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PROMOTION, PROTECTION AND RESTORATION OF HUMAN RIGHTS  
AT THE NATIONAL, REGIONAL AND INTERNATIONAL LEVELS

PREVENTION OF DISCRIMINATION AND PROTECTION  
OF MINORITIES

Proposal concerning a definition of the term "minority"  
submitted by Mr. Jules Deschênes

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## Introduction

1. As a poet said not so long ago, boredom is born one day out of uniformity. This may well be why minorities come into being - to spice up the menu of life. However, after one or two tastings, one begins to wonder, since there is no satisfactory definition - I almost said "recipé". To go to the extreme, might there not even be majorities oppressed by active and dominating minorities?
2. We hear references to religious or linguistic minorities, indigenous populations and equality, and ethnic or national minorities. Yet how are such minorities recognizable? Do they have common characteristics? Do specific factors exist which make it possible, or even mandatory, to recognize certain attributes in them and to observe certain minority rights? In short, what is a minority?
3. The question is more far-reaching than it first appears. The United Nations itself has, after 40 years of trying, been forced to concede its inability to provide a satisfactory answer. Indeed, the scale of the minority concept is equalled only by its vagueness. For an illustration of this, let us enter the realm of minorities. 1/
4. A first category consists of various indigenous groups which the European colonizers of the seventeenth and eighteenth centuries pushed back into the inhospitable regions of the American continent, Siberia and Australasia. Here one immediately comes up against a complication, in that these indigenous populations dispute their inclusion in the minority concept. However, this point will be dealt with in greater detail later.
5. Another category, scattered throughout the Americas, comprises the victims of the slave trade who, into the bargain, have been staggered by the recent accession to independence of the countries of their African ancestors.
6. A third category comprises the artificial minorities created by the colonial Powers, such as Indian merchants and craftsmen in Malaysia, Burma and Central and East Africa, the Chinese in the European colonies of South-East Asia and the Greeks and Cypriots in the Belgian Congo.
7. A fourth category includes the migrant workers of the twentieth century - Pakistanis in the United Kingdom, Mexicans in the United States, Algerians in France, Turks and Yugoslavs in Germany and Belgium and Greek and Maltese in Australia.
8. It may be felt preferable to adopt a different approach by drawing an arbitrary line separating the large minorities on one side from the small minorities on the other, or, alternatively, to distinguish between them on the basis of the density of the distribution of their populations in their respective territories.
9. Further categories could be established by grouping together all the cultural minorities, all the linguistic minorities and all the religious minorities throughout the world.

10. Yet, at the end of the exercise, would any progress have been made in identifying the generic characteristics of minorities or finding their common denominator? Clearly not.

11. This, then, is the task which faces us at the end of this gathering. There are those who will think it strange to set about defining the subject of our deliberations at this late stage. However, on reflection, it is quite sensible, since it enables us to pool all the results of the last few days and to marshall them with one end in view - perceiving a real phenomenon which has thus far been formless and confused, and organizing it into a whole which, while it may still be heterogeneous, provides a number of reference points which will make understanding, and in particular progress, a less forbidding prospect.

12. We are not the first to undertake this task and we shall probably not be the last. However, there is today a special factor which, for the first time, illuminates our way and urges us along it.

13. It is wellknown that, in 1945, the Charter of the United Nations did not deal with the question of minorities. In 1948, the Universal Declaration of Human Rights did not deal with it either. However, 18 years later, the International Covenant on Civil and Political Rights, in its article 27, proclaimed a number of rights of ethnic, religious and linguistic minorities. The Covenant came into force 31 years after the Charter. It was at about that same time, in 1978, that the Commission on Human Rights began work on a declaration on the rights of minorities, based on a draft submitted by Yugoslavia (E/CN.4/L.1367/Rev.1). From 1980 to 1984, the Working Group set up by the Commission on Human Rights studied the draft in general, provisionally adopted the preamble and considered article 1. However, in the spring of 1984, the discussions came up against the question of the advisability of defining the concept of minority. Could work continue without such a definition? Or, before the proclamation of certain rights, should agreement be reached on the identity of those for whose benefit they were about to be enshrined?

14. The Commission on Human Rights decided on a compromise. In resolution 1984/62, on the proposal of Greece, it requested the Sub-Commission on Prevention of Discrimination and Protection of Minorities "to prepare a text defining the term 'minority', taking into account studies already carried out in this field, comments and views provided by Governments, as well as discussions held during the session of the Working Group and other relevant documentation".

15. The question is a simple one, but, at the same time, is not without irony. Mr. Francesco Capotorti, in his Study on the rights of persons belonging to ethnic, religious and linguistic minorities, 2/ made a humorous reference to the situation by noting that the Commission on Human Rights itself had not considered it necessary to define the term minority before setting up the Sub-Commission responsible for the protection of the rights of minorities! 3/ That was in 1947.

16. In the same vein, the Austrian Government wrote to Mr. Capotorti: 4/

"With respect to the theoretical question raised, it may be remarked that these problems have been under discussion in the relevant literature ever since scholars started to examine minority problems. They have so far not succeeded in formulating a generally accepted definition of the concept

of minority - whether ethnic, religious or linguistic. In view of these unsuccessful efforts, it may be doubted whether a satisfactory solution of this problem is possible. Similarly, all efforts made in this field within the framework of the United Nations have failed."

17. Despite these pessimistic comments, the Sub-Commission must respond to the request by the Commission on Human Rights. It has been incautious enough to entrust me with the task of ploughing the first furrow. I therefore invite you to accompany me in this undertaking, in the conviction that you will help me to keep a firm hold on the handle of the plough and will prevent me from embarking on digressions which, although involuntary, could nevertheless divert us from our goal.

18. From the outset, it is important to establish a point of reference. Our research must be carried out within the framework of article 27 of the International Covenant on Civil and Political Rights, of 1966. There is no question of attempting to encompass all possible and imaginable minorities within a single definition. Article 27 of the Covenant is concerned with "ethnic, religious or linguistic minorities", and it is with these alone that we shall deal.

19. It is important to be precise and, if a correspondent whose letter was forwarded to me from London had borne this in mind, he might have saved himself some trouble. The January 1985 issue of the bulletin of the Minority Rights Group 5/ contained a preliminary draft definition suggested by me last summer in Geneva. A reader in Somerset expressed his disagreement. Perhaps unfamiliar with the limitations of article 27, he found the definition too narrow, since it did not cover three groups which he described as "blacks in South Africa, women in the United Kingdom and gays".

20. The question of blacks in South Africa will be considered later. As for the two other groups - women in the United Kingdom and gays - it is difficult to see how they could be included in ethnic, religious or linguistic minorities.

21. I suggest that we proceed in three stages:

Firstly, we shall eliminate what I would call the "non-problems";

Secondly, we shall isolate the variables of the concept of minority;

Thirdly, we shall attempt to identify the constants of this same concept.

22. In conclusion, we shall endeavour to construct a definition which is both sufficiently general and sufficiently specific.

#### I. ELIMINATION OF NON-PROBLEMS

23. By "non-problem" I mean a matter which could raise difficulties but which, for our purposes, should be considered as resolved. There are three such issues: the question of indigenous populations, the question of resident aliens, and the question of the relationship between groups and their members. I propose to deal with them in that order.

A. The question of indigenous populations

24. The problem, let me recall, is as follows: should a definition of minorities cover indigenous populations?

25. At its session in August 1984, the Sub-Commission received the final report of Mr. Martínez Cobo (E/CN.4/Sub.2/1983/21/Add.8) on indigenous populations. The author of the report attempted, if not a definition, at least a description, of such populations:

"379. Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."

26. This text contains elements which are characteristic, if not of all minorities, at least of some of them, such as historical continuity, distinction from other sectors of society, non-dominant situation, and determination to preserve distinctive characteristics.

27. Firstly, however, these do not apply to all minorities. Secondly, a number of other typical characteristics are lacking, such as the numerical situation and reference to citizenship, to name only two. (This last observation should not be seen as veiled a criticism of Mr. Martínez Cobo, who dealt with the specific topic with which he had been entrusted as he saw it).

28. It does not appear, therefore, that the description of indigenous populations proposed by Mr. Martínez Cobo can be used as a basis for a general definition of minorities.

