintenance of their distinctive characteristics.

30. **Minority situations affected by the origins or the presence of the minority in the state concerned**

It appears reasonable to make distinctions, regarding the degree of rights to be enjoyed by members of minorities, between "settled" and "new" minorities. This does not mean that any of them are excluded from the rights of minorities; it only means that the degree of rights are stronger in the former case than in the latter. By "settled" minorities will here be understood (a) minorities descending from groups which existed before the establishment

of the particular state, and (b) minorities descending from groups which formerly belonged to another state, but which afterwards were annexed to the state, for instance in the connection of territorial readjustment after war.

31. Special problems arise for groups which have entered a territory during a period under which the local population did not have control over that territory, such as during colonial times, or during long-standing periods of occupation. As a general rule, persons who have arrived and legally settled in such territories prior to independence or prior to the re-establishment of independent states must be considered to be "settled" minorities and therefore have stronger rights than those who have arrived into a country voluntarily, knowing that it was not their country, and who have settled in that particular territory. Again, it should be underlined that this is not to exclude them from having minority rights, but to argue that a distinction in regard to the degree of rights given to them can be justified.

32. **Minorities versus indigenous peoples and 'peoples'**

In principle, there is agreement to distinguish between "indigenous peoples" and "minorities". Indigenous peoples are covered under ILO Convention 169 and will some time in the future be covered also under the Declaration on the Rights of Indigenous Peoples when adopted, though with a content probably somewhat different from the present draft. Both the ILO Convention and the draft Declaration gives great emphasis to land rights and the right to local self-government, possibly even autonomy. These are rights which are stronger than normal minority rights. Two sets of problems, however, make it necessary also here to avoid sharp distinctions. Firstly, there is so far no definition of "indigenous peoples", and there will be borderline cases between the two. Some groups may under national legislation not be accepted as indigenous peoples but will be accepted as a minority. Secondly, the Human Rights Committee operating under the ICCPR Article 27 has established that indigenous groups may have strong minority rights under that Article, stronger than 'ordinary' minorities, and yet the indigenous groups are considered to be covered by Article 27 which expressly refers to minorities. Thirdly, the main thrust of the draft declaration on the rights of indigenous peoples is the protection of their rights in their own traditional habitat or settlements. We know, however, from practice that many indigenous individuals have moved from their original habitat to the urban centres of the country in which they live. Within such urban centres and other places outside their traditional habitat, minority protection may be the more appropriate response to their situation.

33. Other 'peoples' have stronger rights than minorities have. Under common Article 1 of the two human rights covenants of 1966, every people has a right to self-determination. Indigenous peoples are also envisaged to have stronger rights than minorities. At present, the draft Declaration on the Rights of Indigenous Peoples is under consideration by a

working group under the Commission on Human Rights. It will eventually be somewhat modified as compared to the present text; in particular, the right to self-determination can be expected either to be taken out or given a more circumscribed meaning. Minorities, on the other hand, have much less wide-reaching rights. Consequently, it appears appropriate to distinguish by definition between "peoples", "indigenous peoples" and "minorities".

34. In practice, however, it is the situation in which the group finds itself, rather than the abstract definition which determines the more precise content of the right. The right of peoples to self-determination can only in some very precisely defined situations give a right to political independence, and we can then also see that the word 'people' in those situations have to be interpreted in a territorial, not an ethnic sense. The situation where the United Nations have recognised a unilateral right for a 'people' to political independence, is when a given territory is non-self-governing or subject to alien occupation. A territory has only been defined as non-self-governing when it has been subject to colonialism. The beneficiary of this right, the 'people', has then been understood the composite permanent population of that territory. It may be composed of several ethnic groups, some large and some small, but it is not the ethnic group which can claim political independence; it is the population as a whole.
35. In other contexts, persons belonging to a people in an ethnic sense, may often find themselves in a minority situation within a sovereign state. In that situation, they have no unilateral right to political independence, but have only the rights to which minorities are entitled. As we shall see, their rights may be modest or far-reaching depending on their circumstances, but they have to recognise the territorial independence of the state in which they live.
36. Problems arise when the word "people" is defined not on a basis of territoriality, but on ethnic grounds. When a group of persons having the same common language, some common understandings of their own history and traditions, and therefore consider themselves to constitute one people, happen to live on different side of territorial borders between independent states, parts of that 'peoples' or 'nation' forms a minority in one of the states concerned. These are the groups most frequently thought of when using the term 'national minorities'. When they live in a country inhabited by a different ethnic majority, their justified concern is to be free from discrimination, to preserve their identity, and to maintain contacts with their ethnic kin across borders, but they must respect the territorial integrity and the political independence of the state in which they live.
37. The relations between minorities and majorities, or between different groups, often give rise to tensions and create difficulties in the maintenance of law and order. Peaceful accommodation requires an overall commitment to equal treatment of all members of society, combined with pluralism which does not bestow privileges on any particular group, large or small. The state must be the common home for all living there. Beyond the issue

of appropriate rights applicable to particular minority situations, there should also exist adequate machineries and methods of conciliation and conflict resolution. This, therefore, is another issue to which the working group should address its attention.

COMMISSION ON HUMAN RIGHTS

EDUCATION AND MINORITIES¹

Jose Bengoa

A. INTRODUCTION, PURPOSE AND POINT OF VIEW

1. In 1995, a group of anthropology students and I carried out a study in which we asked 300 families from the Mapuche minority in southern Chile about their educational preferences. Seventy per cent said that they wanted bilingual education for their education, i.e. in Mapuche and in Spanish, the language spoken by the majority in the country. State schools in the country give instruction only in Spanish and the content of curricula is the same for all children. We were struck by the fact that 30% said that they preferred instruction only in Spanish, the majority language. They saw a danger of cultural discrimination if their children were educated in both languages because that would place them at a disadvantage compared with other Chilean children. We discussed this crucial and complex issue at many meetings. One hundred per cent are obviously in favour of the preservation of their language and their culture and the strengthening of their minority identity. The question is, consequently, how much of a role education plays in the cultural reproduction of a minority group? In the discussions we held, some persons said that schools must teach children the universal subjects, such as reading, writing and mathematics, and that their own culture, language religion and spirituality must be learned socially within the family and the community. It was stated that this is a private matter and that the State, which represents the majority culture, must not get involved in such matters. There are many others who are of the opposite view that, if formal and systematic education in State schools does not include the content of the minority culture, this culture will be weakened and will end up being lost because it exists only in the home. There are many empirical studies which show how the language has been lost in one or two generations, together with most of the basic cultural elements of a minority social group. The discussion is complex and of the greatest importance for the future of minorities.
2. This preliminary study, which was requested by the Working Group on Minorities of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, contains elements to start up the age-old, ongoing discussion on the relationship between the right to

¹ Preliminary Report submitted by Jose Bengoa, independent expert of the sub-commission on prevention of discrimination and protection of minorities to the second session of the United Nations Working Group on Minorities, to be held in Geneva from 29 April - 3 May 1996.

education and the right of minorities to preserve, reproduce and develop their own culture, i.e. the right of minorities to preserve their own identity and culture.²

3. The point of view adopted in this report is that progress must be made to incorporating into the school system a broad cross-cultural and multicultural approach which takes account at the same time of the two main trends in today's world: the globalisation of culture and the specificity of identities.

Our view is that the educational challenge in the coming decades will be to combine the universal dimension of the increasingly intercommunicated culture in which we live and the content of local cultures as redefined in cultural interaction. We also consider it dangerous to have a general education that denies or simply does not allow for local identities or specific cultures, like the opposite tendency towards isolationism and shutting off to world events and intercommunication. The challenge of a discussion of this kind is to be able to give the multicultural culture in which cultural diversity is genuinely understood as one of mankind's most important values and in which linguistic diversity is understood not as an obstacle to communication, but as a reflection of the many and varied points of views and ways of expressing themselves that human beings have used to dominate nature, develop and learn to communicate with others. This report is opposed to any attempt at or claim to linguistic, spiritual and cultural homogeneity which regards diversity as the result of an error, original sin or chaos, as well as to any kind of fundamentalism which considers that the solution lies in closing borders, escaping from the world and taking refuge in what is alleged to be the absolute truth. We are therefore trying to give diversity its value and to do so through education, on the understanding that this is a constant struggle.

4. Practical experience in the last few years shows that the process of globalisation is taking place at the same time as the process of cultural particularisation. What is going on, for example, on the internet, the most globalising system in the world today, is very interesting: along with the standardised codification with which it allows people to communicate (or

² There are many studies on the development of international standards relating to minorities. We draw the attention of interested persons to the following texts, which are readily available: Francesco Capotorti, "Study on the Rights of Persons Belonging to Ethnic, Religion or Linguistic Minorities", United Nations, New York (1991); Asbjorn Eide, "New Approaches to Minority Protection"; Minority Rights Group International, (1993, reprinted, 1995); Isse Omanga Bokatola, "The United Nations and the Protection of Minorities", Brussels (1992); "Definition and Classification of minorities"; Memorandum submitted by the Secretary-General, United Nations (1950); Patrick Thornberry, "The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations"; Minority Rights Group (1993); Gudmundar Alfredsson, Goran Melander and Per Erik Nilsson, "A Compilation of Minority Rights Standards", Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund (1993).

prevents them from doing so, in many cases) and the English that dominates communications on the net, data are beginning to appear and are becoming more common in different languages and dialects, on extremely detailed and specific cultural issues which go an incredibly long way towards globalising local culture. The two processes are taking place at the same time.

5. The dominant culture in the twentieth century has not valued diversity, but has only tolerated it. The European liberal tradition, which developed the principle of tolerance, has undoubtedly been positive, but it is not up to the complex challenges of the future of a world that is increasingly pluricultural. The majority of international political instruments protect the existence of minority groups and defend their right to exist. We have only been partly able to create an international political culture which understands that diversity is a basic characteristic of the human race and which not only protects "ethnodiversity", but also makes its promotion an objective of cultural action. In a globalised world, where intercultural contact is increasingly frequent and part of daily life, the lack of a multicultural culture may lead to countless outbreaks of xenophobia, racism, fundamentalism, exacerbated nationalism, ethnic misunderstanding, violence and wars. Education has a very important role to play in this regard. It is obvious that it takes a great deal of imagination to meet these challenges adequately.

B. ASSIMILATION, INTEGRATION AND EDUCATION

6. The conceptual distinction between assimilation and integration is basic to an understanding of the relationship between education and minorities. We will take cultural assimilation to mean the process by which a group of persons begins to lose its values, customs, language and other cultural characteristics and to accept and adapt to the global majority culture of the society in which it lives. Assimilation is a process of cultural loss and replacement. "Cultural integration" or "integration with identity" is, however, the process by which the members of a minority group of persons link up with the majority group on the basis of respect and equality, while keeping their own identity, customs, language and other aspects of their culture. It is obvious that there are cultural changes in any process of cultural intercommunication, and it would be absolutely unthinkable for a cultural integration relationship not to involve what may at times be far-reaching changes in the original cultural structure.
7. The content of the cultural project marks the conceptual and practical difference between assimilation and integration. In one case, the project leads to the elimination of one culture through assimilation to the majority culture. In other case, it considers long-term cultural coexistence to be possible and recognizes the equality and right of both cultures to develop, change, keep traditional aspects and alter others. The position taken by the State in this regard is decisive. The State normally defines these major parameters in the Constitution and the laws, as well as in day-to-day practice of respect for minorities or in subordination

and a policy of assimilation. Despite their limitations, constitutional amendments are of great importance and, in many cases, constitutional recognition of minorities is a decisive step in paving the way for an integration policy based on full respect for minorities.