29. The problem is nowhere better illustrated than in a note verbale dated 19 October 1978 from the Minister for Foreign Affairs of Norway, addressed to the Director of the Division of Human Rights:

"... it would seem appropriate to widen the scope of the declaration to include indigenous peoples as a separate category and pay attention to their specific needs and rights. Indigenous peoples do not necessarily constitute minorities and their situation is in many respects different from that of national, ethnic, religious and linguistic minorities".

30. The Norwegian Government, which has its own problems in this area, would like to see indigenous populations included in a general declaration on the rights of minorities but, at the same time, recognizes that those populations do not necessarily constitute minorities, that their situation is different and that they should be placed in a separate category. This, in itself, is a great deal to expect of a single definition!

31. The Norwegian Government faced up to the difficulty honestly. In a subsequent debate, its spokesman requested that proposals should be held in abeyance and taken up later by the Sub-Commission's Working Group on Indigenous Populations (E/CN.4/L.1540, paragraph 36).

32. Should indigenous populations themselves be sounded out on this point? Some of them, and by no means the least representative, strenuously oppose the idea of being identified as minorities. In March 1980, the working group of the Commission on Human rights reported (E/CN.4/L.1540, paragraph 31):

"The representative of the International Indian Treaty Council believed that the inclusion of indigenous peoples in the draft declaration under discussion was misleading and wrong in its basic assumptions."

33. The same spokesman was also reported as saying that:

"The ultimate goal of their colonizers would be achieved by referring to indigenous peoples as minorities."

34. The same idea was raised in the Working Group of the Sub-Commission last summer (E/CN.4/Sub.2/1984/20, paras. 104 and 107):

"Observers from governments and non-governmental organizations pointed out that a clear distinction should be made between 'indigenous populations' and 'minorities'."

35. The Working Group also concluded that it would be premature to adopt a final definition at its third session.

36. All the above illustrate quite clearly the reluctance to include indigenous populations in a definition of minorities. It is conceivable that, in its final report, the Working Group on Indigenous Populations will suggest a definition coinciding with the more general definition which the Commission on Human Rights requested the Sub-Commission to submit. However, it would seem premature to attempt to do so and the question should, for the time-being, be considered a non-problem.

37. Moreover, the soundness of this conclusion is borne out by recent Canadian history. Under the major constitutional amendments of 1982, 6/ minorities and indigenous populations, far from being amalgamated, were treated separately, and the text makes it quite clear that they should not be considered jointly. Articles 15, 16, 23 and 29, for example, of the 1982 act concern minorities, whereas articles 25, 35 and 37 relate to indigenous populations. The same is true of the first amendments of the new constitution proclaimed on 31 May 1984, which relate only to indigenous populations.

38. The unavoidable conclusion is that the definition which we seek should not attempt to deal with the question of indigenous populations.

#### B. The question of resident aliens

39. Migrations of workers create minorities of various sizes, the members of which retain the nationality of their country of origin. Although resident for an indefinite period in their country of choice, they nevertheless owe no allegiance to it. Should a definition be fashioned to take account of this special phenomenon of minorities composed of aliens?

40. The Working Group of the Commission on Human Rights asked itself this question and replied in the negative (E/CN.4/1984/L.5, para. 8).

41. The Sub-Commission had already considered the question of aliens and had commissioned a study by the Baroness Elles in 1979, entitled "International

provisions protecting the human rights of non-citizens". 7/ No suggestion is made in that study either that aliens should be included in a general definition of minorities.

42. This relationship between minority and citizenship was also considered by all the Powers at the negotiations preparatory to the Treaty of Versailles, of 1919. The ministers plenipotentiary were intent on ensuring respect for the elementary rights of populations inhabiting the territories allocated to the new States and thus decided to conclude the minorities treaties in which each Government would undertake to grant certain civil, political and cultural rights to its ethnic, religious or linguistic minorities. However, the treaties in question linked the granting and exercise of such rights to citizenship by providing for the granting of automatic citizenship to foreign nationals absorbed into the new State, together with the right of such nationals to opt for another nationality.

43. Clearly then citizenship was a prerequisite for the accession by members of minorities to such elementary rights. Moreover, in order to enjoy such rights, the members of a minority group had to be citizens of the country concerned, and it was on that condition that they could claim the protection provided for in the minorities treaties.

44. This conception of things has not changed. Not that a country can avail itself of it in order to persecute aliens residing in its territory; but, when it comes to defining the rights of minorities, the first duty of a State is towards its own citizens. To the others, it owes only courtesy, which does not give rise to any rights.

45. It is unnecessary, therefore, to take up this matter again. The question of resident aliens should be considered, for our purposes, as a non-problem.

46. On 22 October 1984, a different opinion was expressed by a Working Group of the Human Rights Committee with regard to the two matters considered above. The Working Group prepared draft general comments on article 27 (CCPR/C/23/CRP.1) in paragraph 4 of which it asserted:

"The quality of a community as a minority under article 27 does not necessarily depend on a formal bond of citizenship of its members with the host State. The text employs the word 'persons' and does not speak of 'citizens' as it does, for instance, in article 25. It should also be noted that the Committee has always considered indigenous communities to come within the purview of article 27."

47. I do not know whether the Human Rights Committee will confirm the views of its Working Group. It would be most regrettable for an open conflict of interpretation to arise between the Human Rights Committee, which derives its existence from the International Covenant on Civil and Political Rights, and the Commission on Human Rights, which was established under the Charter of the United Nations.

48. Moreover, in its draft comments, the Working Group of the Human Rights Committee does not put forward any overwhelmingly compelling arguments. The distinction drawn on the basis of the terminology used in articles 25 and 27 of the Covenant seems particularly flimsy. Article 25 deals with political rights, a context in which the use of the "citizen" is quite natural. Article 27 deals with minorities, and the use of the word "persons" appears equally natural, even given the underlying concept of citizenship.



49. For the time being, in carrying out the mandate entrusted to me by the Sub-Commission, I prefer to proceed on the basis of the decision already taken with regard to non-citizens and of the cautious approach dictated by circumstances with regard to indigenous populations.

C. Relationship between groups and their members

50. Following the First World War, a complex series of treaties and declarations established a régime for the protection of minorities under the auspices of the League of Nations. Essentially, those instruments provided protection for individual members of minority groups, rather than for minorities as such, with the apparent intention of precluding the risk of dismemberment of the countries concerned. 8/

51. In the same tradition, after referring to "ethnic, religious or linguistic minorities", the authors of article 27 of the 1966 Covenant took care to protect "persons belonging to such minorities". The distinction is significant. The intention was probably to avoid the risk of setting one group against another or to giving one segment of the population of a country an advantage over the remainder of its citizens. Affording protection to a minority as a group suggests the possibility of privilege, perhaps even secession, and endangers a country's unity. Such was of course not the aim of the United Nations in adopting article 27 of the Covenant.

52. The Working Group of the Commission on Human Rights understood that fact clearly. It decided to substitute for the words "rights of minorities" the phrase "rights of persons belonging to minorities" and reiterated in the summer of 1984 its firm intention of adopting a declaration which came within the framework of article 27 of the Covenant.

53. Here too, this attitude corresponds entirely to the thinking of the drafters of the Canadian Charter of 1982. In seeking to guarantee the exercise of minority rights, this instruments refers not to the minorities as groups but to individuals as members of those groups. Everyone, according to articles 17 and 19 of the Charter, has the right to use the official language of his choice. Under the section entitled "Minority language education rights", article 23 recognizes that every Canadian citizen, belonging to a minority, has certain rights. In the event of violation of the rights guaranteed by the Charter, "anyone" according to article 24, may turn to the courts to seek redress.

54. It was in that spirit of the pre-eminence of the individual over the community, that the Superior Court of Quebec decided in 1982 that, in regard to the language of instruction, the Canada provision should prevail over the Quebec provision. 9/

55. It was the same argument that Canada defended last December, through Mr. Jim Hawkes, who reaffirmed, before the Third Committee of the General Assembly, Canada's belief that rights must be vested in the individual. 10/

56. We should therefore adhere to the decision which has already been taken elsewhere: for our purposes, the debate between minorities and their members is closed. Every minority undoubtedly constitutes a group, but where it is a question of determining its rights, it is on the individual as a member of the minority that the emphasis should be placed.