8. To understand the educational problem as it relates to minorities, it must be asked what is meant by the "protection of minorities." As is well known, this concept has been elaborated on in recent decades in many international documents and conventions. There is a passive concept of the "protection of minorities", as well as a active concept. The passive one sets the limits of the State in respect of minority groups and the rights they possess. It limits the action of majorities over minorities.

Protection of minorities is the protection of non-dominant groups which, while wishing in general equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population.³

9. International documentation also embodies a much more dynamic positive concept of the "protection of minorities" which is essential to an understanding of the educational question with which we are dealing:

The texts adopted by the Sub-Commission indicate the fundamental difference between the prevention of discrimination and the protection of minorities. From these texts, it would appear that discrimination implies any act or conduct which denies to certain individuals equality groups in society... The protection of minorities, on the other hand, although similarly inspired by the principle of equality of treatment of all peoples, requires positive action: concrete service is rendered to the minority group, such as the establishment of schools in which education is given in the native tongue of the members of the group. Such measures are of course also inspired by the principle of equality: for example, if a child receives its education in a language which is not its mother tongue, this might imply that the child is not treated on an equal basis with those children who do receive their education equal basis with those children who do receive their education in their mother tongue. The protection of minorities therefore requires positive action to safeguard the rights of the minority group, provided of course that the people concerned (or their parents in case of children) wish to maintain their differences of language and culture.⁴

³ E/CN.4/52, sect. V.

⁴ Memorandum by the Secretary-General, The Main Types and Causes of Discrimination, Sales No. 49.XIV.3, paras 6 and 7, quoted by Capotorti, United Nations, New York, 1991, p. 40.

10. According to the dynamic or positive concept of the "protection of minorities", the duty of States is not only to protect minorities from "attacks" to which they may be subjected by other groups or by the majority, but also to "promote" activities, programmes and policies to enable minorities to develop. It is a concept which considers that the "lowest policy level" lies in respect for and the integrity of minorities and the fact that protection is understood as their right to develop the particularities that differentiate them from the rest of the population.
11. Policies for the protection and promotion of minorities must be intended not only for minorities themselves, but also for society as a whole. This is essential in the educational and cultural sphere. Mere agreement that a group is entitled to preserve its customs is not enough if the rest of the majority society has a negative idea or lack of understanding of these customs or simply holds them in contempt as unsuitable, barbaric, anti-national or the like. Widespread education is essential as a decisive component of a positive view of the "protection of minorities." In many cases, the concept of "positive discrimination" consists of policies which are exclusively in favour of minorities and become hateful for that reason, thus defeating the altruistic purpose for which they were intended. Without opposing specific exceptional measures which particularly favour minorities rather than members of the country's majority (scholarships, for example), it is necessary to be very careful in this regard because such measures may lead to misunderstanding and hatred if they are not part of a comprehensive process designed for society as a whole.
12. In 1947, the Sub-Commission stated that: "When a minority that wishes to assimilate is denied the opportunity to do so, there is discrimination and the matter must be regarded as such." Is it conceivable today that a minority would voluntarily decide to assimilate without any direct, indirect or experience of the last few decades and especially of the last few years, when the question of identity has become the focus of discussions, shows that this statement is relative. It is absolutely true that there have been specific historic periods, such as the nineteenth century, when particular international migrations had a strong culture of assimilation to the "new world" that was going to be built. Unfortunately, experience in recent decades demonstrates that cases in which a minority apparently shows a willingness to assimilate are the result of existing cultural pressures that prevent it from developing. In such cases, it often happens that the minority "covers up" its identity as a means of surviving. The distinction between voluntary and enforced assimilation at the individual level is therefore useful, but very much open to discussion at the collective level.
13. Integration and segregation constitute another conceptual duality which is of great importance in relation to education and culture. Integration involves a harmonious process in which the local identity approach is combined with belonging to the global nation and to increasingly intercommunicated mankind. Segregation, however, is when identity processes go to the extreme of not belonging to global society. Educational segregation, disguised as a search for identity, is the perverse result of a misunderstanding of the

"protection of minorities." It is a system of protection that builds a wall around the minority and turns it into a ghetto. Disguised as a protective approach, it may reach the top level of discrimination. Some "minority schools", many of which were established with praise worthy intentions, turn, with time, into places of hateful discrimination.

14. In the modern world, education is a key factor in the acquisition and reproduction of cultural identities. As families and traditional local communities change and become weaker and secularised, they lose their ability to reproduce the culture and to be the only components of the cultural dynamics of a local society, as they were decades or centuries ago. Similarly, if academic education becomes institutionalised and does not take on elements of the local culture, it is in fact or by omission giving rise to cultural discrimination and preventing that culture from having enough legitimate room to develop. This usually happens with the language, which is deprived of its importance, becomes weakened and tends to die out if it is relegated to use only in the private, family environment. Education must therefore accept the principles of integration, taking account of the difficult balance between belonging to a local community, its language and its culture and belonging to a national community, language and majority culture and then to increasingly more globalised world culture. As clearly stated in the 1991 New Delhi Declaration entitled "Towards full Education for All":

The greatest care must be taken to ensure that programmes of basic education for all are entitled to the particular conditions of each society and culture. The Education for All Programme cannot become an instrument for the cultural destruction of third world societies, but must be an instrument for their development.⁵

Education for identity and education for the world are the main focus of educational discussions at the present time.