57. That then disposes of the three non-problems to which I referred at the outset namely, the question of indigenous populations, which our draft definition will not deal with; the question of resident aliens which our draft will not consider either; and the question of the relationship between groups and their members, where the emphasis will be placed upon the latter.

## II. ISOLATION OF THE VARIABLES OF THE MINORITY CONCEPT

58. One of the main difficulties which has so far prevented the adoption of a universally acceptable definition of minorities is the great diversity of the situations of minorities - and frequently even their radical opposition - from one country to another.

59. It is therefore important to make an inventory of these variables, since to have any hope of defeating an adversary, it is first necessary to try to know both his strengths and his weaknesses. In a country of minorities, however, weakness is reflected in the phenomenon of discrimination. This adversary must be known in order to be overcome and sometimes it is necessary to know how to recognize it in oneself. Therefore let us not point to the mote in our neighbour's eye, but let us note two examples of the beam that is obstructing our own vision.

60. I take the first example from the findings of a Gallup poll commissioned in November 1981 by the Minister of State Responsible for Multiculturalism and carried out throughout Canada. Of the numerous propositions presented in that questionnaire, three are particularly noteworthy: 11/

(a) Statement No. 5: "I would support organizations which are working to keep Canada for whites only".

Only half of the respondents refused such support; nearly one third expressed their readiness to give such support.

(b) Statement No. 6: "I would restrict the immigration of coloured persons, and those admitted would have to demonstrate their worth before having access to the services provided by the State."

Less than one quarter of the respondents would oppose such a policy; three fifths were prepared to support it.

(c) Statement No. 10: "I would support local organizations working for multiculturalism and racial harmony."

Barely one third of the respondents expressed agreement; more than two fifths were opposed. This is the statement which brought the greatest number of "undecided" responses, i.e. 19 per cent.

61. The discovery of this state of mind in Canada is no cause for rejoicing. Let us hope that article 27 of the 1982 charter of rights, which seeks the "preservation and enhancement of the multicultural heritage of Canadians", will help to heal this wound.

62. But let us take our second example, which is even closer to home, namely, the question of the Haitian minority community in Montreal. It will help us to understand more clearly the difficulty of grasping the problem, through the contradictory assessments made of it by various public authorities. On 20 June 1979, after an early-evening football match, a fight broke out between a group of Haitians and policemen of the Montreal Urban Community. Excessive force may have been used - the police authorities took disciplinary action against two of their members. But the basic question remained: had the police action been racially motivated?

63. Two public bodies made separate inquiries - the Police Commission of Quebec and the Quebec Human Rights Commission.
64. On 23 May 1980, the Police Commission concluded that nothing in the conduct or in the statements made by the police officers enabled the Commission to state that they had engaged in racist aggression or discriminatory acts. 12/
65. Less than one month later, the Human Rights Commission issued diametrically opposed findings, 13/ stating that the Haitians had been victims of a discriminatory attitude based on race, colour or national origin. The Commission added that such behaviour was to be condemned and the victims should receive compensation.
66. As if the contradiction between these two public bodies was not enough, the Commission instituted judicial proceedings against the city of Montreal Urban Community. 14/ On 15 November 1982, the Supreme Court found against the city in favour of the only Haitian on whose behalf the Commission was acting, but awarded him only \$500 after finding that the evidence of racial discrimination which the Commission had put forward was generally insufficient. The Court dismissed the action against the nine police officers accused, for lack of positive identification.
67. The Human Rights Commission lodged an appeal, 15/ which is still pending.
68. It can be seen how difficult it is, with the best will in the world, to understand the concept of discrimination and to assess its manifestations. The difficulty of identifying groups whose members might be the objects of such discrimination is therefore no less considerable. It is made the more serious by the fact that these groups are sometimes cohesive and sometimes dispersed and that they have a wide variety of characteristics.
69. No one can give an exhaustive list of these variables. It is possible, however, to mention a few which are of particular significance, even if it is difficult to follow to his final conclusion the writer who recently said - perhaps with a touch of peculiarly British humour - that he would include in the concept of minority women, children and the bulk of the animal kingdom! 16/

A. The will of the minority to survive

70. The first variable contains a significant element of subjectivity in that it relates to the determination of the minority to survive. This variable may lead in turn to a great number of diverse situations.
71. If the minority group wishes to preserve its cultural or religious independence, for example, it will tend to choose a political approach leading either to a sort of federal association in mutual tolerance - a well-known example being Switzerland - or to autonomy, then to secession; the history of our own country is a clear illustration of this type of constant and continually recurring tension.
72. On the other hand, if the minority group does not wish to preserve its independence, it may wish to melt into the surrounding society. Then it is a social approach which will prevail, and non-discriminatory measures will help to bring about the blending of the various elements of society. It may happen,

however, that the majority, imbued with its prejudices, will refuse to accept the integration sought by the minority and wish to keep it apart. I shall refrain here from giving examples, for fear of offending national susceptibilities.

73. Lastly, the Jewish minority provides a mixed example in many countries, since its members wish to be integrated into the local economic system, but isolate themselves in their own family and religious system. How is it possible to achieve the former while at the same time preserving the latter?

74. This chameleon-like quality therefore creates considerable difficulties for the definition of minorities. But these difficulties can be alleviated by reverting to the main object of the exercise, which is to ensure the protection of minorities. Therefore, for the purposes of a definition, the only minorities of interest are those who wish to continue to exist and to be recognized as such, with their own ethnic, linguistic or religious characteristics. The others, those who wish to merge into the dominant mass, do not require protection. At the very most, they may perhaps have to combat insidious discrimination designed to perpetuate, against the will of the minority, an exceptional situation rejected by that minority. But that is an entirely different matter which strikes at the very foundation of the theory of protection of the rights of minorities.

75. For the purpose of defining minorities, it will therefore be necessary to retain the positive aspect of this first variable, namely, the collective will to survive. Failure to demonstrate such a will excludes the minority from the definition.

#### B. The number of members of the minority

76. The second variable relates to the number of members of the minority. Here, too, two problems arise.

##### 1. Minimum number

77. It must be first asked whether, to be recognized, a minority group has to consist of a minimum number of members. Clearly, there can be no mathematical answer to this question. At best, the number should be of no importance whatever. But it was said long ago that politics is the art of the possible, and this question concerns the organization of the State. In the distribution of public resources, account must be taken, as Mr. Capotorti stressed in his study on minorities, 17/ "of a reasonable proportionality between the effort involved and the benefit to be derived from it". To justify official recognition, a minority should therefore not be so small as to tap a percentage of public resources entirely out of proportion with the benefit which society should derive from the expenditure. That, it should be added, is purely a question of fact which a definition cannot attempt to decide.

## 2. Oppressed majority

78. The other problem raised by the second variable falls squarely, however, within the purview of our definition, namely, does a minority necessarily have to be in the minority? This somewhat paradoxical question reflects a serious problem of our time. No one has expressed it more strikingly than the poet Rabindranath Tagore in describing a world in which "the few are more than the many". 18/
79. Etymologically, the question can have only one answer: to be a minority, a group has to be able to claim that it is in a minority situation, in other words that it is less numerous than the total of its neighbours. For some, however, that is a false premise. In their opinion, it is not a question of etymology, but of sociology, since the number of members of a group is of little importance; if it is dominated, it comes within the social category of minorities. It is therefore necessary to have an over-all view of a particular society, including the various social, economic and especially political aspects. For, if the society is heterogeneous and one group has to live under the domination of another, its numerical size is of little significance. The group must be considered to be subjugated as a minority. The classic example always given to support this thesis is the case of the black majority subjugated by the white minority in South Africa.
80. However, the argument must be carefully examined before jumping to conclusions: if accepted, this thesis might extend the definition of "minority" to most of the people on the face of the earth. Certainly that is not a legal impossibility, since a legal instrument may indeed call black white. Thus, under the rules of interpretation 19/ in the law of Canada, the masculine includes the feminine and the singular includes the plural. But we must look beyond this depressingly technical consideration.
81. However, let us not forget that we are living in an era of minority rule. At the most, one quarter of the Members of the United Nations have a system in which democratic liberties are recognized and practised. In the 125 or so other countries - whatever is stated in their written Constitutions - it is a minority which governs and imposes its views, either through a single party, through a régime somewhat delicately described as authoritarian, or through an openly dictatorial régime. Furthermore, even in countries where free elections are held, few Governments can boast of enjoying the support of a majority of the citizens of voting age.
82. Moreover, that is how things inevitably happen in all large organizations: a small group of determined persons finally takes the initiative and directs the activities of the majority. The same is true of political parties, trade-union organizations and the councils of the Catholic Church.
83. To return to the example given above, these observations do not justify the policy of apartheid imposed by the white minority on the black majority of South Africa; but they make it possible to understand the impossibility of including the notion of oppressed majority wholesale in the concept of minority.