C. EDUCATION, DISCRIMINATION AND MINORITIES

15. What does "discrimination in education" mean? The Convention against Discrimination in Education was adopted in 1960. The definition it contains is well known to specialists:

The term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the

⁵ New Delhi, 14 September 1991, World University Service.

purpose or effect of nullifying or impairing equality of treatment in education and in particular:

- (a) of depriving any person or group of persons of access to education of any type or at any level;
- (b) of limiting any person or group of persons to education of an inferior standard;
- (c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or installations for persons or groups of persons; or
- (d) of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.

16. The main objective of the Convention was to ensure that there was no educational discrimination against minority persons, primarily in access to education. As is well known, Article 2 refers to cases of educational specialisation in which discrimination is deemed not to exist. The other articles indicate the legislative changes necessary to guarantee children non-discriminatory access to schools. Article 5 recognises:

The right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however:

- (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;
- (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and
- (iii) That attendance at such schools is optional.

17. The right of minorities to carry on their own educational activities is subject to three conditions in the Convention against Discrimination in Education: in the first place, it depends "on the educational policy of each State"; secondly, it is subject to an interpretation that historical practice has shown to be ambiguous and interpretative, namely, it must not be exercised in a manner "which prejudice national sovereignty"; and, thirdly, it is subject

to a number of lesser accumulate conditions, such as the fact that attendance at such schools must be optional, something that would often in practice involve duplicating schools. In any discussions with educational experts, the argument of the condition of equality of educational quality is put forward on the grounds that instruction in the minority language per education would lower educational quality and, consequently, place minority children at a disadvantage compared to children belonging to the majority. The conditions for the exercise of this right have had the result, *inter alia*, that many countries did not adopt policies in this regard until just a few years ago and many minorities have not been able to exercise their right. It seems obvious that this topic should be discussed at greater length.

18. Non-discrimination in education refers almost exclusively to minority persons, but not to their culture, i.e. their cultural heritage. In this sense, educational discrimination exists when a country's schools offer a historical interpretation in which minorities play a secondary or simply negative role. Discrimination exists when minority languages do not have adequate status in education. Discrimination exists when, as in most countries, relations between majorities and minorities in education are seen from the point of view of the "civilisation v. barbarism" dialectic. In many countries, there is no "formal discrimination", i.e. in the provisions which enable minority children to enter educational establishments in an equitable manner, but there is "cultural discrimination", since curricula either do not include the content of the minority culture or under rate or treat it pejoratively.

D. MINORITIES AND THE SCHOOL SYSTEM

19. "Bilingual intercultural education" means schooling that takes account of the intercultural identity of children belonging to the national minority or a minority group within a larger society and its purpose is to enable them to find a place both in their local society and in the national society to which they belong. Bilingual intercultural education differs from "bilingual transitional education", whose purpose is to begin education using the mother tongue, which is later given up once the children have acquired the language of the majority. The mother tongue is a literacy tool that is later set aside. This type of bilingual education has been criticised, as it apparently causes a much faster loss of the mother tongue than if the mother tongue was not taught in school.
20. There are problems involved in providing intercultural education in the school system. Capotorti cites the UNESCO study on "The use of Vernacular Language in Education" and draws attention to some of these problems:
 - (a) inadequacy of the vocabulary - since most of the languages in question are unwritten, a decision on vocabulary is technically and politically highly complex. In Latin America, for example, in countries which have adopted a "unified alphabet" that has been accepted by the minorities, it has been possible to incorporate the vernacular languages into the school system. However, there are

situations in which discussions about the type of alphabet have been going on for decades without any agreement being reached. In the view of some persons, the unified alphabet would "Castilianise" the vernacular language, depriving it of its specificity. Such discussions usually delay the establishment of an intercultural educational system for a long time;

- (b) the shortage of educational materials is a second factor which is linked to the first and which also hampers the right of minorities to their own education;
- (c) the shortage of suitably trained teachers is an important factor. In our experience, it is perhaps the primary issue to be dealt with in trying to implement a differentiated educational policy such as the one we are referring to. If suitable teachers are not available, it is extremely difficult to implement a realistic educational programme for minorities;
- (d) the multiplicity of languages in a locality may be an insoluble problem;
- (e) the multiplicity of languages in a country is also an objective difficulty in many places;
- (f) the existence of a "lingua franca", spoken in one form or another by all the minorities in a vast region. Capotorti cites the example of Swahili; and
- (g) "popular opposition to the use of the mother tongue", a genuine issue on which we commented in the introduction. However, this obstacle should nowadays be understood not as a reason brought up spontaneously by minorities themselves, but as a reaction to widespread discrimination. An additional obstacle is the high cost of differentiated education.

21. A debate should be encouraged as a means of weighing the problems, drawbacks, costs and benefits of bilingual intercultural education and the right of minorities to practise their own forms of education. Investment in this type of education will probably be an important factor in achieving internal peace, developing greater national unity based on respect for diversity and establishing a multicultural culture.

E. EDUCATION AND MINORITIES RESULTING FROM MIGRATION

22. The issue of the education of minorities whose presence is the result of recent migrations and the education of the families of migrant workers is a complex one that has been the subject of heated debate in many countries. There are those who take the view that the persons concerned have migrated voluntarily to another country and should therefore follow the cultural rules of their host country. This would mean offering them access to

public and private schools in the national system of education in order to promote fuller integration into the new culture. This approach rejects the use of the concept of "assimilation" on the grounds that migrants and their children are persons who voluntarily left their own country and culture. The establishment of special schools that reproduce the migrants' own culture is also rejected as it would help promote a stable minority within the host country.

23. There are, however, those who support the establishment of culturally differentiated schools for the children of migrants workers and for nationals who are the descendants of recent migrants. It is argued that these sectors of the population are fully entitled to develop their own schools and that it is the duty of the public education system to allow their full cultural development. In practice, something along these lines has happened with the foreign colonies in most third world countries. These groups, which are mostly European, still have their own schools and even universities which reflect their original culture and are often legally recognised by the educational system of their country of origin. In Asia, Africa and Latin America, there are schools which are over 100 years old and which continue to educate the fourth or fifth generation descendants of former migrants, on the basis of the cultural patterns, curricula, textbooks and discipline of their country of origin. This historical argument would say that there is no reason why what was valid for some should not be valid for others.
24. Teaching migrants their mother tongue is undoubtedly of great importance for the preservation and development of their identities. However, this is clearly a complex matter. Crispin Jones and Rachel Warner have studied the case of Bengalis in the United Kingdom who are either direct migrants or were born in England. Eighty-six percent of them speak Sylhet as their first language. Although there are bilingual schools, these young people admit that, after some time, they gradually forget the language and increasingly think in English.⁶ There are many such cases in which the language of the country of origin is relegated to the private sphere and even dies out, despite the special education programmes. In a number of Latin American countries, there are courses and programmes to teach the vernacular language to young indigenous persons who are children of migrants and who have forgotten their mother tongue. They consider their language to be an inseparable part of their identity. They have forgotten it as a result of the public education process. The challenge facing a multicultural education are certainly highly complex, and more extensive experiments and follow-up will be required before it is possible to reach more convincing conclusions. The issue is open for discussion.
25. In the light of the above, a methodological distinction has to be made between the education of minorities living in their own territory, in their own country, who are usually culturally homogenous and whose population is sufficiently dense, and the education of

⁶ Education Rights and Minorities, Minority Rights Group, (1994).

minorities who are the result of migration. Education in their own culture (intercultural education) and in their own language is a right to which minorities living in their own territory and in their country of origin are entitled, and it should encounter no obstacles despite the practical problems already referred to.

26. When minorities who are the result of recent migrations become part of a larger and different society, they often have to combine their attachment to their country of origin with the new attachment they have chosen. The right "to retain their own language, culture and traditions" is explicitly provided for in many international instruments and, in particular, in the Declaration on the Human Rights of Individuals who are not Nationals of the country in which they live (13 December 1985). In many cases, however, these minorities specifically intend to integrate, while, in other cases, especially where minorities have been forced to migrate by political violence, widespread economic crises or other forms of acute conflict and plan to return home, they want to preserve their identity, language and cultural characteristics. The growing trend throughout the world today seems to be towards the preservation of the identities of the minorities who are the result of recent migrations. In this connection, education plays a vital role in forming the new identity and redefining the links with the society from which they migrated and the new society. These minorities are entitled to education in their culture of origin and in their host culture. The solution to the practical, technical and educational problems involved is of the greatest complexity and importance. It too is open to discussion.

F. THE MEDIA, EDUCATION AND MINORITIES

27. The media play a leading role in developing a culture of tolerance and, in particular, a multicultural culture in the modern-day world. The globalisation of communications should increasingly promote two extraordinary positive factors, i.e. broader and deeper knowledge of the world's cultural diversity and increasingly effective protection by the international community against violations of the rights of minorities. It is well known that the roots of xenophobia and intolerance lie in ignorance. More information will certainly be an important factor in giving future generations a better understanding of mankind's cultural diversity. The instantaneous presence of the media in all parts of the world should also help to improve the system by which human beings protect one another and should become a kind system of self-control.
28. Without an explicit policy in this regard, the media may become the unwitting agents of racism, xenophobia and discrimination against minority groups. The globalisation of cultures has brought with it a "fear of foreigners" (Georges Duby) and a rise in new kinds of nationalism, chauvinism and fundamentalism, as well as in various forms of intolerance. As a result of the speed of communications, there is a dangerous tendency for the modern media to create stereotypes, i.e. to categorise persons belonging to particular cultures or minorities by using features which are easy for the public to understand and which are

superficial, crude, mistaken and often slighting, derogatory or pejorative. In addition, news and information on racist groups and movements that have not been analysed and criticised often become propaganda for the extremist groups themselves.

29. On the basis of a positive and dynamic approach to its mandate, the international system of protection for minorities should appeal to the media and, in particular, to the world's major media chains, to discuss how these decisive issues should be dealt with.
30. Some media, i.e. those used to disseminate racism and xenophobia, play a clearly defined and very effective role in promoting racism, xenophobia and discrimination against minority groups and the international system should establish an effective system of condemning them. The resolution adopted on this topic by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its 1995 session is an important step in this direction.
31. The right of minorities to own media and to use them for the manifestation of their culture is extensively guaranteed by international law. Articles 18 and 19 of the International Covenant on Civil and Political Rights are explicit, clear and applicable to any individual or group of individuals and thus to minorities, as confirmed by Article 27 of the Covenant. Such media play a vital role in educating minorities, ensuring respect for their culture, promoting their identity, preserving their language and disseminating their traditions and culture and should be encouraged as a means of fostering peaceful relations between minorities and majority groups or societies.

G. MULTICULTURAL, CULTURE, MINORITIES AND EDUCATION

32. This is certainly a broad topic and there are many other aspects that have neither been analysed nor mentioned in this preliminary report, whose sole purpose is to provide elements for the discussion in the Working Group on Minorities. In our view, the challenge is to incorporate the topic of cultural multiplicity and respect for minorities into the practice of education, schools, the media and, in short, all those involved in education. In this connection, the Working Group may become an important forum for ethnodiversity and the promotion of "multicultural culture" as a positive and optimistic way of looking at an increasingly interrelated, globalised and culturally interactive world in which cultural and ethnic diversity is valued more and more as one of mankind's main sources of wealth.