84. It is true that, in a memorandum entitled "Definition and classification of minorities", submitted by the Secretary-General of the United Nations on 27 December 1949 for the Sub-Commission (E/CN.4/Sub.2/85), the following is stated in paragraph 61:

"Normally, the term minority has a certain numerical significance: it usually refers to a smaller number of individuals than the number included in the remainder of the population. However, there are instances in which the numerical majority of the population, whether homogeneous or composed of differentiated groups, is in the position of a minority, the State being dominated by a numerically smaller group which imposes its own language, culture, etc."

85. However, the Secretary-General did not go any further, and perhaps it would be presumptive to draw, 35 years later, a conclusion which he did not deem it advisable to submit at the time. Moreover, to do so might lead to confusion between situations which do not arise from the same causes and do not call for the same remedies.

86. On the one hand, the active and dominating minority has no more need of protection than the minority which wishes to blend with the majority does. Within the framework of a régime of protection of the rights of minorities, the minority in a domination situation has to be excluded from the definition which we are formulating.

87. On the other hand, it would be an insult to the dominated majority to consider it to be similar to a minority and, while claiming to protect it, to appear to restrict its rights to those set forth in article 27 of the Covenant, namely culture, language and religion. The oppressed majority requires, not protection, but liberation; it is not its rights as a "minority" which are being flouted, but its fundamental right to self-determination recognized by the Charter of the United Nations and the law of nations.

88. Consequently, there is no need to stretch the traditional meaning of the word "minority" to make it encompass a reality which is essentially alien to it and to make it play a role doomed in advance to failure. The second question raised with regard to the second variable should therefore receive an affirmative reply: to qualify as a minority, a group has to be smaller in number than the rest of the population of the country of which it is a part and to be in a non-dominant situation. To return to the paradox mentioned above, the definition we are seeking should cover only minorities that are truly in a minority situation in the strict sense of the term.

### III. IDENTIFICATION OF THE CONSTANTS IN THE CONCEPT OF MINORITY

89. After eliminating some non-problems and making a selection from among several variables, it remains for us to identify, as a third phase, the last ingredients, namely, the constants which will give the definition of minority its particular flavour.

#### A. National minorities

90. An important preliminary question arises. The terms of reference of the competent bodies of the United Nations are based on article 27 of the International Covenant on Civil and Political Rights. The declaration which is being prepared, in particular its basic definition, will therefore cover, in principle, the minorities mentioned in article 27, i.e. ethnic, religious and linguistic minorities. However, the Working Group of the Commission on Human Rights decided to give its draft a title encompassing "(national or) ethnic, religious or linguistic minorities". Therefore, exactly which are the minorities concerned - national minorities, other minorities, or all minorities taken together? The difficulty arises from the fact that the terms have not been defined. We know almost instinctively the meaning of "religious minority" or "linguistic minority", but the distinction between "ethnic minority" and "national minority" is not so evident.

91. At the time of the Versailles Treaty, the negotiators, no doubt inspired by their long and instructive experience of nationality conflicts, did not wish to embody in texts intended to be eternal the existence of "national minorities". Mr. Nathan Feinberg, who made a detailed study of the question within the framework of the Treaty negotiations, wrote in 1929: 20/

"We are well aware that the authors of the peace treaties did not agree to the term 'national minorities'".

92. The question arose again in 1953, while the United Nations was considering the draft covenant. The Sub-Commission had proposed the wording "ethnic, religious or linguistic minorities". In the Commission on Human Rights, differing views were expressed, 21/ some in favour of the text proposed, others favouring the expression "national minorities", and yet others supporting a combined text. The result is now to be found in history textbooks; in the Commission on Human Rights, the text proposed by the Sub-Commission, i.e., "ethnic, religious or linguistic minorities", was adopted by 12 votes to 1, with 3 abstentions. Subsequently, in the Third Committee, the same text was approved by 80 votes to none, with 1 abstention. Finally, in the General Assembly in 1966, the same text was adopted unanimously.

93. If only out of a desire for continuity and efficiency, it would be unwise to reopen the debate at the risk of encouraging sterile controversies and of delaying the adoption of an otherwise appropriate solution.

94. What purpose would be served, for example, by reverting to the observations of the representative of the Netherlands in the Working Group of the Commission who asked, in 1980, whether the expression "national minority" referred to sub-national groups or to marginal groups (E/CN.4/L.1540, para. 24)?

95. What purpose would be served by possibly adding to the confusion through a reference to the 1979 study by Baroness Elles, in which she wrote: 22/

"180. The protection of human rights granted to ethnic, religious and linguistic minorities in article 27 of the International Covenant on Civil and Political Rights is not extended to national minorities."

96. Indeed, a few lines previously Baroness Elles had written:

"For the purpose of this report 'national minority' will be taken to mean: 'persons who belong to a group owing allegiance on account of nationality to a State other than the one in which they are residing and who are numerically less than the other inhabitants of the State of residence.'"

97. Following the logical line of thought of her study, the author, speaking of national minorities, referred to resident aliens. However, there is no reason why the same meaning must be given to the same term in the context of a declaration on the rights of minorities.

98. Lastly, what purpose would be served by risking a controversy on the strength of recent contradictory interpretations of the same words? As examples, we might cite the discussions in the Council of Europe in 1973 and the consideration of the matter by Mr. Capotorti in 1977.

99. In connection with the preparation of an additional protocol to the European Convention on Human Rights, the Council of Europe considered the meaning of the expression "national minorities". Its Committee of Government Experts wrote: 23/

"Some experts considered that if the term 'national minority' were to be used in an additional protocol, it should be interpreted as broadly as possible so as to include all ethnic, religious and linguistic minorities, as well as specifically 'national' minorities."

100. Four years later, Mr. Capotorti interpreted article 27 of the International Covenant as follows: 24/

"In the context of article 27 of the Covenant, the substitution of the term 'ethnic minorities' for the term 'racial minorities' and the omission of any reference to 'national' minorities would seem to reflect a wish to use the broadest expression and to imply that racial and national minorities should therefore be regarded as included in the category of ethnic minorities."

101. What does this mean? Quite simply, Mr. Capotorti includes national in ethnic, while the Council of Europe includes ethnic in national. I do not say that one is right or that the other is wrong; but all these examples amply demonstrate the importance of avoiding any possible source of ambiguity by eliminating the use of expressions on whose meanings there may not be unanimous agreement.

102. Therefore, it would be appropriate to delete the reference to "national minorities" and to define the rights of ethnic, religious or linguistic minorities only, in accordance with the terms of article 27 of the Covenant.



B. Judicial opinions

1. The Permanent Court of International Justice

103. After the First World War, the Versailles Peace Treaty and the minorities treaties gave rise to a number of disputes which were heard by the Permanent Court of International Justice. In several advisory opinions, the Court set forth principles which it is important to bear in mind. (It should be said in passing that some of these opinions would have been extremely relevant in Quebec if they had been re-read five or six years ago!)

104. From the outset, the Court based its deliberations on article 93 of the Versailles Treaty (28 June 1919) which bound the parties to "protect the interests of inhabitants of Poland who differ from the majority of the population in race, language or religion": 25/ that was a flexible definition which, according to the Court, made it an obligation to give the idea of minority a broad and generous interpretation in keeping with the intention of the treaty. 26/ However, it was in its advisory opinion of 31 July 1930 that the Court expressed itself most clearly. The question involved the protection of minorities under the Greco-Bulgarian Convention of 27 November 1919, prepared according to the general model of minorities treaties of the time. The Court was concerned that the population transfers envisaged under the Convention should be carried out as humanely as possible and with respect for the "communities" of which the local minorities were part. Therefore, the Court made first the following comment: 27/

"On the contrary, the aim and object of the Convention, its connection with the measures relating to minorities, the desire of the signatory powers, to which the whole Convention bears witness, that the individuals forming the communities should respectively make their homes permanently among their own race, the very mentality of the population concerned - everything leads to the conclusion that the Convention regards the conception of a 'community' from the point of view of this exclusively minority character which it has had for centuries past in the East, and in which it played so important a part both under the Turkish Empire and at the time of the recognition of the independence of the States which emerged from the old Turkish provinces or dependencies."