COMMISSION ON HUMAN RIGHTS

DOMICILE AND RESIDENCE CONCERNING MINORITIES AND MIGRANT GROUPS

Working Paper

Justice Mohammed Sardar Ali Khan

The object of this paper is to throw some light on the problems of "migrants" who are forcibly uprooted from their parent countries and seek refuge mostly in adjoining areas of another country. Apart from coming within the category of "refugees", these segments of population by virtue of their long residence in the migrated areas constitute a distinct "minority" of their own by virtue of their ethnicity, separate identity, social value, religion and distinct way of life.

The question that arises for consideration is what "status" is to be granted by the receiving state to such migrant groups who may be living in the areas for a considerable length of time and may be the second and even the third generation of the original peoples who were forced to flee from their Motherland. Are these groups to be treated as Stateless persons or citizens of the country of their origin or are they to be granted a certain status to be looked upon as a conglomerate unit of the state in which they happen to be? If such groups, even though they may be the second or third generation, are not to be treated as full fledged citizens, then they can be considered as people domiciled in the country, in which they make their permanent Home without any foreseeable hope of returning to their country of origin.

It is noteworthy that such groups due to their long and habitual residence cease to be "refugees per education" and by virtue of their attachment to the soil constitute a distinct group having certain essential features of a "minority". But they are invariably denied the status of citizenship due to the rigorous application of the laws of Citizenship especially those with regard to naturalisation and are for all intents and purposes treated as "aliens" or "foreigners" liable to be deported according to the laws applicable to such groups.

It is a universally accepted principle of international law that all sovereign states are duty bound to reduce statelessness as far as possible and to treat the migrant groups in accordance with the established norms of international legal principles.

By way of illustration, it can be said that the Turkish population in Greece, the Germans who migrated from the different parts of Europe during Nazi regime, the Tibetans living in India, the influx of population in the North-Eastern part of India from neighbouring state of Bangladesh, the

Chakma groups living in India and the Kashmir migrants who are Indian citizens and have fled from their veritable paradise due to the gun culture there and are now spread all over India, constitute good examples of migrant groups. Except for Kashmiris who are full-fledged Indian citizens even though Kashmir enjoys a special status under Article 370 of the Constitution of India, all these groups are in a state of flux, away from their parent land. The presence of these Groups who answer to a general concept of minority either linguistic, cultural, religious, ethnic or otherwise, gives rise to a problem which has to be solved in accordance with accepted norms of civilised jurisprudence.

In order to appreciate the problem created by such large scale migrations, it would be necessary to examine the principles of law which govern the status of such migrants particularly in the field of private international law.

The law is well-settled on the point that nobody shall be without a domicile and it is presumed that every person has a domicile of origin at his birth. A legitimate child has the domicile of his father and an illegitimate child enjoys the domicile of his mother. A founding is supposed to have a domicile of the place where he is found.

This domicile of origin remains attached to a person till he acquires a new domicile of choice if he leaves the country of his origin and sets up a permanent home or habitual residence in the country of his choice. But in any case, no one can remain without a proper domicile either of origin or of choice. This point is to be kept in mind while discussing the status of a migrant group or individual.

The object of insisting that every person has a domicile is to establish a definite legal system by which his rights and obligations are determined. Moreover, in the case of a federation where the legislative authority is shared between the Centre and States, the persons of the group concerned is governed by the law of the state in which that person or group is actually settled down. It is, therefore, clear that domicile created a link between an individual or group with a single legal system of territorial law and connotes a system that prescribes identical rules for all class of persons with marginal variations. For example, in a state unit such as India or for that matter U.S.A. or Commonwealth of Australia, different rules may apply to different classes of people according to their caste or race but the basic principle is that the territorial law of the land governs each person who has the domicile of that country.

There is a presumption in favour of continuance of an existing domicile unless it is proved to the contrary by those who allege that there has been a change in the domicile of the person concerned. The standard of proof required for establishing such a change is a fairly rigorous one and has to be judged in accordance with the principles applied to civil actions of similar nature.

In the case of *Wimans v. A.E*¹ , such a presumption was treated utmost as an irrebuttable presumption.

The application of the above principles to the "migrant groups", therefore, leads to the inevitable conclusion that such groups cannot be treated as having no domicile even though their status as the nationals of a particular country may be doubtful. The concept of migration is inextricably linked with the territory where the group may be more or less permanently settled at a particular time. Hence the question arises whether any such group having migrated from State A to State B can be treated as having a domicile of choice in State B. This requires a careful consideration of the principles governing the acquisition of domicile of choice, which are residence and intention to settle down permanently with no "animus revertendi" to the country of origin. It should be made clear that mere residence without the necessary intention of settling down permanently cannot result in the acquisition of a new domicile of choice. Both the elements must be present to establish a domicile of choice as they are inter-related concepts. It has been held in *I.R.C. v. Duchess of Portland*² Residence in a country for the purposes of law of domicile is the physical presence in that country as an inhabitant.

Therefore, it is from residence that intention as required under law must be inferred. In this regard, circumstances under which the migration has taken place, the length of residence and the mode and style of living in the country play a notable part to determine whether individual or group has "migrated" from its country of origin to another country to settle down there as inhabitants. The concept of habitual residence has also even advocated to determine the nature of domicile that a person may be enjoying. Mere length of residence cannot qualify a person for domicile of choice as it must be coupled with intention of settling down permanently. Thus in *Jopp v. Wood*³ the court held that a residence of 25 Years in India did not suffice in the case of a certain John Smith to an Indian domicile as he had the "animus revertendi" to return to Scotland, his country of origin.

On the other hand brevity of residence was not supposed to be an obstacle in the way of acquiring a domicile of choice⁴ where the person concerned was supposed to have surrendered his domicile of origin even though his stay in the country of his choice was an extremely limited one. If the migrant group is resident in several countries at the same time then a case of dual or multiple residence arises. In such circumstances, a domicile of choice can be inferred from the country where the group has its main residence⁵.

¹ [(1904) A.C. 287]

² [(1982) Chancery (U.K.) 314]

³ [1865) 4De & Sym.616]

⁴ [*White v. Tennatt* 31 WVA 790]

⁵ [*Plummer v. I.R.C.* 1988 A.E.R. 356]

The question where a person or group has its main residence is a question of fact and can be decided only after taking into consideration all the surrounding circumstances of the case. However, the basic fact remains that the permanent residence must be inferred from the day of life of a group which has the most reliable and constant link with the territory in which it lives. The word "permanent" connotes a style of life which evidences lasting or almost habitual existence or living in a particular territory.

The object of investing these migrant groups with a domicile of choice provided they fulfil the above conditions is to confer upon them a status which could ensure a fair deal to such groups and even confer some rights on them which may be necessary for their peaceful existence in the country in which they are living. As opined by Prof. D.C. Cheshire:

It is impossible to lay down any positive rule with respect to the evidence necessary to prove intention. All that can be said is that every conceivable event and incident in a man's life is a relevant and an admissible indication of his state of mind.

Thus, it would not be difficult to associate a migrant group with a particular territory on the basis of some credible evidence which shows their permanent attachment to that territory. There are instances which show that even after the second or third Generation is born in a particular territory the people inhabiting such areas are being treated as aliens who are liable to be expelled from the territory at short notice. This gives rise to a great human problem apart from resulting in grave injustice to the mass of people who may have acquired a domicile of choice, by the operation of law in their favour. In certain cases, the law permits even the prisoners, refugees, invalids, fugitives from justice, fugitive debtors to acquire a domicile of choice; hence there does not appear to be any reason why a migrant group should not be allowed to have a domicile of choice if they are qualified for it.

Moreover, it is an agreed principle of law that if the domicile of origin is displaced due to the acquisition of a domicile of choice it can be revived later if there is a drastic change in the circumstances of the case and the migrant group can again avail of its domicile of origin which looms large in the background even if the new domicile of choice has been acquired.

It would be necessary at this stage to indicate the difference between the concept of nationality and that of domicile. Nationality represents a man's political status by virtue of which he owes allegiance to a particular country whereas domicile indicates his personal status and determines the law by which his personal rights and obligations are to be governed. Therefore, conferment with status of domicile does not mean the person or persons concerned are being conferred with the nationality of a particular country. However, the point may remain that more often than not the acquisition of domicile is usually the first step towards acquisition of nationality. It is noteworthy that as a matter of fair play and justice the Government of India has declared its intent to enable the Kashmiri migrants living in India to exercise their franchise by providing them facilities to cast

their votes in India. This appears to be a step in the right direction to recognise their status as a migrant group of people who are governed by the provisions of Article 370 of the Constitution of India to enjoy their democratic rights in other parts of India.

It is, therefore, obvious that the legal personality of a migrant group bordering on the status of a "minority" will have to be recognised in order to give a fair deal to these people who are otherwise roaming about in different parts of the world as more or less stateless persons.

CONCLUSIONS

Migrant groups are inevitably to be associated or linked with the territory in which they are living making it their habitual or permanent home. They cannot any more be treated as mere nomads or aliens who can be driven away from place to place in a state of statelessness.

U.S. COMMITTEE FOR REFUGEES

Issue Paper^{*}

THE PEOPLE IN BETWEEN

INTRODUCTION

Hundreds of thousands of Sri Lankans, almost all ethnic Tamils, were displaced in northern Sri Lanka in autumn 1995 after government armed forces launched an operation to capture the northern town of Jaffna. The city had for many years been the centre of a quasi-state administered by Tamils militants, the Liberation Tigers of Tamil Eelam (LTTE). Assessing the number of displaced is difficult. Estimates range from the government figure of 300,000 to the figure of 453,000 given by non-governmental organisations (NGOs).

Surprisingly, several months after the displacement, information from the areas where the displaced civilian population fled during the late months of 1995 remains limited and sketchy. However, representatives of local NGOs and international relief workers who are familiar with the situation reported that by December 1995 the situation had stabilised. They say that, although the displaced remain vulnerable and live in very basic, overcrowded conditions, essential food and non-food items are reaching them slowly. An NGO representative, while noting that access for all non-governmental groups is still difficult, observed, "The people are not starving." An academic described the situation as "not so bad," and a representative of a donor agency referred to it as "managed."

These responses are cold comfort, however, reflecting only that relief officials initially had feared a much worse humanitarian crisis. For the newly displaced, the current situation is traumatic. According to a report by the London-based Tamil Information Centre (TIC), "The Jaffna population has been shattered by the loss of their homes, possessions, and their entire way of life."

The military offensive came two months after the government made public its constitutional proposals to seek ethnic reconciliation and address minority grievances. The proposals are the boldest to have emerged from a sitting government and were widely perceived as the only bona fide government attempt in recent years to address the ethnic problem. The government decision to mount a massive attack on Jaffna in October 1995 was the latest turn in a spiral of violence that has traumatised Sri Lankan society and further ruptured relations among the different ethnic groups.

* Excerpts from a paper written by Mario Gomez for the U.S. Committee for Refugees. Conclusions and Recommendations are reproduced in their entirety here.

Prior to the offensive, more than ten years of separatist violence had produced 649,000 internally displaced people in Sri Lanka, according to government estimates. That figure included almost 100,000 muslims forcibly evicted by the LTTE from the North in 1990. The displaced muslim minority and their future are often forgotten in discussions about the predominantly Tamil internally displaced population. Hundreds of thousands of other Sri Lankan Tamils fled to India and other countries of Asia, Europe and North America in the period spanning 1983-1995. The recent military offensive has added to the numbers of persons displaced and has displaced once again people who had been displaced before.