105. Then, proceeding to give its opinion in response to the questions submitted to it, the Court, aware that "communities, within the meaning of the Convention, are of a character exclusively minority and racial", 28/ stated: 29/

"1. The criterion to be applied to determine what is a community within the meaning of the articles of the Convention, inter alia, Article 6, paragraph 2, is the existence of a group of persons living in a given country or locality, having a race, religion, language and traditions of their own, and united by the identity of such race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another."

106. Consequently, there emerges a concept of minority the outlines of which the Court made more specific later in its advisory opinion concerning minority schools in Albania: 30/ The court set forth, first of all, the principle: 31/

"The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority and satisfying the ensuing special needs."

107. The Court then drew attention to the basic text before it: 32/

"Albanian nationals who belong to racial, linguistic or religious minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals."

108. The Court therefore came to the following conclusion: 33/

"... it is natural to conclude that the same treatment and security in law and in fact implies a notion of equality which is peculiar to the relations between the majority and the minorities.

This special conception finds expression in the idea of an equality in fact which in article 5 supplements equality in law. All Albanian nationals enjoy the equality in law stipulated in Article 4; on the other hand, the equality between members of the majority and of the minority must, according to the terms of Article 5, be an equality in law and in fact.

It is perhaps not easy to define the distinction between the notions of equality in fact and equality in law; nevertheless, it may be said that the former notion excludes the idea of a merely formal equality; that is indeed what the Court laid down in its Advisory Opinion of September 10th, 1923, concerning the case of German settlers in Poland (Opinion No. 6) in which it said that:

'There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law.'

Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations. It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact; treatment of this description would run counter to the first sentence of paragraph 1 of article 5. The equality between members of the majority and of the minority must be an effective, genuine equality; that is the meaning of this provision."

109. From this decision by the Permanent Court of International Justice some elements may therefore be drawn for incorporation in a definition of minorities:

- (a) Distinct groups;
- (b) Real minorities;
- (c) Race, religion or language different from those of the majority;

- (d) Sentiment of solidarity;
- (e) Desire to preserve its distinctive characteristics;
- (f) Peaceful co-existence and equality in law and in fact with the majority.

## 2. The International Court of Justice

110. In the nearly 40 years of its existence, the International Court of Justice has not been called upon to consider the question of concern to us here.

## 3. The European Court of Human Rights

111. In general, the same is true with regard to the European Court of Human Rights. It must be understood that the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, contains no provision concerning the rights of minorities. Therefore, in 1965, within the framework of a debate in the Belgian Senate, the Minister for Foreign Affairs, Mr. Spaak, stated: 30/

"It is essential for the Court to make, as the Convention instructs it to do, a clear distinction between the defence of individual rights and the defence of minorities which is excluded from its competence."

112. In all fairness to the Court, it must be recognized that problems relating to minorities have sometimes been raised before it; but they have not let the Court to try to clarify the definition of minority. Therefore, no attempt at definition will be found, for example, in the case of the Muslim minority in the United Kingdom in 1981, 35/ or in the case of religious instruction in schools in Sweden in 1973. 36/ The linguistic conflicts in Belgium gave rise to a multitude of appeals to the European Court, but in its basic judgement of 1968, 37/ the Court, referring to the "two large regions of Belgium", spoke of unilingualism only for a "large majority of the population", without deeming it necessary to carry the analysis further. The Court had, moreover, cited previously with approval (p. 862) the report of a Committee of Experts which had considered that the problem of ethnic minorities "fell outside the scope of the Convention".

113. Therefore, the decisions of the European Court of Human Rights do not shed any light on the problem.

114. However, in addition to international bodies, many national jurisdictions have no doubt studied the problems of their own minorities. The means and time at my disposal do not enable me to make an exhaustive study of them: for our purposes, I shall take two examples: India and Canada.

## 4. Indian courts

115. The courts in India have, for their part, acquired great experience in the field of the rights of minorities, particularly religious or

linguistic minorities. The pertinent paragraphs of articles 29 and 30 of the Indian Constitution of 1949 provide as follows:

"29. Protection of interests of minorities -

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

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

30. Right of minorities to establish and administer educational institutions -

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

1 (a) ...

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language."

116. Nevertheless, on several occasions, Indian courts have refrained from defining the concept of minority. Thus, in State of Bombay vs. Bombay Education Society, 38/ the Supreme Court of India decided that the constitutional protection of language and of the educational system implied the right to choose the language of instruction; however, the Court did not deem it necessary for that purpose to define the concept of the Anglo-Indian minority in question.

117. In Kerala Education Bill, 1957 39/ the Supreme Court dwelled specifically on the question: "What is a minority?" (p. 976). It considered it self-evident that a minority should be a group numerically less than 50 per cent of the total population but, it asked, of what population: of India as a whole, of the State concerned, or of one region only? In the event, the Bill under attack related to the entire State of Kerala, and the Supreme Court appeared to consider with sympathy the proposition that it was therefore necessary to think of the Christian, Muslim and Anglo-Indian groups in terms of the entire population of the State. Nevertheless, the Court ended its lengthy analysis of the question by stating (p. 977):

"... strictly speaking (...) we need not enquire as to what a minority community means or how it is to be ascertained."

118. In Patro vs. State of Bihar 40/, where the issue was the educational rights of Protestants, the Supreme Court simply stated that persons claiming a right enshrined in the Constitution "must form a well-defined religious or linguistic minority" (p. 263).

119. In the interim, however, the question had been resubmitted to the Kerala courts, which undertook to rule on it.

120. In Patroni vs. Kasavan 41/, the issue was the power of appointment of the Superior of a Jesuit College. All the judges on the High Court of Kerala recognized that such a right belonged to the religious minority under article 30 of the Constitution and prohibited governmental intervention. With regard to the subject of concern to us, the Court made the following statement (p.76):

"The word 'minority' is not defined in the Constitution; and in the absence of any special definition we must hold that any community, religious or linguistic, which is numerically less than 50 per cent of the population of the State is entitled to the fundamental right guaranteed by the article.

The Christians, at the 1961 census, amounted only to 21.26 per cent of the population of the State. The Roman Catholics with whom we are concerned form a section of that community."

121. A short time later, in Varkey vs. State of Kerala, 42/ a judge of the High Court followed the same doctrine.

122. The Supreme Court then had an opportunity to state its views clearly in the two cases of D.A.V. College vs. State of Punjab. 43/ The case concerned the rights of the Arya Samajis, who are part of the great Hindu community, which is a majority in India but a minority in Punjab. The Arya Samajis profess their own religious beliefs and use a different alphabet (script).

123. As the Act in question had been adopted by the State of Punjab, the Supreme Court expressly decided that the concept of minority should be applied in relation to the State, and not to the country as a whole. It followed, therefore, that the group concerned should have, in Punjab, the status of a constitutionally protected minority, both under article 29 (language) and under article 30 (religion) of the Constitution.

124. What is shown by this brief survey of Indian constitutional jurisprudence? Two main criteria emerge:

(a) The concept of minority should be applied in relation to the territory of the State whose legislation is in question;

(b) The concept of minority implies a group numerically less than half the total of the population of the State concerned.

## 5. Canadian courts

125. Canadian legislation also refers to minorities but without providing a guide that is genuinely useful to the courts.

126. Our organic law - the 1867 British North America Act 44/confines itself to mentioning, in the chapter on education, the rights or privileges of the Protestant or Roman Catholic minority. 45/

127. In Quebec, the Act on Public Education 46/ does offer a definition, but it is of little help to us: 47/ it states that the terms "religious majority" or "religious minority" mean the Roman Catholic or Protestant majority or minority, as the case may be.