The immediate impact of the offensive has been to decrease the space for peace and a negotiated solution to the problem. It has deepened ethnic cleavages in Colombo and strengthened the lobby of the Sinhalese nationalist elements who have come out strongly against any negotiated deal. Ethnic relations came under further strain in January 1996 when an LTTE suicide bomber triggered a massive explosion at the Central Bank, in the heart of Colombo's business district, killing ninety civilians and causing widespread damage.

USCR has continued to monitor the situation through regular contacts with relief agencies and other non-governmental organisations working in Sri Lanka. In late November 1995, USCR spent five days in the country gathering first-hand information on the status of the displaced and the progress of the conflict. USCR did not visit the areas where the displaced are located, but met with numerous representatives of international and local NGOs, international organisations, Sri Lankan government officials, and others familiar with the situation. This report is based in part on the findings of that investigation.

CONCLUSIONS AND RECOMMENDATIONS

As with most conflicts, it is the civilians in Sri Lanka who suffer the most. As of late winter 1995, the majority of Sri Lanka's northern population was displaced. While the situation has stabilised to some extent and most sources say that food and other supplies are reaching them, they are still treated as pawns, caught in a continuing struggle for control over the population. The threats to their physical security have increased. They have no control over any aspect of their lives: they have lost their homes, work, often family, and all personal security. A large number of them live in over crowded conditions with poor access to sanitation and health facilities. Children, who are particularly vulnerable, have no access to education.

The displacement is likely to continue into the foreseeable future with little possibility for the displaced to return to their homes. The immediate crisis is taking place in the shadow of a continuing civil war that is now in its second decade of armed conflict. USCR does not believe there will be a lasting solution to the problem of the displaced in northern Sri Lanka short of an answer to the underlying civil conflict.

To Restore Peace:

1. The Sri Lankan government and the LTTE should desist from further acts of violence and begin good faith negotiations to seek a durable solution to the conflict. The government's peace package released in August 1995 provides a basis on which at least to begin negotiations.
2. The Sri Lankan government and the LTTE should agree to the assistance of a third party in helping to resolve the conflict.
3. The Sri Lankan government and the LTTE should conduct themselves in accordance with the principles of international humanitarian law, and make every effort to ensure the safety of civilian life and property, including all facilities necessary for civilian life.

The Sri Lankan government should ratify Protocol II to the 1949 Geneva Conventions, which deals with internal armed conflict. The LTTE, in a public statement released in 1988, undertook to conduct itself in accordance with principles laid down in the Geneva Conventions. It should honour that commitment.

4. Political parties should put aside rivalries and cooperate in an effort to find a durable solution to the conflict. They should make known their stands on the August 1995 proposals and assist in public education efforts on the need for finding a lasting political solution to the conflict.
5. The U.S. government should actively encourage the Sri Lankan government and the LTTE to resume negotiations. It should provide all available assistance to facilitate a dialogue between the two groups.

To Assist the Conflict's Newest Victims:

1. The Sri Lankan government and the LTTE should ensure that the displaced have access to satisfactory conditions of shelter, hygiene, health, safety and nutrition. Special protection should be made available to those among the displaced population who are particularly vulnerable, including women, children, and the elderly. Education for displaced children should begin as soon as possible.
2. The Sri Lankan government and the LTTE should grant local and foreign NGOs full and free access to the displaced population. Every effort should be made to facilitate NGOs' ability to deliver food and non-food items and to provide other essential services to the displaced.

3. Donor governments should provide adequate levels of humanitarian assistance to NGOs working in Sri Lanka. Specifically, donor governments should respond urgently and positively to the two funding appeals that have already been put forward by the ICRC and UNHCR.
4. The government of Sri Lanka and the LTTE should, by recognising the freedom of movement guaranteed by international human rights law, permit the displaced to return to their original areas or move to any other area of the country if they so wish.

Full and independent information should be made available to the displaced to enable them to exercise effectively their right to free movement. The information should include specifically the security, welfare, and infrastructure conditions of their original areas of habitation, or other areas to which they wish to move.

To Assist in Providing Accurate Information:

1. The Sri Lankan government should permit local and foreign media representatives, and representatives of international organisations monitoring the situation, to visit the affected areas.
2. The LTTE should permit all representatives of the media to have free and full access to the people in the areas it controls.
3. Donor government should provide adequate levels of humanitarian assistance to the government and NGOs working in Sri Lanka. Specifically, donor governments should respond urgently and positively to the two funding appeals that have already been put forward by the ICRC and UNHCR.

To Promote Better Relations Among NGOs, the Media, and the Government:

1. The Sri Lankan government should recognise the special role played by humanitarian NGOs in times of conflict and remove any obstacles that may be hindering NGOs in the performance of their functions.
2. The Sri Lankan government should guarantee the freedom of association and expression of all NGOs.
3. The Sri Lankan government should initiate a dialogue with NGOs - including peace, humanitarian, development and human rights NGOs - with a view to sharing perspectives and understanding better one another's work. The government should discuss with NGO representatives any proposed regulatory regimes affecting NGOs.

Sri Lankan NGOs should begin a dialogue with representatives of the media with a view to developing a closer relationship between the two groups.

4. The Sri Lankan government should invite Francis Deng, the Special Representative of the UN Secretary General on Internally Displaced Persons, to make a follow up visit to the country. The government and the LTTE should permit the Special Representative - who first visited the country in 1993 - to have access to the conflict areas, and should facilitate his meeting with the internally displaced and local and foreign NGOs in those areas.

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