128. It is known that, over the past century, numerous disputes at law concerning various aspects of the rights of minority have been resolved by Canadian courts from one end of the country to another and, many years ago, by the Judicial Committee of the Privy Council. At the request, sometimes, of French-speakers or English-speakers or persons speaking other languages, and, sometimes, of Catholics, Protestants or Jews, the courts have had to consider the rights of minorities in regard to language, education, school elections, distribution of taxes and religious instruction. Ten years ago, there were more than a dozen of these major decisions of which I made a detailed analysis in a 1976 judgement. 48, Others have been added since. 49/ The most recent judgement of the Supreme Court of Canada in this field was handed down on 20 December 1984 when the Court considered the question of school financing within the framework of the Quebec denominational system. 50/ However, the Court went no further than to refer to "members of a minority religious group" (p.17) without seeking to be more specific. The majority of judgements handed down in Canada have not gone beyond that point.

129. Nevertheless, an indication, however vague, of a criterion of proportionality might perhaps be obtained from three judgements of the Privy Council.

130. In Maier v. Town of Portland, 51/ the Catholics of New Brunswick complained about the method of distribution of tax revenues. In 1873, the Court of Appeals spoke of "large majority" (p.350) and, the following year, the Privy Council referred to a "great majority" (p.367).

131. Twenty years later, the Privy Council studied the school situation in Manitoba in Brophy v. Attorney-General of Manitoba. 52/ It noted that, at one time Catholics and Protestants had been equal in number; then it added, referring to 1871:

"But the future was uncertain. Either Roman Catholics or Protestants might become the preponderating power in the Legislature, and it might under such conditions be impossible for the minority to prevent the creation at the public cost of schools, which, though acceptable to the majority, could only be taken advantage of by the minority on the terms of sacrificing their cherished convictions."

132. Would it be imprudent to deduce from this passage that any group numerically less than 50 per cent of the total population would constitute a minority?

133. Lastly, the Privy Council handed down a decision in 1928 in the case of Hirsch v. Protestant Board of School Commissioners of Montreal. 53/ The case concerned a referral by the Government of Quebec concerning the place of Jews in the Protestant system of education. On the subject of dissenting schools outside Montreal and Quebec, the Privy Council pointed out that they could be set up at the request of "any number of inhabitants professing a religious faith different from that of the majority". Here, too, would it not be possible to draw the same conclusion as in the Brophy case?

134. Canadian judicial decisions with regard to minorities do not make it possible to go further; however, they do not contradict the proposition that a minority is a group numerically less than half the total of the population of the political entity concerned.

### C. Quasi-judicial opinions

#### Human Rights Committee

135. The United Nations Human Rights Committee does not hand down judgements strictly speaking. As modestly called upon to do in article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, the Committee puts forward "views". While the subtle difference in meaning may be important elsewhere, such is not the case in this context.

136. In its eight years of existence, the Committee has expressed its views only once in connection with a case coming under article 27 of the Covenant. This was the Canadian case: of Sandra Lovelace. 54/

137. Sandra Lovelace is an Indian woman who had married a non-Indian. Under the Canadian Indian Act, she had automatically lost, through her marriage, her special status as an Indian. This is a penalty which the same Act does not impose on an Indian man who marries a non-Indian woman.

138. Having divorced, Sandra Lovelace wished to return to live on the reserve with her children, but encountered difficulties on the part of her Indian compatriots. She complained to the Human Rights Committee which admitted her complaint and noted that the facts "... disclose a breach by Canada of article 27 of the Covenant". As a result of that conclusion, Canada undertook to amend the Indian Act in such a way as to bring it into conformity with its international obligations; in addition, it recently solemnly renewed its undertaking in a statement to the Human Rights Committee on 31 October 1984.

139. Reference to this view of the Human Rights Committee may appear incongruous and even contradictory, since the draft definition on which we are working will not apply to indigenous persons. I nevertheless wished to mention it since it is the only case in which that high international authority has laid down criteria for belonging to a minority, and these criteria are easily transposable to the field of ethnic, religious or linguistic minorities: 55/

"Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant."

140. Here we find concepts which are already familiar: birth, and hence citizenship; distinct characteristics; solidarity; the will to survive.

D. Doctrinal opinions

141. Let us now proceed from court decisions to doctrine. I shall concentrate on six authors who, over a period of about 40 years, have tried to resolve this problem of the definition of minority.

142. At the time of the League of Nations and the minorities treaties, Mr. P. de Azcárate was, for 12 years, head of the section on minority questions. He told of his experience in 1945 in an extremely interesting study entitled League of Nations and National Minorities: An Experiment. 56/ The author did not give a definition strictly speaking, but tried to highlight some elements (p.4):

"My personal experience during this time leads me to the conclusion that what in the last resort constitutes the distinctive and characteristic features of a national minority is the existence of a national consciousness, accompanied by linguistic and cultural differences."

(author's emphasis)

143. He goes on to say (p.5):

"In short, the substratum of a minority, from the political point of view, is that 'imponderable', so vital, irresistible and dynamic, and so difficult to express in words, which goes under the name of 'national consciousness'."

144. Various comments are called for:

(a) The author is speaking of "national minorities", while we have excluded that expression. He himself defines it as follows: (p. 3):

"In general terms, the expression 'national minority' refers to a more or less considerable proportion of the citizens of a State who are of a different 'nationality' from that of the majority."

If the author wishes to equate "national minority" with "foreign citizenship", we are faced with a situation which does not concern us. If on the other hand, he makes a distinction between citizens of various national allegiances, we then come back to ethnic, religious or linguistic minorities, and there is no need to speak of national minorities.

(b) The author speaks of "the existence of a national consciousness".

There seems to be considerable analogy with the criterion of "the collective will to survive" to which I have previously referred.



(c) While retaining language and culture, Mr. de Azcárate tends, nevertheless, to eliminate religion as a distinctive criterion of a minority. He stresses that freedom of conscience and of religion in modern States makes the specific guarantee of minority religious rights superfluous, and he adds that, in his experience in the League of Nations, the number of cases of religious oppression was insignificant compared with cases of economic, cultural or political oppression (p.6). In regard to the facts, the author is perhaps right: however, from the standpoint of principles it would be, in my humble opinion, an unpardonable backward step to abolish official recognition of the existence of religious minorities on the same level as ethnic or linguistic minorities. If only one of them is persecuted, mankind as a whole has a duty to be indignant. Today, there is the deplorable case, for example, of the Baha'is in the Islamic Republic of Iran and the Ahmadis in Pakistan. 57/

145. I therefore retain from the paper from Mr. de Azcárate, the criterion of "the state of national consciousness" as being on a par with "the collective will to survive".

146. In 1969, Mr. Tore Modeen published, under the auspices of the Abo Academy in Finland, an impressive paper entitled The International Protection of National Minorities in Europe. 58/ After making a distinction between nationality and citizenship, the author excludes non-citizens from the concept of minority (p.21). He retains the criterion of a numerically smaller group but refuses to qualify a dominant minority as a minority, as the Swedish minority in Finland was in the last century (p. 21). Lastly, he was obliged to note (p.24): "There are no typical national minorities, only a number of different groups which may be described as such".

147. In 1973, Mr. Sampat-Mehta published in Ottawa an important dissertation entitled, Minority Rights and Obligations. 59/ He raised directly the question (p.2): "What constitutes a minority group?" Unfortunately, he provided no direct reply to his own question. It is nevertheless interesting to read the following observation (p.4): "Since they (the minorities) are numerically less in numbers they must generally abide by the majority decisions in the State". I gather from this that the author would support a definition in which a number less than 50 per cent of the population constitutes one of the criteria of differentiation.

148. A new effort was made in 1974 during the Seminar on the promotion and protection of the human rights of national, ethnic and other minorities, held at Ohrid, Yugoslavia. One of the participants proposed the following definition of the term "minority": 60/

"A group of citizens, sufficient in number to pursue the aims of the group, but numerically smaller than the rest of the people, linked together by historical, ethnic, cultural, and religious or linguistic bonds and wishing to preserve such bonds, which are different from those of the rest of the people."

149. This is closer to the objective that we are seeking. It nevertheless lacks certain essential elements such as, for example, the non-dominant

situation. It also contains an explicit allusion to the minimum number required. However, the flexibility of that concept is well-known as are the discussions to which it gave rise in Canada on the occasion of its inclusion in the 1982 Canadian Charter of rights and freedoms concerning the right to receive instruction in the language of the minority. 61/

150. We must therefore press on to the fifth study which I wish to mention. It was done, in 1977, by my distinguished colleague on this panel, Mr. Capotorti. 62/ I have, moreover, already referred to it and I do not intend to revert to questions on which I have already mentioned his views. I must add, however, that he also agrees that article 27 of the Covenant cannot provide a remedy to the tragic fate of oppressed majorities. 63/ But the importance of Mr. Capotorti's contribution should be measured, among other merits, against its efforts to improve the definition of the concept of minority. I need only refer to the results of his work: 64/

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

151. This represents substantial progress and is very close to the objectives that we are pursuing. I should like, however, to reserve my comments until later, when we examine some observations which official sources have made on the draft definition. For the moment, let us concentrate on the case of Africa.

152. The situation there is particularly complex. According to Mr. Ali A. Mazrui, of Kenya, who wrote, in 1980, on The African Condition, 65/ not only are the 50 African countries delimited by frontiers which often recall the caprices of the former colonizing Powers, but they contain 850 ethnic and linguistic groups (p.92). When the author, as if to complicate matters, includes the religious aspect, he concludes on a disillusioned note (p. 96):

"In the ultimate analysis, ethnicity is a more serious line of cleavage in black Africa than religion. Africans are far more likely to kill each other because they belong to different ethnic groups than because they belong to different religions."

153. It is in this context that the last author whom I wish to quote defines the African tribe as follows: 66/

"A community which believes that it is culturally different from all other communities around it, a belief shared by the surrounding communities."

154. Here, too, therefore we find the elements of distinct groups and cultural characteristics.

155. The doctrine therefore lends its weight to a number of elements which have already emerged from the other sources we have studied so far. However, account must also be taken of the comments made by various Governments.

#### E. Observations by Governments

156. Our task would of course be made much easier by the acceptance of the argument put forward by the French Government on 16 September 1976, when the Permanent Representative of France wrote to the Director of the Division of Human Rights to the effect that the French people recognized no distinction based on ethnic characteristics and thus ruled out any concept of minority.

157. Referring to the study assigned to Mr. Capotorti, he said that the French Government was compelled, under the terms of the Constitution of the French Republic, to oppose the very principle of such a study.

158. While the domestic situation in France may enable the Government to adopt such a detached attitude with regard to the question of minorities - although recent developments would seem to cast some doubt on the official position - it is nevertheless true that the international community has recognized the existence of the problem of minorities and has for some years been seeking the most effective means of affording them protection. We cannot, therefore, turn our backs on the issue or claim complete ignorance of it. Let us continue on our course.

159. Greece introduced a further element into the debate in a note verbale dated 9 November 1978, addressed to the Secretary-General:

"There should be taken into account not only the number of persons belonging to a particular group, but also the relation between the number and the size of the geographical area in which the group lives."

160. This would introduce a new variable - geographical area - together with a proportional element, namely, the relation between the number and the size of the area, and raises endless complications which defy all rationalization. It is a well-established fact that the status of minorities must be defined in relation to the political entity, i.e. the State, in which they exist. For our purposes, it is not important to refine further this territorial concept, and to do so could render our own task impossible.

161. In a note verbale of 7 November 1978, addressed to the Secretary-General, Finland drew attention to a difficulty in the English text of the definition proposed by Mr. Capotorti:

"The expression 'nationals of the State' used by the Special Rapporteur in his definition, is somewhat vague, since in a State there may exist several different nationalities as presupposed in the UNESCO Convention against Discrimination in Education. A more accurate expression would be 'citizens of the State'."

162. Last year, while working on the English text of the definition, I declared myself in agreement with this suggestion, particularly since it was in line with the terminology used at the Ohrid seminar. We are now working on a French text in which the same concept has been rendered by the word ressortissants. Three reasons lead me, too, to prefer the use of the French word citoyens:

(a) Ressortissant conveys the idea of nationality; 67/

(b) The Ohrid seminar preferred the French word citoyen;

(c) In the study referred to above, 68/ the Baroness Elles notes in her preface (page iii):

"The 'citizen' and the 'national' do not have the same significance in United States immigration law".

She goes on to say (page iii):

"Nationality does however indicate some kind of attachment or allegiance to a State without necessarily implying the enjoyment of civic rights under municipal law."

163. It is therefore the word "citizen" which should be used.

164. In an opinion submitted in 1984, the Federal Republic of Germany referred to a definition which had been proposed several years earlier (E/CN.4/1984/42/Add.1, page 2), namely:

"Separate or distinct groups, well-defined and long-established on the territory of a State".

165. However valid the proposed criteria may be, they seem somewhat brief and should not prevent us from enumerating below all the others that have been accepted thus far.

166. Again in 1984, the Canadian Government submitted the following comments (E/CN.4/1984/42/Add.2, page 2):

"In Canada, the term 'minority' sometimes carries a negative connotation for the groups to which it is applied. To avoid such a negative connotation, it would be appropriate to find an alternative term or to define the term 'minority' in the declaration in a positive manner."

167. The Canadian Government's memorandum went on to suggest that, again in the definition suggested by Mr. Capotorti, the words "inferior to" and "rest" should be replaced respectively by "smaller than the sum of" and "others". These amendments appear felicitous, if only from a psychological point of view.

168. I feel bound to add that, through the good offices of the Centre for Human Rights, I was also able to study the observations submitted by the Governments of the United Kingdom, New Zealand, Chile, Madagascar, Italy, Morocco and the Ivory Coast. However, I found no comments relevant to the specific question dealt with here.

IV. CONCLUSION: A DEFINITION OF MINORITY

169. This brings us to the end of our long journey. We must now assess the results of our research - on the debit side, the elements discarded, and on the credit side those retained. The definition of minority should then become quite clear of itself.

170. On the debit side, our definition will not take account of the following factors:

- National minorities;
- Indigenous populations;
- Resident aliens;
- Groups in preference to individuals;
- Minimum number of members;
- Dominant minorities;
- Oppressed majorities;
- Relationship with geographical area.

171. On the credit side, the following elements should be included:

- Distinguishable groups;
- Ethnic, religious or linguistic characteristics;
- Number less than half the population of the State;
- Non-dominant situation;
- Citizenship;
- Solidarity;
- Collective will to survive;
- De jure and de facto equality with the majority.

172. However, before proceeding with the final operation of constructing a definition, there is one final point to be considered. It is important to subject the criteria adopted to one last check by comparing them with the situation of the largest nation in the world, the Chinese.

173. However, before doing so we must know something of the situation of the minorities in the People's Republic of China. Internal sources are inaccessible to us and there are very few foreigners who can claim to be really familiar with the Chinese situation.

174. Fortunately, in 1984, there appeared the account of a journey undertaken in two stages, in the summer of 1982 and the spring of 1983, by a Chinese journalist born in Hong Kong and resident in Los Angeles. 69/ He had already visited China on several occasions, but this time his purpose was to meet members of minorities where they lived. Like a sort of modern Marco Polo, the journalist, Wong How-Man, embarked on and completed a journey of 18,000 kilometres by jeep which took him, sometimes by impossible routes, to six provinces and two autonomous territories. He brought back some highly instructive observations.

175. Of the one billion persons who make up the population of China, 93 per cent are of Han origin, so that there is a large degree of homogeneity. Nevertheless, China officially recognizes 55 minorities comprising some 67 million individuals. This underscores the difference in the order of magnitude of our concerns; in China, a population two and a half times that of the whole of Canada represents only a small proportion (7 per cent) of the total population.

176. Of these 55 minorities, Wong How-Man visited about ten varying considerably in size from the Di, who number only about 10,000, the Salar and the Ge, each of which number 70,000, the Qiang 100,000 and the Tu, 160,000, to the Dong, 1.4 million, the Miao, 5 million, spread over about one hundred sub-groups, the Yi, 5 million and the Hui, 7 million.

177. Despite the power of attraction exerted by the immense population in which they are immersed, these minorities have preserved the languages of their ancestors, together with numerous special cultural peculiarities, such as diet, clothing, jewellery, music, occupations, customs and religion, which are often accentuated by a unique physical appearance. Moreover, the 70,000 Salars and the 7 million Hui are also distinguished by their membership of Islam.

178. Thus, the same conditions of particularism that we have observed elsewhere are also found in these Chinese minorities. Expressed simply, these conditions include the distinction between groups, ethnic, religious or linguistic characteristics and the collective will to survive.

179. The criteria which we have retained on the credit side of the concept of minority are thus strengthened by the Chinese comparison, and actually take on a universal character. We can now derive the desired definition with greater assurance.

180. In the light of the Ohrid seminar and the work done by Mr. Capotorti, the foregoing considerations led me initially to propose the following definition of minority:

"A group of citizens numbering less than half the population of a State and in a non-dominant position, whose members, have a community of interest, are motivated - albeit implicitly - by a collective will to survive, and possess ethnic, religious or linguistic characteristics which differ from those of the majority of the population, and whose aim is to achieve equality with that majority in fact and in law."

181. However, after further reflection, I have come to the conclusion that this definition could be tightened and would benefit from a more logical ordering of its various elements. Consequently, I propose the following definition of minority:

"A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law."

182. I hope that this answer to the question "what is a minority?" will be found satisfactory.

Notes

- 1/ The description which follows is based on Oliver, "Introduction: The Minority Rights Group: What's in a Name?", Whitaker, Minorities - a question of human rights?, Oxford, Pergamon Press Ltd., 1984, pp. 1 and 2.
- 2/ United Nations Publication, sales no.: E.78.XIV.1.
- 3/ Ibid., para. 561.
- 4/ Ibid., para. 33.
- 5/ Outsider, No. 20, January 1985, London.
- 6/ Canada Act 1982, 1982, chap. 11 (United Kingdom).
- 7/ United Nations Publication, sales no.: E.80.XIV.2.
- 8/ United Nations Publication, sales no.: E.78.XIV.1, para. 101.
- 9/ Quebec Association of Protestant School Boards v. Attorney General of Quebec et al., 1982 C. S. 673; Court of Appeal (1983 C.A. 77) and Supreme Court of Canada (26 July 1984) upheld the decision of the Superior Court in substance, without discussing this specific point.
- 10/ Statement by Mr. J. Hawkes, representative of Canada on the Third Committee of the General Assembly at its thirty-ninth session, on 6 December 1984, published by the Cultural and Public Information Bureau, Department of External Affairs, Ottawa, Canada.
- 11/ "The law and interracial relations", record of the symposium on the law and interracial relations held at Vancouver from 22 to 24 April 1982, p. 39.
- 12/ Quebec Police Commission, file no. p-79-1628, Rapport d'enquête sur la conduite des agents André Deguire, Rémi Gauthier, Gilles Laurin et de certains autres membres du Service de la police de la Communauté urbaine de Montréal à l'égard de Molière Théard, Max Mascary, Jean-Louis Léger, Marcellin Arguy et de certains autres membres de la communauté haïtienne de Montréal, lors d'incidents survenus le ou vers le 20 juin 1979, à Montréal, au cours d'une intervention policière, 23 May 1980, p. 8.
- 13/ Press release issued in Montréal on 19 June 1980 by the Human Rights Commission of Quebec.
- 14/ Human Rights Commission of Québec v. the Montreal Urban Community et al., No. 500 05-007 653-809, judgement of 15 November 1982.
- 15/ No. 09-000 071-837.
- 16/ Oliver, loc. cit., pp. 9 and 10.
- 17/ United Nations Publication, sales no.: E.78.XIV.1, para. 566.
- 18/ Quoted by Ramphal, "Human Rights Today: Must the Few be More than the Many?", Minorities - a question of human rights? (see note 1/), p. 107.
- 19/ 1970 S.R.C. chap. I-23, art. 26 (6) and (7).
- 20/ Nathan Feinberg, La question des minorités à la Conférence de la paix de 1919-1920 et l'action juive en faveur de la protection internationale des minorités, Paris, Rousseau, 1929, p. 91.
- 21/ United Nations Publication, sales no.: E.78.XIV.1, para. 179.
- 22/ United Nations Publication, sales no.: E.80.XIV.2, para. 180 and 177.

- 23/ United Nations Publication, sales no.: E.78.XIV.1, para. 51.
- 24/ Ibid., para. 201.
- 25/ German settlers in Poland, Advisory Opinion of September 10th 1923, Publications of the Permanent Court of International Justice, series B, No. 6, p. 19.
- 26/ Acquisition of Polish Nationality, Advisory Opinion of September 15th 1923, Publications of the Permanent Court of International Justice, series B, No. 7.
- 27/ The Greco-Bulgarian Communities, Advisory Opinion of July 31st 1930, Publications of the Permanent Court of International Justice, series B, No. 17, p. 21.
- 28/ Ibid., p. 35.
- 29/ Ibid., p. 33.
- 30/ Minority schools in Albania, Advisory Opinion of April 6th, 1935, Publications of the Permanent Court of International Justice, series A/B, No. 64.
- 31/ Ibid., p. 17.
- 32/ Ibid., p. 18.
- 33/ Ibid., p. 19.
- 34/ Yearbook of the European Convention on Human Rights, 1965, p. 479.
- 35/ European Convention on Human Rights, Jurisprudence et documents, 5ème éd., 1984, p. 110.
- 36/ Ibid., p. 156.
- 37/ Case "Relating to certain aspects of the laws on the use of languages in education in Belgium", Yearbook of the European Convention on Human Rights, 1968, p. 885.
- 38/ 1954 A.S.C. 561.
- 39/ 1958 A.S.C. 956.
- 40/ 1970 A.S.C. 259.
- 41/ 1965 A.Ker. 75.
- 42/ 1969 A.Ker. 191.
- 43/ 1971 A.S.C. 1731 et 1737.
- 44/ 30-31 Vict., chap. 3 (United Kingdom).
- 45/ Ibid., art. 93 (3).
- 46/ 1977 L.R.Q., chap. I-14.
- 47/ Ibid., art. 1 (240).
- 48/ Le Bureau métropolitain des écoles protestantes de Montréal c. le Ministre de l'éducation de la Province de Québec et al., 1976 C.S. 430, upheld by the Court of Appeal on 18 January 1978. Leave to appeal denied by the Supreme Court of Canada: (1978) 1 R.C.S., p. viii.



49/ For the period 1968-1980, all these decisions can be found in the author's work, Ainsi parlèrent les tribunaux ... Conflits linguistiques au Canada 1968-1980, Montréal, 1980. A second volume covering the period 1981-1984 is ready for publication.

50/ Le Procureur général du Québec vs Greater Hull School Board et al., 20 December 1984.

51/ 1896 Wheeler's Confederation Law of Canada, 338.

52/ 1895 A.C. 202.

53/ 1928 A.C. 200.

54/ See report of the Human Rights Committee, Official Records of the General Assembly, thirty-sixth session, Supplement No. 40 (A/36/40), annex XVIII.

55/ Ibid., para. 14.

56/ P. de Azcárate, League of Nations and National Minorities: An Experiment, Washington, Carnegie Endowment for International Peace, 1945.

57/ See The Gazette of Pakistan, Presidential Ordinance No. XX, 26 April 1984 (F.17 (1)84-Pub).

58/ Tore Modeen, The International Protection of National Minorities in Europe, Abo, Abo Akademi, 1969.

59/ Ampat-Mehta, Minority Rights and Obligations, Ottawa, Harpell's Press, 1973.

60/ See ST/TAO/HR/49, para. 36.

61/ Constitutional Act of 1982, annex B, part I, art. 23 (3) (a) and (b).

62/ United Nations Publication, sales no.: E.78.XIV.1.

63/ Ibid., preface, p. iii.

64/ Ibid., para. 568.

65/ Ali A. Mazrui, The African Condition: A Political Diagnosis, London, Heinemann, 1980.

66/ Jan Vansina, Kingdoms of the Savannah, University of Wisconsin Press, 1966, p. 14.

67/ Nouveau Larousse universel, 1969, Ressortissant: Personne qui appartient à une nationalité. Petit Robert, 1977, Ressortissant: Personne qui ressortit à l'autorité d'un pays, à un statut.

68/ United Nations Publication, sales no.: E.80.XIV.2.

69/ Wong How-Man, "Peoples of China's Far Provinces", National Geographic, vol. 165, No. 3, March 1984, p. 283 to 333.